

[Cite as *State v. O'Neal*, 2009-Ohio-2670.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SHAWN O'NEAL

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. CT2008-0051

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR2004-0364

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 8, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Shawn A. O’Neal appeals from the decision of the Muskingum County Court of Common Pleas denying his post-conviction motion for relief from judgment. The relevant facts leading to this appeal are as follows.

{¶2} On February 8, 2005, appellant pled guilty to an indictment charging him with one count of possession of crack cocaine, with a forfeiture specification, a felony of the first degree. The State and appellant reached a plea agreement wherein the State recommended a five-year prison sentence. The trial court deferred sentencing at that time pending a pre-sentence investigation.

{¶3} On March 28, 2005, appellant appeared with counsel for sentencing. The court found, inter alia, that appellant had been on post-release control at the time of the offense at issue. The court thereupon ordered that appellant serve a prison term of five years and pay a fine of \$10,000.00. The court further terminated appellant’s period of post-release control (“PRC”) in Muskingum Common Pleas case CR97-0059 and Athens Common Pleas case 97CR000035, and ordered that appellant serve 1,016 days in regard to those cases, consecutive to his five year sentence in the present case. See Judgment Entry, March 31, 2005.

{¶4} Appellant did not appeal his aforesaid conviction and sentence.

{¶5} On April 2, 2008, appellant filed a “motion for relief from the unjust operation of a judgment,” citing Civ.R. 60(B). Appellant therein contended that his 2005 sentence was void for want of compliance with R.C. 2929.141, particularly as to the calculation of the 1,016 days for violation of PRC stemming from his two earlier cases.

{¶6} On August 29, 2008, the trial court denied appellant's motion, finding as follows: "The Defendant is complaining about the amount of time this court gave him for violation of his post-release control. * * * That number is provided to the court from the defendant's parole officer who works for the Adult Parole Authority. Any complaints should be directed to them; therefore the defendant's motion is denied." Judgment Entry at 1.

{¶7} On September 18, 2008, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶8} "THE TRIAL COURT ERRED WHEN IT NEGATED TO CORRECT THE IMPOSED JUDICIAL SANCTION THAT CONTRAVENES OHIO REVISED CODE SECTION 2929.141."

{¶9} In his sole Assignment of Error, appellant contends the trial court erred in denying his post-conviction motion to correct the PRC imposition in the sentencing entry of March 31, 2005. We disagree.

{¶10} R.C. 2929.141(B), as written at the time of the trial court proceedings at issue, addressed situations where a defendant committed another crime while on post-release control:

{¶11} "(B) A person on release who by committing a felony violates any condition of parole, any post-release control sanction, or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code that are imposed upon the person may be prosecuted for the new felony. Upon the person's conviction of or plea of guilty to the new felony, the court shall impose sentence for the new felony, the court may terminate the term of post-release control if the person is a releasee and the

court may do either or both of the following for a person who is either a releasee or parolee regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on parole or is serving a term of post-release control:

{¶12} “(1) In addition to any prison term for the new felony, impose a prison term for the violation. If the person is a releasee, the maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the releasee has spent under post-release control for the earlier felony. *In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board or adult parole authority as a post-release control sanction.* In all cases, a prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. If the person is a releasee, a prison term imposed for the violation and a prison term imposed for the new felony, shall not count as, or be credited toward, the remaining period of post-release control imposed for the earlier felony.

{¶13} “ *** ”

{¶14} (Emphasis added).

{¶15} Appellant now maintains that the trial court, in 2005, miscalculated the remaining time to be served under the PRC imposition, particularly as to a claimed 120-day administrative imposition. However, under the doctrine of res judicata, “ * * * 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. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. By analogy, we have applied the doctrine of res judicata to a jail-time credit motion that alleges an erroneous legal determination on jail time credit. See *State v. Moyer*, Guernsey App.No. 07 CA 18, 2008-Ohio-2166, ¶14, citing *State v. Chafin*, Franklin App. No. 06AP-1108, 2007-Ohio-1840;

{¶16} Appellant, despite the res judicata barrier, directs us to *State v. Godbolt*, Licking App.No. 07 CA 57, 2008-Ohio-3425, wherein we held that a sentence which fails to notify the offender that he or she is subject to post release control is wholly unauthorized and void. Id. at ¶ 11, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197.

{¶17} We are not persuaded that *Godbolt* and the precedent cited therein are on point in the case sub judice, such that the present claim would still be ripe for review. The concern of the Ohio Supreme Court in *Bezak* and *Simpkins* was the complete failure to notify convicted defendants at sentencing of their PRC obligations, as required by statute. Here, appellant does not claim he was not notified about PRC when he was sentenced in 2005 for crack cocaine possession; rather, he claims a mathematical error took place when the trial court imposed prison time under the PRC provisions from two earlier cases.

{¶18} We thus hold that res judicata indeed applies to appellant’s “60(B)” post-conviction motion to correct sentence, as this mathematical issue could have been raised on direct appeal. The trial court therefore did not err in denying the motion.

{¶19} Appellant's sole Assignment of Error is overruled.

{¶20} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES

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