ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 2009-1096
Appellee,	:	
v.	:	Fifth District Court of Appeals Case No. 2006-CA-0109
RONALD RUSSELL,	:	
Appellant.	:	

STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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SUPREME COURT OF OHIO

Explanation as to why this case is not a case of public or great general interest and does not involve a substantial constitutional question:

The State of Ohio submits that this case is not a case of great public or general interest. This case presents absolutely no unique facts, rulings, or issues. It also does not raise any substantial constitutional questions worthy of review by this Court.

The Appellant, Ronald Russell, was charged in a Bill of Information with one count of gross sexual imposition, a felony of the fourth degree, (Case No. 2005-CR-557D). He was also charged in a separate Bill of Information with one count of unlawful sexual conduct with a minor, a felony of the third degree, and one count of sexual battery, a felony of the third degree, (Case No. 2005-CR-907D).

These charges arose from allegations that the Appellant sexually molested three teenage boys from approximately September of 1989 through August of 2004. The first incident of abuse was reported in July of 2005. At that time, the victim informed police that the Appellant, a family friend that he met through the Johnny Appleseed Baseball program, had fondled his penis on two separate occasions.

The first occurrence was in the summer months of 2004 when he was helping the Appellant move items into the store and lock it area at 2220 Stumbo Road in Mansfield, Ohio. The victim, who was twelve years old at the time, indicated that the Appellant fondled his penis on top of his clothing until he got up and walked away.

The second occurrence was on March 28, 2005 while the victim, his brother, and his father were visiting the Appellant's home at 644 Villa Drive in Mansfield, Ohio. The victim was thirteen years old at the time of this incident. The victim told police that he and the Appellant were alone in the family room watching a movie when the Appellant

stuck his hand inside the victim's clothing and fondled his penis. The Appellant stopped when the victim's brother came into the room.

During a taped interview with Sgt. Jeff McBride of the Richland County Sheriff's Department, the Appellant admitted fondling the victim and stated that he did so because he thought the victim wanted him to. The Appellant also apologized to the victim for touching his penis during a controlled phone call on March 31, 2005.

During the investigation into the first allegation of abuse, the Appellant gave a second taped statement to Sgt. McBride. The Appellant's attorney, Robert Whitney, was present when this statement was taken. In the second taped statement, the Appellant admitted to sexually abusing another teenage boy who worked for him at the Regal Coins and Sports shop in Lexington, Ohio around the years 1988 to 1989. Sgt. McBride contacted the boy, who confirmed the Appellant's statement.

The second victim indicated that between five and ten incidents of sexual abuse had occurred over the period of one year. The victim stated that the sex acts included fondling, masturbation, and fellatio performed on him by the Appellant. He stated that the abuse had occurred primarily in Lexington, Ohio. The victim also stated that sex acts had also occurred on several occasions in Cleveland, Ohio when he accompanied the Appellant to sports card shows. The victim indicated that he was fourteen years old at the time of the incidents.

In his second taped statement, the Appellant also admitted to sexually abusing a third victim. Upon being interviewed by Sgt. McBride, the third victim indicated that he played baseball for the Appellant starting in January of 2000, when he was thirteen years old. He indicated that he broke his leg in May of 2000 but stayed on the team as a

statistician. The victim stated that the sex acts included masturbation and fellatio performed on him by the Appellant. The sexual abuse occurred in the Appellant's home, in hotel rooms, and in the Appellant's car for the baseball seasons of three years, ending in 2003.

On November 22, 2005, the Appellant appeared before Judge James DeWeese and entered a plea of no contest to all three charges. The trial court made a finding of guilty on his no contest pleas. Prior to sentencing, the court ordered that a pre-sentence investigation and a forensic psychological examination be conducted on the Appellant.

On January 9, 2006, the Appellant appeared before the court for sentencing in case numbers 2005-CR-557D and 2005-CR-907D. At the sentencing hearing, the trial court heard several victim impact statements. The Court also reviewed the results of the pre-sentence investigation and the forensic evaluation before classifying the Appellant as a sexual predator. The trial court sentenced the Appellant to five years of community control with the requirement that he complete the in-patient sex offender treatment program at the Volunteers of America. The trial court also ordered that the Appellant pay restitution for the victims' counseling expenses. Neither the Appellant, nor his attorney objected to the restitution order at the time it was imposed.

The Appellant was unsuccessfully terminated from the Volunteers of America program on October 25, 2006. As a result of his termination from the program, a community control violation was filed against the Appellant. Following an oral hearing, the trial court found that the Appellant had violated the conditions of his community control by failing to successfully complete the Volunteers of America sex offender treatment program. As a result of that violation, the Appellant was sentenced to five years

for the sexual battery charge, and five years for the unlawful sexual conduct with a minor charge in case number 2005-CR-907D, and one and a half years for the gross sexual imposition charge in case number 2005-CR-557D. Those sentences were to be served consecutively for a total prison term of eleven and a half years. The Appellant was also advised that he would be subject to five years of post-release control, and again was ordered to pay restitution for the victims' counseling expenses. Once again, the defense did not object to the restitution order or request a hearing on the issue.

Following the termination of his probation, the Appellant had a full and fair appellate review of his sentence. He filed a direct appeal of the revocation of his community control in the Fifth District Court of Appeals, case number 06-CA-116. In that appeal, the Appellant challenged the basis for revoking his community control, and the validity of the prison sentence imposed for that violation. He did not raise any claim regarding the validity of the trial court's restitution order in this proceeding. On October 31, 2007, the Fifth District issued an opinion overruling both assignments of error.

Thereafter, on June 23, 2008, the Appellant filed a pro se Motion to Vacate and Set Aside A Void Judgment in the trial court. In that motion, he challenged the validity of the restitution order imposed by the trial court in its original January 10, 2006 sentencing entry, and the validity of the prison sentence imposed for the community control violations. On August 25, 2008, the trial court issued a judgment entry overruling the Appellant's motion, finding that it was an untimely post-conviction petition and that the claims raised therein were barred by *res judicata*. In the Appellant's subsequent appeal of the issue, the Fifth District agreed with the trial court's determination.

ARGUMENT

Response to Proposition of Law Nos. I and IV: The Trial court properly determined that the issues raised in the Appellant's Motion to Vacate or Set Aside a Void Judgment were barred by res judicata.

The Appellant challenges the validity of the restitution order imposed by the trial court for the victims' counseling expenses where resulted from his sexual abuse, arguing that the trial court failed to determine a definite amount of restitution per victim. The Appellant also challenges the trial court's finding that the claims raised in his motion were barred by *res judicata*.

The doctrine of *res judicata* is clearly applicable to the Appellant's case. Contrary to Appellant's contentions, "any issue that could have been raised on direct appeal and was not is *res judicata* and not subject to review in subsequent proceedings." State v. Saxon (2006), 109 Ohio St.3d 176, 846 N.E.2d 824. "Under the doctrine of *res judicata*, a final judgment of conviction bars the convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant * * * on appeal* from that judgment." (Emphasis added) Id. at P17, quoting State v. Perry (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. As the court explained, "the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, *res judicata* promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which defendant already received a full or fair opportunity to be heard." Id. at P18.

The State submits that the Appellant misconstrues the term "final" to mean completely error free. Rather, it is clear that in the context of *res judicata*, a judgment is considered "final" when no appeal was filed, or an appeal of the issue was filed and was decided. The purpose of this rule is to promote judicial economy, and to limit endless appeals such as this one.

The trial court properly applied the doctrine of *res judicata* to the claims in this case. Neither the Appellant, nor his trial counsel challenged the validity of the restitution order at the time of his original sentencing on January 9, 2006, or at his community control violation sentencing on November 22, 2006. Furthermore, the Appellant did not raise this issue in a direct appeal from his original sentencing entries. He had the opportunity to raise this issue in a cross-appeal when the State appealed the original community control sentence (Case No. 06-CA-12), yet he failed to do so. The Appellant did file a direct appeal of his conviction for community control violations and his subsequent prison sentence (Case No. 06-CA-116). However, yet again, he failed to raise either the lack of specificity in the court's restitution order. Because the Appellant had the opportunity to litigate these issues and chose not to do so, the State contends that he is now barred by *res judicata* from raising them in this proceeding.

Second, the trial court properly refused to consider the Appellant's claim because it was raised in an untimely post-conviction petition. R.C. 2953.21(A)(2) provides that a petition for post-conviction relief must be filed no later than one hundred-eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction; or, if no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

petition for post-conviction relief was required to be filed no later than August 20, 2007. Therefore, his June 23, 2008 petition was untimely, coming nearly a year too late.

A trial court lacks jurisdiction to entertain an untimely petition for post-conviction relief unless petitioner demonstrates that one of the exceptions in R.C. 2953.23(A) applies. See, State v. Lee, 2000 Ohio App. LEXIS 2414, (June 8, 2000), Franklin App. No. 99AP-668; State v. Raines (10th Dist.), 2004 Ohio 2524, 2004 Ohio App. LEXIS 2120 at P5. Those exceptions allow a trial court to consider untimely petitions for post-conviction relief in limited situations.

The Appellant is not entitled to relief under R.C. 2953.23(A)(1), the exception which allows the court to consider untimely petitions, due to the nature of the claims presented in his petition. In his petition, the Appellant sought to challenge the validity of the restitution order imposed as a part of his sentence. In State v. Rawlins, the Fourth District Court of Appeals held that the plain language of R.C. 2953.21(A)(1)(b) does not extend to sentencing errors, except those occurring in the context of capital punishment. 2006 Ohio 1901, 2006 Ohio App. LEXIS 1739 at P13; citing, State v. Barkley, 2005 Ohio 1268, 2005 Ohio App. LEXIS 1241.

If the Court finds that the Appellant is not barred by *res judicata* or by his untimely post-conviction petition, the State would concede that a hearing should be held to address only the restitution issue. R.C. 2929.18(A)(1) provides, in pertinent part:

the commission of the offense. * * *."

In reliance upon R.C. 2929.18(A)(1), Ohio appellate courts have found plain error where the trial court's restitution order fails to state a specific amount of restitution to be paid. See, State v. DeLong (2nd Dist.), 2005 Ohio 1905, 2005 Ohio App. LEXIS 1835; State v. Ray (4th Dist.), 2006 Ohio 853, 2006 Ohio App. LEXIS 745; and State v. Hall (5th Dist.), 2007 Ohio 3428, 2007 Ohio 3132.

In this case, the sentencing entry issued by the trial court merely states that the Appellant "* * * shall pay restitution for the victims' counseling expenses." However, it does not state a specific amount, or to which victim the restitution is to be paid.

Response to Appellant's Proposition of Law No. II: The trial court properly considered the Appellant's Motion to Vacate or Set Aside a Void Judgment as a petition for post-conviction relief.

The Appellant contends that the trial court erroneously classified his motion as a post-conviction petition when the basis for the motion was that the trial court's failure to comply with the mandates of Crim.R. 32(C), R.C. 2929.18 and R.C. 2929.19 rendered the judgment void. The State will address this assignment of error out of order for purposes of clarity.

It is well settled that motions to vacate sentences can be considered petitions for post-conviction relief as defined under R.C. 2953.21. In State v. Reynolds, the Ohio Supreme Court held that "[w]here a criminal defendant, subsequent to his or her direct

LEXIS 2905; State v. Sturkey (5th Dist.), 2007 Ohio 3701, 2007 Ohio App. LEXIS 3009; State v. Ulis (6th Dist.), 2007 Ohio 1192, 2007 Ohio App. LEXIS 1130; and State v. Stein (5th Dist.), 2008 Ohio 3427, 2008 Ohio App. LEXIS 2875.

In this case, the Appellant's June 23, 2008 motion was captioned "Motion to Vacate and Set Aside a Void Judgment. That motion was filed in the trial court after the time for filing a direct appeal of his original sentence had expired, and after the Appellant had appealed the revocation of his community control. Therefore, the trial court properly considered it as a petition for post-conviction relief under R.C. 2953.21.

Response to Proposition of Law No. III: The prison sentence imposed by the trial court for the Appellant's community control violation complied with Ohio's felony sentencing laws.

The trial court did not err in overruling the Appellant's challenge to the validity of his prison sentence as it was also barred by *res judicata*. The Appellant filed a direct appeal of the revocation of his community control in case number 06-CA-116. That appeal included a challenge to the validity of the prison sentence imposed as a result of the community control violation. As the Appellant has already litigated this issue and lost, he is barred from raising it in further proceedings.

Furthermore, as stated above, the Appellant's June 23, 2008 Motion to Vacate or Set Aside a Void Judgment was an untimely post-conviction petition. He is not entitled to relief under R.C. 2953.23(A)(1), the exception which allows the court to consider

the State submits that this issue is moot. As stated above, the error that the Appellant cites is in his original sentencing entries from January 10, 2006. However, he has subsequently been re-sentenced to prison as a result of community control violations. In the Community Control Violation Journal Entry for Case No. 2005-CR-557D, the court imposed an eighteen month prison sentence for the sole charge of gross sexual imposition. In the Community Control Violation Journal Entry for Case No. 2005-CR-907D, the court imposed a five year prison sentence for Count I, unlawful sexual conduct with a minor, and a five year prison sentence for Count II, sexual battery. As a sentence was imposed separately for each count, the Appellant's claim of error lacks merit.

Finally, the State would argue that to re-sentence the Appellant would be a waste of judicial resources. The Appellant was sentenced on both cases at the same time, and was aware of exactly how much time he would get if he violated the conditions of community control. Thus, the original sentencing entries complied with the requirements of State v. Brooks (2004), 103 Ohio St.3d 134, 814 N.E.2d 837. Furthermore, the prison sentences that were ultimately imposed was within the felony sentencing ranges.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that the Court deny Appellant jurisdiction to pursue his appeal.

Respectfully Submitted,

(419) 774-5676

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing State of Ohio's Memorandum in Opposition to Jurisdiction was served on Ronald Russell, Inmate No. A514-993, Hocking Correctional Institution, P.O. Box 59, 16759 Snake Hollow Road, Nelsonville, Ohio 45764 by regular U.S. Mail, this 29th day of June, 2009.

Kirsten L. Pscholka-Gartner (0077392)