

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,
Appellee,

vs.

WILLIAM B. VORE,
Appellant.

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14-0817

On Appeal from the Warren County
Court of Appeals, Twelfth
Appellate District

Court of Appeals No: CA2012-07-065

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT WILLIAM B. VORE

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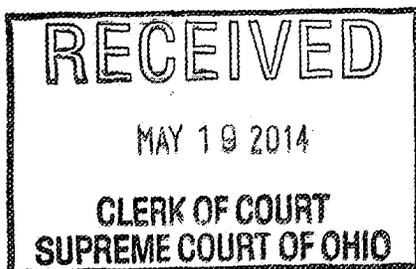
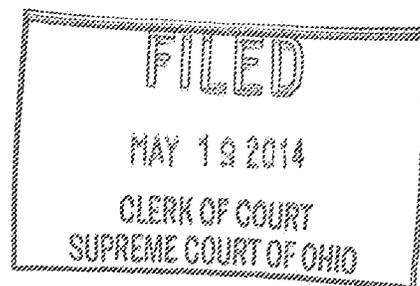


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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents critical issues of great general interest and involves three substantial Constitutional questions: The questions before this Court are: (1) Whether a trial court errors when it sentences an appellant to five years in prison for violating R.C. 2911.02(A)(3), when appellant was resentenced after H.B. 86 was enacted and at the time of his resentencing the maximum sentence was 36 months; (2) Whether a trial court errors when it sentenced an appellant to mandatory post-release control for three years when appellant did not cause or threaten to cause physical harm to the bank teller during the offense; and (3) Whether the trial court erred when it denied appellant's request to award jail-time credit for the time he was in state custody on the instant offense.

This Court should grant jurisdiction to review this case because there appears to be a split among the appellate court's regarding whether a defendant who is resentenced after the effective date of H.B. 86, qualifies for a reduced penalty under R.C. 1.58(B), which is specifically included in H.B. 86. See, State v. Clay, 2012 Ohio 5011, 2012 Ohio App. LEXIS 4388 (Ohio App. 12th Dist. 2012), ("rejecting application of H.B. 86"); State v. Provens, 2013-Ohio-3225 (Ohio App. 5th Dist. 2013), ("same rationale"); State v. Gatewood, 2012 Ohio 4181, 2012 Ohio App. LEXIS 3679 (Ohio App. 2nd Dist. 2012), ("applying H.B. 86 toward a defendant who was resentenced after effective date").

Furthermore, it's Mr. Vore's contention the 12th District's

ruling appears to be inconsistent and contrary to the Supreme Court decision in, State v. Taylor, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, 2014 Ohio LEXIS 254 (Decided on February 13, 2014), which ruled that even though the defendant's offense occurred prior to the effective date of H.B. 86, since he was sentenced after the effective date the reduced penalties applied.

Furthermore, there appears to be a split among the appellate court's regarding whether a defendant is subject to a mandatory three years of post-release control penalty for a third degree robbery under R.C. 2911.02(A)(3). See, State v. Vore, 2014-Ohio-1583, 2014 Ohio App. LEXIS 1529 (Ohio App. 12th Dist. 2014); State v. Koester, 2010-Ohio-5052 (Ohio App. 10th Dist. 2010), and State v. Williams, 2011-Ohio-316 (Ohio App. 8th Dist. 2011).

This case presents critical questions of great general interest and involves substantial deprivation of state and federal Constitutional rights under the Due Process Clause.

This Court should grant jurisdiction to review this case because the 12th Appellate District's ruling conflicts with other appellate court decisions concerning whether H.B. 86 should be applied toward defendant's who are resentenced after the effective date of said act.

II. STATEMENT OF THE CASE AND FACTS

The appellant Mr. Vore was convicted by a jury out of Warren County, Ohio, for Robbery of the Third Degree (R.C. 2911.02(A)(3)), and Grand Theft in the Fourth Degree (R.C. 2913.02(A)(1)). The charges arose out of an unarmed bank robbery of a Fifth Third Bank in Warren County, Ohio, on April 20, 2010.

Following a three-day jury trial, Mr. Vore was convicted of both counts, even though the bank teller who was robbed, never identified Mr. Vore as the suspect. The grand theft charge was merged with the robbery conviction for sentencing purposes, and on August 30, 2011, the appellant was sentenced to five years in prison.

Appellant timely appealed to the 12th Appellate District, arguing that the trial court erred by failing to give a lesser-included offense jury instruction; by admitting improper "other acts" evidence; by overruling his motion to suppress eyewitness identifications; and by denying his motion for funds to obtain an eyewitness identification expert.

The 12th Appellate District affirmed Mr. Vore's conviction, however reversed and remanded his case to the trial court for resentencing to properly impose the post-release control penalty. State v. Vore, 12th Dist. Warren No. CA2011-08-093, 2012-Ohio-2431.

Mr. Vore was resentenced on July 18, 2012, to five years in prison, and post-release control for a mandatory three years. The trial court awarded Mr. Vore 428 days of jail time, but denied his request for an additional 67 days jail-time credit.

This appeal has been timely filed within 45 days time from the date of the decision of the 12th Appellate District.

III
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

WHETHER THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO FIVE YEARS IN PRISON FOR VIOLATING R.C. 2911.02(A)(3) WHEN APPELLANT WAS RESENTENCED AFTER H.B. 86 WAS ENACTED AND AT THE TIME OF HIS RESENTENCING THE MAXIMUM SENTENCE WAS 36 MONTHS IN PRISON

On the date of appellant's resentencing hearing the maximum penalty for violating R.C. 2911.02(A)(3), was 36 months. H.B. 86 amended the sentencing range for most third-degree felony robbery offenses to 9, 12, 18, 24, 30, or 36 months. (See R.C. 2929.14 (2013)).

The maximum penalty prior to H.B. 86, for a third degree robbery was five years. H.B. 86 was enacted on June 29, 2011, and became effective on September 30, 2011. Appellant was resentenced on July 20, 2012.

Even though appellant's offense occurred prior to the enactment of H.B. 86, his resentencing hearing occurred almost ten months after the bill was enacted. Penalties or punishments imposed after September 30, 2011, are governed by the amendments of H.B. 86. See, State v. Taylor, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, 2014 Ohio LEXIS 254 (Decided on Feb. 13, 2014).

Several appellate court's have applied H.B. 86 toward defendant's who have been resentenced after the effective date of H.B. 86. See, State v. Gatewood, 2012 Ohio 4181, 2012 Ohio App. LEXIS 3679 (Ohio App. 2nd Dist. 2012); State v. Tolliver, 2013-Ohio-3861, 2013 Ohio App. LEXIS 4016 (Ohio App. 4th Dist. 2013).

When rejecting this argument the 12th Appellate District ruled that appellant wasn't entitled to the benefit of a reduced sentence under H.B. 86, based on the 12th District's previous

ruling in, State v. Clay, 12th Dist. Madison No. CA2011-12-016, 2012-Ohio-5011.

It's Mr. Vore's contention the appellate court erred because under H.B. 86, the General Assembly specifically stated that R.C. 1.58(B), applies under H.B. 86. Under R.C. 1.58(B), such statutory provisions states: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended". (See R.C. 1.58(B)). Also See, State v. Solomon, 2012 Ohio 5755, 983 N.E.2d 872, 2012 Ohio App. LEXIS 4996 (Ohio App. 1st Dist. 2012), ("same holding"); State v. Taylor, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, 2014 Ohio App. LEXIS 254 (Decided on Feb. 13, 2014).

Based on the above rationale appellant current sentence of five years in prison is contrary to law, as it's well settled a court has no power to substitute a different sentence than that provided for by statute. Colegrove v. Burns, (1964), 175 Ohio St. 437, 438, 25 Ohio Op.2d 447, 195 N.E.2d 811; State v. Bilder, (1987), 39 Ohio App.3d 135, 529 N.E.2d 1292; State v. Potts, 2002-Ohio-4829, 2002 Ohio App. LEXIS 4888 (Ohio App. 6th Dist. 2002).

In State v. Rush, 83 Ohio St.3d 53, 1998-Ohio-423, 697 N.E.2d 634 (1998), the Ohio Supreme Court recognized under similar circumstances that the reduced sentencing penalties didn't apply to defendant's sentenced after the amended penalty provisions due to the fact the legislative intent of such act made it clear that such provisions would not apply toward defendant's who committed

their crimes prior to the effective date of the act. Id.

In the instant case H.B. 86 specifically stated that the statutory provisions would apply to those defendant's who were sentenced after the effective date of the act, regardless of whether they committed there offenses prior to the effective date of the act. State v. Taylor, supra.

Assuming arguendo the state argues that Mr. Vore's argument is precluded under, State v. Fischer, (2010), 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332, because the appellate court remanded his case back to the trial court only for the limited purposes of correcting the PRC notifications, this Court should reject this argument. State v. Vore, 2012-Ohio-2431.

It's Mr. Vore's this Court should reject this argument because the mandatory language of R.C. 1.58(B), and the usage of the word "shall" acts as a jurisdictional provision that overrides any limitations imposed under, Fischer, supra. State v. Wilson, 77 Ohio St.3d 334, 336-337, 1997 Ohio 35, 673 N.E.2d 1347 (1997), ("recognizing in determining legislative intent, we look to the face of an act or statute, and give significance and effect to every word, phrase, sentence and part thereof, if possible"). Id. "It is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when the language is inserted in a statute it is inserted to accomplish some definite purpose". State ex rel. Cleveland Elec. Co. v. Euclid, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).

Here, the General Assembly stated in Section 3 of H.B. 86 that the provisions of the former act and not the amendments apply

to those sentenced before the effective date of the act, but that the amendments apply to a person "to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable". State v. Taylor, supra; State v. Solomon, supra.

Since Mr. Vore's sentence was vacated and remanded to the trial court, the trial court was required by law to resentence him under the amended penalty provisions of H.B. 86, pursuant to the legislature's intent of the act. (Tp. p. 7-9; July 18, 2012).

In United States v. Veteto, 980 F.2d 697 (11th Cir. 1993), the federal appellate court for the Eleventh Circuit Court of Appeals correctly recognized that when the court vacated the defendant's sentence the first time, there was no sentence in effect for defendant, therefore, the trial court had the authority to modify the sentence. Id.

Clearly based on the above rationale since Mr. Vore's original sentence was vacated the trial court likewise had the legal duty to resentence him under H.B. 86, reduced penalty provisions. See, United States v. Hines, 713 F.3d 1303 (11th Cir. 2013), ("same rationale when resentencing defendant to reduced penalty provisions"). Id.

This Court should vacate appellant's current sentence and remand his case back to the lower court for resentencing, or in the alternative grant jurisdiction to review this case.

Proposition of Law No. 2

WHETHER THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO MANDATORY POST-RELEASE CONTROL FOR THREE YEARS WHEN APPELLANT DID NOT CAUSE OR THREATENED TO CAUSE PHYSICAL HARM TO THE BANK TELLER DURING THE OFFENSE

It's appellant's contention the trial court erred when the court sentenced him to mandatory post-release control for a third degree robbery offense in violation of R.C. 2911.02(A)(3). It's appellant's further contention the 12th Appellate District erred when upholding the trial court's ruling. State v. Vore, 2014-Ohio-1583, 2014 Ohio App. LEXIS 1529.

Since Mr. Vore was sentenced before March 22, 2013, the version of R.C. 2967.28, in effect at the time of appellant's resentencing called for a mandatory term of post-release control for first and second degree felonies, for felony sex offenses, and "for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person". (See R.C. 2967.28(B)).

For felonies of the third, fourth, and fifth degree, that are not subject to division (B)(1) through (3), a sentence to a prison term "shall include a requirement that the offender be subject to a period of post-release control of up to three years" if the parole board determines that a period of post-release control is necessary for that offender. (See R.C. 2967.28(C)).

When rejecting appellant's argument the 12th Appellate District ruled that Mr. Vore's actions caused or threatened to cause physical harm to the bank teller because the teller had testified that the demand note had an impact on her ability to physically function. State v. Vore, supra.

The 12th Appellate District's rationale was based on the court's conclusion that the bank teller's physiological impairment

was sufficient to establish that appellant caused or threatened to cause physical harm to a person for purposes of R.C. 2967.28(B)(3). State v. Vore, 2014-Ohio-1583.

Contrary to the 12th Appellate District's ruling nothing in the record demonstrates that appellant's actions "caused or threatened to cause physical harm to the bank teller". (Tp. p. 22-24, 27, 34-35).

This Court should grant jurisdiction to review this appeal because it appears the 12th Appellate District's ruling is in conflict with other state appellate court decisions regarding this issue. See, State v. Koester, 2010-Ohio-5052, 2010 Ohio App. LEXIS 4231 (Ohio App. 10th Dist. 2010), ("recognizing threatening while committing an offense under R.C. 2911.02(A)(3), is not always a threat of physical harm as opposed to force"); State v. Williams, 2011-Ohio-316, 2011 Ohio App. LEXIS 258 (Ohio App. 8th Dist. 2011), ("same rationale"). Id.

This Court should vacate Mr. Vore's current sentence and remand his case back to the trial court for resentencing to correct the post-release control error, or in the alternative grant jurisdiction to review this case.

Proposition of Law No. 3

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO AWARD JAIL-TIME CREDIT FOR THE TIME HE WAS IN STATE CUSTODY ON THE INSTANT OFFENSE

It's appellant's contention the trial court erred under the Equal Protection Clause when it denied his request to award him jail-time credit for the time he was in state custody on the instant offense.

The record demonstrates Mr. Vore was taken into custody of the Warren County Sheriff's Department on March 11, 2011. He was held by the Warren County authorities during the pendency of his robbery charges, until August 30, 2011, when he was sentenced to five years in prison. State v. Vore, 2014-Ohio-1583.

At Mr. Vore's resentencing he objected to the hearing being limited to PRC notice, and submitted an oral motion to have the court reconsider his jail-time credit under R.C. 2967.191. (Tp. p. 7).

The trial court overruled appellant's oral motion. On appeal the 12th Appellate District affirmed the trial court's ruling stating that Mr. Vore's claim should have been raised on direct appeal in his original appeal, and was barred by res judicata. State v. Vore, supra.^{1/}

It's appellant's contention the 12th Appellate District's ruling is inconsistent with the statutory provisions of R.C. 2967.191, "which requires that jail-time credit be applies to all prison terms imposed for charges on which the offender has been held". State v. Fugate, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶12. Id.

It's appellant's contention the 12th Appellate District's ruling was erroneous because even though under, State v. Fischer, 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332 (2010), res ^{1/} The 12th Appellate District's ruling failed to recognize that appellant did raise his jail-time credit claim in his Application to Reopen Direct Appeal pursuant to Ohio App. Rule 26(B), based on an ineffective assistance of appellate counsel claim, however the 12th District ruled that the court would not consider the claim since appellant's subsequent appeal in regards to his resentencing raised this issue. (See 12th Dist. Order, Case No: CA2011-08-093, Ground Eighth).

judicata applies to most aspects of the merits of a conviction, the Fischer, Court stated that "the scope of an appeal from a resentencing hearing in which a mandatory term of post-release control is imposed is limited to issues arising at the resentencing hearing". Id.

Contrary to the 12th Appellate District's ruling it's Mr. Vore's position that the appellate court's interpretation of Fischer, is erroneous. He believes that R.C. 2967.191, is in substance a mandatory jurisdictional provision that applies to all defendant's who were in state custody during the course of there offense of conviction.

CONCLUSION

This Honorable Court should Grant Jurisdiction to review this appeal.

Respectfully Submitted,

William B. Vore
William B. Vore-#612-862
Richland Correctional Institution
P.O. Box-8107
Mansfield, OH 44905

CERTIFICATE OF SERVICE

I, Appellant, William B. Vore, hereby certify that a true copy of the above Memorandum in Support of Jurisdiction, was served on this, 15th, day of May, 2014, to the Appellee, David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, Assistant Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036. A true copy was served via U.S. Mail.

William B. Vore
William B. Vore- 612-862
Richland Correctional Inst.
P.O. Box-8107
Mansfield, Ohio 44901

APPENDIX A

APR 2014
COURT OF APPEALS
WARREN COUNTY
FILED

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

APR 14 2014

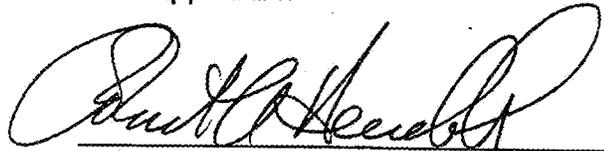
James L. Spaeth, Clerk
LEBANON OHIO

STATE OF OHIO, :
 :
Plaintiff-Appellee, : CASE NO. CA2012-07-065
 :
- vs - : JUDGMENT ENTRY
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WILLIAM B. VORE, :
 :
Defendant-Appellant. :

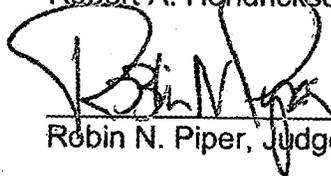
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

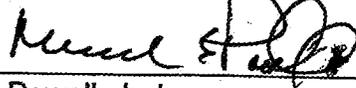
Costs to be taxed in compliance with App.R. 24.



Robert A. Hendrickson, Presiding Judge



Robin N. Piper, Judge



Mike Powell, Judge

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT

BY 
DEPUTY

APR 2014
COURT OF APPEALS
WARREN COUNTY
FILED

APR 14 2014

James L. Spaeth, Clerk
LEBANON OHIO

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM B. VORE,

Defendant-Appellant.

CASE NO. CA2012-07-065

OPINION
4/14/2014

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR27091

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,
Lebanon, Ohio 45036, for plaintiff-appellee

Neal D. Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, William B. Vore, appeals from a Warren County Court of Common Pleas decision resentencing him upon remand from this court to correct a postrelease control sentencing error. For the reasons discussed below, we affirm.

{¶ 2} In December 2010, appellant was indicted for robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree, and grand theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree. The charges arose out of appellant's robbery of a Fifth Third

Bank in Warren County, Ohio. Appellant had given a bank teller a handwritten note, which said: "This is a Robbery Give me All your 100s, 50s, 20s, Fast, no dye packs or alarms [sic]." He then asked the teller, "Do you got it?" Although the teller did not observe appellant holding a weapon, the teller nonetheless felt scared and believed she would be harmed if she did not comply. The teller handed over \$9,200, and appellant fled the bank.

{¶ 3} Following a three-day jury trial, appellant was convicted of both offenses. The grand theft charge was merged with the robbery conviction for sentencing purposes, and on August 30, 2011, appellant was sentenced to five years in prison. Appellant timely appealed to this court, arguing the trial court erred by failing to give a lesser-included offense jury instruction for the robbery charge, by admitting improper "other acts" evidence, by overruling his motion to suppress eyewitness identifications, and by denying his motion for funds to obtain an eyewitness identification expert. *State v. Vore*, 12th Dist. Warren No. CA2011-08-093, 2012-Ohio-2431. We found no merit to appellant's assigned errors and affirmed his conviction. However, we noticed and raised, sua sponte, an error in the trial court's imposition of postrelease control. *Id.* at ¶ 70. We therefore reversed and remanded the case to the trial court "for the limited purpose of permitting the trial court to employ the [postrelease control] correction procedures of R.C. 2929.191." *Id.* at ¶ 76.

{¶ 4} On July 18, 2012, the trial court held a resentencing hearing in accordance with our remand. At the hearing, appellant objected to the limited nature of the proceeding and asked that he be given additional jail-time credit for time he spent in the Warren County Jail while serving the remainder of a federal sentence, which ended May 17, 2011.¹ The trial court denied appellant's request, re-imposed a five-year prison term, and gave appellant jail-

1. Appellant had been serving a sentence at a federal penitentiary in Terre Haute, Indiana when he was transferred into Warren County's temporary custody on March 11, 2011. Appellant's federal sentence expired May 17, 2011.

time credit for 428 days. The trial court then advised appellant that he was subject to three years of mandatory postrelease control upon his release from prison.

{¶ 5} Appellant appealed, raising three assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO FIVE YEARS IN PRISON FOR VIOLATING R.C. 2911.02.

{¶ 8} In his first assignment of error, appellant argues the trial court erred in resentencing him to a five-year prison term as 2011 Am.Sub.H.B. No. 86 (H.B. 86), which became effective on September 30, 2011, reduced the maximum sentence for third-degree felonies to 36 months. Because appellant was resentenced on July 18, 2012, after the effective date of H.B. 86, appellant contends he is entitled to the benefit of a reduced sentence. The state, however, argues H.B. 86 is inapplicable to appellant as his sentence was actually imposed on August 30, 2011.

{¶ 9} This court has addressed the issue presented by appellant in a similar case. See *State v. Clay*, 12th Dist. Madison No. CA2011-12-016, 2012-Ohio-5011. In *Clay*, the defendant was convicted of possession of criminal tools, vandalism, and robbery. *Id.* at ¶ 3. He was sentenced on February 2, 2011 to a one-year prison term for possession of criminal tools and a one-year prison term for vandalism, which were to run concurrent to each other, but consecutive to a five-year prison term for the robbery conviction. *Id.* On appeal, we found the offenses of robbery and possession of criminal tools allied offenses of similar import, and we remanded the matter to the trial court with instructions to merge the offenses at sentencing after the state elected which of the allied offenses to pursue. *Id.* at ¶ 4. *Clay* was resentenced on November 4, 2011, at which time the state elected to pursue sentencing on the robbery offense. *Id.* at ¶ 5. The trial court, believing H.B. 86 was applicable to the defendant, resentenced *Clay* to a one-year prison term for vandalism, to run consecutively to

a 36-month prison term for the robbery conviction. *Id.* at ¶ 6. On appeal, we reversed the trial court's decision, finding that Clay's sentence was "imposed" when the penalty was originally pronounced on February 2, 2011. *Id.* at ¶ 16-17. The fact that we had reversed the sentences and remanded the matter to correct an allied offense error did not negate the fact that a penalty had been imposed prior to the effective date of H.B. 86. *Id.* at ¶ 18. We reversed and remanded for the trial court to resentence Clay using the sentencing laws that were in effect prior to the effective date of H.B. 86. *Id.* at ¶ 22.

{¶ 10} Here, a sentence was imposed on appellant on August 30, 2011, when the trial court pronounced the five-year prison term. As a penalty had been imposed on appellant prior to the effective date of H.B. 86, appellant was not entitled to the benefit of the less stringent sentencing provisions. See R.C. 1.58(B); *Clay* at ¶ 16-18.

{¶ 11} Moreover, the July 18, 2012 resentencing hearing was held for the limited purpose of properly advising appellant of his postrelease control obligations. Only that part of appellant's sentence failing to properly impose the statutorily mandated postrelease control was void and set aside by our holding in *Vore*, 2012-Ohio-2431 at ¶ 75-76. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 26 (holding that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, [only] that *part* of the sentence is void and must be set aside"). In all other respects, appellant's sentence was affirmed and, therefore, was not subject to review by the trial court on resentencing. See *State v. Schleiger*, 12th Dist. Preble No. CA2011-11-012, 2013-Ohio-1110, ¶ 30.

{¶ 12} Accordingly, appellant's first assignment of error is overruled.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO MANDATORY POST-RELEASE CONTROL FOR THREE YEARS.

{¶ 15} In his second assignment of error, appellant argues the trial court erred when it

determined that postrelease control was mandatory rather than optional. Appellant contends postrelease control was optional as he did not cause or threaten to cause physical harm during the robbery. The state, relying on the most current version of the postrelease control statute, R.C. 2967.28, argues a three-year period of postrelease control is mandated by the statute as robbery is an "offense of violence."

{¶ 16} At the outset, we note that the version of R.C. 2967.28 relied on by the state is inapplicable to appellant as he was sentenced before March 22, 2013, the effective date of the current postrelease control statute.² The version of R.C. 2967.28 in effect at the time of appellant's sentencing called for a mandatory term of postrelease control for first and second-degree felonies, for felony sex offenses, and "for a felony of the third degree that is not a felony sex offense and *in the commission of which the offender caused or threatened to cause physical harm* to a person." (Emphasis added.) Former R.C. 2967.28(B). Pursuant to this division of the statute:

[A] period of post-control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

R.C. 2967.28(B). For felonies of the third, fourth, and fifth degree that are not subject to

2. The current version of R.C. 2967.28(B) provides that postrelease control is mandatory for first and second-degree felonies, for a felony sex offense, and "for a felony of the third degree that *is an offense of violence* and is not a felony sex offense." (Emphasis added.) For those third-degree felonies that constitute an "offense of violence," postrelease control is mandatory for three years. R.C. 2967.28(B)(3). R.C. 2901.01(A)(9) defines an "offense of violence" and it specifically provides that robbery in violation of R.C. 2911.02 constitutes an "offense of violence." However, as discussed above, appellant was not sentenced under this version of the postrelease control statute.

division (B)(1) through (3), a sentence to a prison term "shall include a requirement that the offender be subject to a period of post-release control of up to three years" if the parole board determines that a period of postrelease control is necessary for that offender. R.C. 2967.28(C).

{¶ 17} Appellant was convicted of third-degree felony robbery in violation of R.C. 2911.02(A)(3). The issue, therefore, is whether appellant, in the commission of the robbery, caused or threatened to cause physical harm to the bank teller. "Physical harm to persons" is defined as "any injury, illness or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). The term "physiological impairment" is not defined by statute. As such, the term is accorded its common, ordinary, everyday meaning. *State v. Martin*, 12th Dist. Brown No. CA99-09-026, 2000 WL 1145465, * 5 (Aug. 14, 2000); *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70 (1988). "Impair" means to "make worse" or "diminish in quantity, value, excellence, or strength." *Webster's Third New International Dictionary* 1131 (1993). "Physiological" means "characteristic of or appropriate to an organism's healthy or normal functioning." *Id.* at 1707. The term "physiological impairment" may, therefore, "be defined as a damaging or lessening of a person's normal physical functioning." *State v. Roof*, 1st Dist. Butler No. CA77-10-0110, 1978 WL 216430, * 1 (Nov. 8, 1978).

{¶ 18} After reviewing the record, we find sufficient facts for the trial court to conclude appellant caused or threatened to cause physical harm to the bank teller, such that mandatory postrelease control is required. The bank teller testified at trial that appellant's handwritten note demanding money had a significant impact on her ability to physically function. Specifically, the teller testified appellant's action of handing her the demand note caused her to "freeze." The teller testified she was unable to act and did not "snap out of it" until appellant then questioned her "you got it?" Once appellant questioned her, she grabbed the money from her drawer and handed it over to appellant, who immediately left the bank.

The teller testified that after appellant left, she again "froze," and she did not "snap out of it" the second time until a manager walked by and asked her if something was wrong. The teller's testimony clearly established appellant's actions diminished or lessened her normal physical functioning, at least for a short period of time. As any physiological impairment, "regardless of its gravity or duration," is sufficient under R.C. 2901.01(A)(3), we conclude that the evidence supports the trial court's finding that postrelease control was mandatory for a period of three years.

{¶ 19} Appellant's second assignment of error is, therefore, overruled.

{¶ 20} Assignment of Error No. 3:

{¶ 21} THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO AWARD JAIL-TIME CREDIT FOR THE TIME HE WAS IN CUSTODY.

{¶ 22} In his third assignment of error, appellant argues the trial court violated his Equal Protection rights when it failed to award him jail-time credit for the full period of time he was in the custody of Warren County. Appellant contends he was taken into custody by Warren County on March 11, 2011 and held during the pendency of his robbery charges. He argues this date should be used by the court in determining his jail-time credit, not the May 17, 2011 date, which marked the expiration of his federal sentence. Appellant asserts he is entitled to an additional 67 days of jail-time credit. The state contends appellant's argument is barred by the doctrine of res judicata. We agree with the state.

{¶ 23} The doctrine of res judicata provides that "a final judgment of conviction bars a 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 at the trial which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10, citing *State v.*

Szefcyk, 77 Ohio St.3d 93 (1996), syllabus. Here, appellant does not seek to challenge the propriety or validity of the July 18, 2012 resentencing. Rather, he attempts to attack the date the trial court used for calculating jail-time credit. The May 17, 2011 date was utilized by the trial court at appellant's original sentencing hearing on August 30, 2011. As such, appellant could have, and should have, raised the issue of the proper starting date for calculating jail-time credit on his original appeal. Appellant's resentencing for postrelease control purposes does not open the door for him to retry issues that were previously raised or could have been previously raised on direct appeal. See *Fischer*, 2010-Ohio-6238 at ¶ 40; *State v. Sprauer*, 12th Dist. Warren No. CA2010-04-033, 2011-Ohio-48, ¶ 29 ("while the doctrine of res judicata does not preclude review of a void sentence, 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").

{¶ 24} Appellant's third assignment of error is, therefore, overruled.

{¶ 25} Judgment affirmed.

PIPER and M. POWELL, JJ., concur.

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JAMES L. SPAETH, CLERK
WARREN COUNTY, OHIO
COMMON PLEAS COURT
BY Chris Welles
DEPUTY