

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-128
WILLIAM A. PAYNE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 03 CR 000137.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

William A. Payne, pro se, 878 Coitsville-Hubbard Road, Youngstown, OH 44505 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, William A. Payne, appeals the decision of the Lake County Court of Common Pleas denying his Motion to Set Aside Judgment and Sentence. However, Mr. Payne's assignment of error and brief address issues concerning his original conviction in 2004, and not the trial court's most recent order. Because Mr. Payne's appeal is barred by res judicata, we affirm the decision of the Lake County Court of Common Pleas.

{¶2} Substantive Facts and Procedural History

{¶3} Mr. Payne was convicted by a Lake County jury on June 17, 2004 of conspiracy to commit aggravated robbery, a second degree felony, in violation of R.C. 2923.01(A)(1), with a repeat violent offender (“RVO”) specification; conspiracy to commit aggravated burglary, a second degree felony, in violation of R.C. 2923.01(A)(1), with an RVO specification; conspiracy to commit kidnapping, a second degree felony, in violation of R.C. 2923.01(A)(1), with an RVO specification; and aggravated theft, a third degree felony, with a firearm specification. The trial court found Mr. Payne to be an RVO, pursuant to R.C. 2941.149(B), and sentenced him to an aggregate term of 42 years in prison.

{¶4} Mr. Payne timely appealed his conviction and we reviewed his case on direct appeal in *State v. Payne*, 11th Dist. No. 2004-L-118, 2005-Ohio-7043 (“*Payne I*”). In *Payne I*, we vacated his sentence with respect to the RVO classification, holding that it violated his Sixth Amendment right to a trial by jury, and further holding that all three of his conspiracy charges should have merged for the purposes of sentencing. We remanded the case to the trial court for resentencing consistent with our opinion.

{¶5} On November 9, 2006, a resentencing hearing was held, at which the trial court resentenced Mr. Payne per our remand instructions and pursuant to *Foster*. The November 28, 2006 judgment entry sentenced him to a single eight-year term of imprisonment for the three counts of conspiracy, five years for the count of aggravated theft, three years for the firearm specification, and ten years for the RVO specification, for an aggregate term of imprisonment 26 years. In addition, the court notified Mr. Payne that post-release control is mandatory in this case for a maximum of three years.

{¶6} Mr. Payne again appealed in *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740 (“*Payne II*”), challenging his new sentence. In *Payne II*, we affirmed in part and reversed and remanded in part, sending Mr. Payne’s case back to the Lake County Court of Common Pleas for a new sentencing hearing. Upon remand, the trial court was instructed to sentence Mr. Payne within the one to ten-year range for the RVO specification, since he previously pled guilty to a felony that is classified as an offense of violence pursuant to R.C. 2929.01(DD)(1)(a) and (2). The trial court then resentedenced Mr. Payne to an aggregate 26 years in prison.

{¶7} On July 7, 2010, Mr. Payne filed a Motion to Set Aside Judgment and Sentence Pursuant to R.C. 2945.75(A)(2). The trial court denied Mr. Payne’s motion on August 24, 2010, and Mr. Payne filed a motion for leave to file a delayed appeal with this court on October 27, 2010. We granted Mr. Payne’s motion, and now review his single assignment of error:

{¶8} “The verdict of the jury was against the manifest weight of the evidence, and the jury’s verdict were [sic] inconsistent and invalid, therefore the court should have entered a verdict of not guilty for the defendant.”

{¶9} Mr. Payne’s Appeal is Barred by Res Judicata

{¶10} In his sole assignment of error, Mr. Payne raises a manifest weight of the evidence argument with respect to the jury verdict. We note, however, that in his brief, he does not discuss manifest weight, focusing, instead, on errors in the jury verdict form. Either way, Mr. Payne’s appeal is barred by the doctrine of res judicata.

{¶11} “[A] convicted defendant is precluded under the doctrine of res judicata 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 appeal from that judgment.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96. Furthermore, and particularly on point, this court has recently held that “where the appellant filed and argued a direct appeal but did not raise any arguments under [*State v. Pelfrey*, 112 Ohio St.3d422, 2007-Ohio-256] or related to the inadequacy of the jury verdict form, res judicata applies to subsequent appeals.” *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, ¶23 , citing *State v. Evans*, 9th Dist. No. 10CA0027, 2011-Ohio-1449 and *State v. Foy*, 5th Dist. No. 2009-CA-00239, 2010-Ohio-2445.

{¶12} Mr. Payne is not challenging the trial court’s most recent order denying his motion to set aside his judgment and sentence. Rather, Mr. Payne is, yet again, attempting to challenge his underlying conviction from 2004. Any challenge to this conviction should have been brought via his direct appeal in 2005. Mr. Payne could have raised the issue of the jury verdict form at trial and during his initial appeal, but, for whatever reason, failed to do so. His failure to raise this current issue of his jury verdict form at that time precludes a review of the issue now.

{¶13} Because Mr. Payne’s single assignment of error is barred by the doctrine of res judicata, his appeal is without merit and we affirm the decision of the Lake County Court of Common Pleas.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.