

ORIGINAL

In the
Supreme Court of Ohio

State of Ohio,	:	
	:	
Plaintiff- Appellee	:	
	:	
vs.	:	CASE NO. 11-1696
	:	On Appeal from the
Edward B. Avery, Sr.	:	Union County Court of Appeals
	:	Third Appellate District
Defendant- Appellant	:	C.A. Case No. 14-10-35

**MEMORANDUM OF THE STATE OF OHIO
OPPOSING JURISDICTION**

David W. Phillips, Esq. (0019966)
Union County Prosecuting Attorney
By: Rick Rodger (0041574)
Assistant Prosecuting Attorney
Union County Justice Center
221 West Fifth Street, Suite 333
Marysville, Ohio 43040
Telephone: (937) 645-4190
Fax: (937) 645-4191
dphillips@co.union.oh.us

Counsel for Plaintiff-Appellee

Craig M. Jaquith, Esq. (0052997)
Assistant State Public Defender
250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394

Counsel for Defendant-Appellant

FILED
NOV 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191
E-mail prosecutor@co.union.oh.us

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS SHOULD DECLINE JURISDICTION	1
STATEMENT OF THE CASE AND FACTS	2
RESPONSES TO PROPOSITIONS OF LAW	4
First Proposition of Law:	
Appellate proceedings premised on a trial court entry that does not constitute a final appealable order have no preclusive effect on an appeal timely initiated after a defendant receives his or her first final appealable order from the trial court.	
Second Proposition of Law:	
A trial court errs by not declaring a mistrial when a dismissed alternate juror was present for two hours during jury deliberations	
Third Proposition of Law:	
A criminal defendant's due process rights are violated when the trial court issues improper jury instructions for the offense of kidnapping.	
Fourth Proposition of Law:	
A trial court errs when it does not merge rape and kidnapping as allied offenses, and both offenses involve the same victim in a single location.	
CONCLUSION	7
CERTIFICATE OF SERVICE	8
APPENDIX	9

1997 Sentencing Entry, Case No.: 97-CR-0020
Ohio Revised Code Section 2967.28
(in effect at the time of sentencing)

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191
E-mail prosecutor@co.union.oh.us

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Appellant does not set forth any compelling reason for this Court to review this matter. There are no substantial constitutional questions presented for review by this Court.

Appellant was convicted in 1997 of Rape, Kidnapping, Aggravated Burglary and Robbery. He appealed to the Third District Court of Appeals raising the same issues as contained in Propositions of Law Two, Three and Four. A decision was issued by the Court of Appeals in 1998. He now relies on the holding of *State v. Baker*, 119 Ohio St. 3d 197, a case decided 11 years after his conviction, claiming that he did not have a final appealable order and should now be permitted to raise the same issues in a second appeal. The issues raised by Appellant are not new to this Court nor do they present an opportunity to change the law or develop new law.

The issue raised by Appellant has already been determined by this Court in *State v. Fischer*, 128 Ohio St. 3d 92, and should not be addressed again. Because the issues herein have already been addressed, this case does not present a matter of public or great general interest or a substantial constitutional question. This Court should decline jurisdiction.

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4180
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

STATEMENT OF THE CASE AND FACTS

Appellant was indicted by the Union County Grand Jury on March 21, 1997 for one count of Rape, in violation of O.R.C. Section 2907.02(A)(2), a felony of the first degree; Aggravated Robbery, in violation of O.R.C. Section 2911.01, a felony of the first degree; Aggravated Burglary, in violation of O.R. C. Section 2911.11(B), a felony of the first degree; and Kidnapping, in violation of O.R. C. Section 2905.01, a felony of the first degree. Along with Kidnapping, the Grand Jury included a specification that Appellant committed the offense of kidnapping with a sexual motivation.

The matter proceeded to trial on July 31, 1997. At trial, the testimony presented indicated that Appellant, on or about March 14, 1997, broke in the apartment of a 41 year old single female, kidnapped her, stole money from her and brutally raped her. At the time of the event, the victim had taken her boyfriend to work that morning about 5:30 a.m. and returned to her apartment. Upon entering her bedroom, she reported she saw a "tall black shadow" which leapt at her with something in its hands that he tried to throw over her head. Appellant threw the victim on the bed and was able to place a blanket over her head. With the blanket over the victim's face, she was cast into darkness wherein she had difficulty breathing. She had testified that she thought she was going to die. While on the bed, Appellant then forcibly raped her. After raping her, Appellant then dragged her or forced her into the bathroom and into the shower.

After Appellant left the victims' apartment, she left also and drove to her boyfriend's employer extremely upset. Law enforcement was contacted and the victim reported the rape. A rape kit was collected and sent for testing. Following DNA testing, a profile consistent with Appellant was received indicating that one in five million African-American males possesses a similar profile.

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

Following a jury trial of this matter, Appellant was convicted of Rape, a felony of the first degree; Robbery, a felony of the second degree; Aggravated Burglary, a felony of the first degree; and Kidnapping, a felony of the first degree. On August 7, 1997, Appellant was sentenced to prison for ten (10) years on the rape, aggravated burglary and kidnapping, to be served consecutive to one another and eight (8) years on the robbery count which was to be served concurrent to the other counts. Appellant was also determined to be a sexual predator.

Appellant appealed to the Third District Court of Appeals which affirmed Appellant's conviction and overruled his assignments of error. *State v. Avery* (1998), 126 Ohio App. 3d 36.

Appellant filed a motion for leave to file a delayed appeal to the Ohio Supreme Court which was denied at 91 Ohio St. 3d 1462.

On January 12 2004, Appellant filed a request for review and modification of his sentence which was overruled by the trial court without a hearing. Appellant appealed the decision of the trial court. The Court of Appeals affirmed the decision of the trial court and found that the trial court's refusal to hold an evidentiary hearing on the motion was appropriate as the motion was untimely and barred by res judicata. See *State v. Avery*, 3d Dist. No.: 14-04-06, 2004-Ohio-4165.

Appellant has continued to file a number of actions with the trial court and with the Court of Appeals claiming that he had never been advised of post-release control and that he needed to be resentenced. On November 23, 2010, a de novo sentencing hearing was held. On November 24, 2010, Appellant was resentenced to an aggregate sentence of thirty (30) years in prison (with credit for time served) and informed him of post release control. Appellant then appealed the resentencing. The Court of Appeals affirmed his conviction and sentence in *State v. Avery*, 2011-Ohio-4182.

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

RESPONSE TO PROPOSITIONS OF LAW

First Proposition of Law:

Appellate proceedings premised on a trial court entry that does not constitute a final appealable order have no preclusive effect on an appeal timely initiated after a defendant receives his or her first final appealable order from the trial court.

Second Proposition of Law:

A trial court errs by not declaring a mistrial when a dismissed alternate juror was present for two hours during jury deliberations

Third Proposition of Law:

A criminal defendant's due process rights are violated when the trial court issues improper jury instructions for the offense of kidnapping.

Fourth Proposition of Law:

A trial court errs when it does not merge rape and kidnapping as allied offenses, and both offenses involve the same victim in a single location.

Appellant's propositions of law will be addressed together as the response to Appellant's First Proposition of Law precludes having to address the remaining propositions of law under the doctrine of the law of the case and res judicata.

Appellant complains that the August, 1997 sentencing entry was not a final appealable order and was deficient as it did not contain "the means of conviction, whether by plea, verdict or finding by the court" as contemplated in *State v. Baker*, 119 Ohio St. 3d 197. Appellant claims that he was not advised of post release control in his sentencing entry thus, he did not have a final appealable order until November 24, 2010. Because of this, he claims that the 1998 decision of the Third District Court of Appeals is void because that Court lacked jurisdiction to hear the appeal. Thus, he should now be permitted to raise his issues a second time for determination by the Court.

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

The 1997 sentencing entry, despite being a checklist entry used in 1997, indicated that Appellant had been advised of post-release control. A copy of the checklist is included in the Appendix. Upon that form, the Court indicated that Appellant was advised of the required post release control provisions. A review of the transcript from the sentencing hearing clearly shows that the Court advised the Appellant regarding post release control pursuant to R.C. Section 2967.28. (Tr. Vol. VI. P.31) A copy of R.C. Section 2967.28, in effect at time of sentencing is included in the Appendix.

Decided approximately eleven (11) years after Appellant's conviction, the Ohio Supreme Court, in *State v. Baker*, 119 Ohio St. 3d 197, held, in accordance with Criminal Rule 32(C), that "a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the Judge; and (4) entry on the journal by the clerk of court. Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence."

The 1997 sentencing entry complies with the requirements of *Baker, supra*, in that it contains the convictions, provides the sentence imposed by the Court, carries the signature of the Judge and has been filed with the Court. Thus, it was a final appealable order at the time.

Appellant later indicated that he had not been properly advised of post release control. Appellant was resentenced in November, 2010 to resolve any issue of post-release control.

Appellant then appealed to the Third District Court of Appeals raising the same issues or issues which could have been brought forth in his 1998 appeal. The Court of Appeals held he was precluded from doing so having already had the benefit of a direct appeal. The Court held that he can not raise any and all claims of error in successive appeals. He now wishes to raise the same issues in this Court which were previously determined by the Third District

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

Court of Appeals in 1998. By this Court's reasoning in the case of *State v. Fischer*, 128 Ohio St. 3d 92, he should be precluded from doing so.

In *Fischer, supra*, the Court addressed a similar issue which arose after a sentencing court failed to impose post release control. This Court held that "when a judge fails to impose statutorily mandated post release control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." Thus, only the portion of the sentence that is void must be corrected. This Court went further and explained that an appeal from a resentencing, after a determination that a portion of original sentence was void, is not a "first" direct appeal and that the first appeal is not a "nullity". The Court continued and indicated that Fischer already had one direct appeal and "could not raise any and all claims of error in a second, successive appeal" as the law of the case doctrine provides that a decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels citing *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1. This doctrine "precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued in a first appeal". *Fischer, supra*.

Appellant raises the same argument as stated in *State v. Fischer, supra*. and claims that since the Court failed to properly advise of post release control, the sentence was void. Because the sentence was void, there was no final appealable order and, because of this, the Court of Appeals lacked jurisdiction over the initial appeal thereby rendering the 1998 appeal invalid. This Court, in *Fisher, supra*., rejected this argument and held that "res judicata still applies to other aspects of the merits of a conviction including the determination of guilt and the lawful elements of the ensuing sentence. The scope of an appeal from a resentencing

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

hearing in which a mandatory term of post release control is imposed is limited to issues arising at the resentencing hearing.” Thus, when a Court affirms the convictions in an Appellant's first appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them are barred. See *State v. Harrison*, 8th Dist. No.: 88975, 2008-Ohio-921. Therefore, in a subsequent appeal, only arguments relating to the resentencing are proper. *State v. Riegenbach*, 5th Dist. No.: 09-CA-121, 2010 Ohio 3392, affirmed by 128 Ohio St. 3d 338; *State v. Poole*, 8th Dist. No.: 94759, 2011 Ohio 716; *State v. Freeman*, 11th Dist.; 2011 Ohio 2457.

Appellants Propositions of Law Two, Three and Four were or should have been raised in his direct appeal in 1998. If the issues were addressed or if he failed to raise any issue in his 1998 appeal, he should now be precluded from raising the issue. Failure to raise an issue at the proper opportunity is to be considered a waiver of that issue and may be not be considered on subsequent appeals. The doctrine of res judicata applies. *State v. Castro* (1979), 67 Ohio App. 2d 20; *State v. Brown*, 1985 Ohio App. LEXIS 9920.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is therefore respectfully submitted that jurisdiction should be declined.

DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us

Respectfully submitted,

**DAVID W. PHILLIPS,
UNION COUNTY PROSECUTOR**



Rick Rodger (0041574)
Assistant Prosecuting Attorney
221 West Fifth Street
Suite 333
Marysville, Ohio 43040
(937) 645-4190
(937) 645-4191 FAX

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon Mr. Craig Jacquith, Esq.; Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio, 43215 by ordinary U.S. Mail, this 7 day of November, 2011.



Rick Rodger (0041574)
Assistant Prosecuting Attorney

**DAVID W. PHILLIPS
UNION COUNTY
PROSECUTING ATTORNEY**

Assistant Prosecutors
Terry L. Hord Chief Assistant
Rick Rodger
Melissa A. Chase

221 West Fifth Street
Marysville, Ohio 43040
Telephone: 937-645-4190
Fax: 937-645-4191

E-mail prosecutor@co.union.oh.us