

[Cite as *State v. Barcus*, 2009-Ohio-3388.]

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT M. BARCUS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 09 CA 51

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 04 CR 89

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 6, 2009

APPEARANCES:

For Plaintiff-Appellee

KENNETH OSWALT  
PROSECUTING ATTORNEY  
20 South Second Street  
4th Floor  
Newark, Ohio 43055

For Defendant-Appellant

ROBERT M. BARCUS, PRO SE  
LONDON CORRECTIONAL INSTITUTION  
1580 State Route 56 SW  
Post Office Box 69  
London, Ohio 43140-0069

*Wise, J.*

{¶1} Appellant Robert M. Barcus appeals the March 25, 2009, Judgment Entry of the Licking County Common Pleas Court denying his motion to vacate fines and court costs.

{¶2} Appellee is State of Ohio.

{¶3} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶4} “(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶5} This appeal shall be considered in accordance with the aforementioned rule.

#### **STATEMENT OF THE FACTS AND CASE**

{¶6} On September 2, 2004, Appellant Robert M. Barcus, entered pleas of no contest to one count of complicity to commit trafficking in marijuana, two counts of possession of marijuana and two counts of trafficking in marijuana. The trial court sentenced Appellant to concurrent sentences to be served at the Orient Reception Center, with said sentence to run consecutive to his sentence in Case No. 02 CR 00096.

{¶7} On September 22, 2004, Appellant filed a motion captioned “Modification of Sentence to Vacate Payment of Fines”.

{¶18} On October 13, 2004, the trial court held an oral hearing on Appellant's motion.

{¶19} By Judgment Entry filed November 1, 2004, the trial court denied Appellant's motion.

{¶10} On March 5, 2009, Appellant filed an appeal from the trial court's September 22, 2004, Entry, which was assigned Case No. 09-CA-23. This case was ultimately dismissed by this Court on March 27, 2009.

{¶11} On March 5, 2009, Appellant also filed a Motion for Jail-Time Credit and a Motion Requesting the Court to Vacate Payment of Fines and Court Costs with the trial court.

{¶12} By Judgment Entry filed March 25, 2009, the trial court found that it was without jurisdiction to consider Appellant's motion to vacate fines and costs as a result of the appeal filed in Case No. 09-CA-23. The trial court also stated in its Entry that it had previously ruled on this motion on November 1, 2004, and that such issue was now res judicata, as Appellant could have filed a direct appeal from said Entry but failed to do so.

{¶13} The trial court, by separate entry dated March 25, 2009, also denied Appellant's motion for jail-time credit.

{¶14} On April 20, 2009, Appellant filed a Notice of Appeal from the trial court's March 25, 2009, Judgment Entry denying his Motion Requesting the Court to Vacate Payment of Fines and Court Costs.

{¶15} On May 4, 2009, Appellant proceeded to file two separate appeal briefs. As both briefs have identical cover pages and were filed and time-stamped at the same

time, it appears that it was not readily apparent to the Clerk of Courts or to the State of Ohio, which only filed a response brief to Appellant's first brief, that Appellant was filing two separate briefs in this matter each addressing separate issues.

{¶16} The assignments of error set forth in each of the briefs are as follows:

"Brief 1"

{¶17} "I. APPELLANT, WHO WAS SENTENCED ON MULTIPLE CHARGES, WAS ENTITLED TO EQUAL JAIL-TIME CREDIT FOR PRETRIAL DETENTION AGAINST ALL CONCURRENT TERMS, WHICH INCLUDE HIS SENTENCES FOR HIS FELONY DRUG CONVICTIONS. THE FAILURE TO AWARD JAIL TIME CREDIT AGAINST ALL CONCURRENT TERMS VIOLATES OHIO REVISED CODE 2967.191 AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 2, ARTICLE 1 OF THE OHIO CONSTITUTION.

{¶18} "II. THE TRIAL COURT DENIED THE DEFENDANT-APPELLANT HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW WHEN THEY DENIED HIM THE JAIL-TIME CREDIT HE SERVED PRIOR TO CONVICTION AND SENTENCE AND PRIOR TO TRANSPORTATION TO THE PLACE WHERE HE WAS TO BEGIN SERVING THE SENTENCE IMPOSED BY THE TRIAL COURT. "

"Brief 2"

{¶19} "I. THE TRIAL COURT ERRED IN ITS FAILURE TO VACATE THE IMPOSITION OF FINES, COURT COST [SIC], AND/OR RESTITUTION IMPOSED UPON DEFENDANT-APPELLANT.

{¶20} “II. THE TRIAL COURT ERRED IN ITS FAILURE TO HOLD A HEARING TO DETERMINE DEFENDANT-APPELLANT’S PRESENT AND FUTURE ABILITY TO PAY SUBSTANTIAL FINES, COURT COST [SIC] AND/OR RESTITUTION.

{¶21} “III. TRIAL COURT WAS INEFFECTIVE IN THAT TRIAL COUNSEL FAILED TO FILE AN AFFIDAVIT OF INDIGENCE EITHER AT THE TIME OF OR PRIOR TO SENTENCING DEFENDANT-APPELLANT BY THE TRIAL COURT.

{¶22} “IV. THE TRIAL COURT ERRED IN ITS FAILURE TO TAKE INTO CONSIDERATION THE MANNER AND/OR METHOD OF WHICH THE DEFENDANT-APPELLANT WOULD HAVE TO PAY THE FINES, COURT COST [SIC] AND/OR RESTITUTION IMPOSED AT OR DURING SENTENCING.”

{¶23} App.R. 3(D) governs the content of the notice of appeal and provides, in part, that the notice of appeal “shall designate the judgment, order or part thereof appealed from.”

{¶24} An appellate court need not review the merits of the judgment or order, unless it is designated or otherwise referenced in the notice of appeal. *In re: Allen*, (June 1, 2004), 5<sup>th</sup> Dist. App. No. 03CAF08041; *Schloss v. McGinness* (1984), 16 Ohio App.3d 96, 97-98, 474 N.E.2d 666.

{¶25} As Appellant’s Notice of Appeal and Docketing Statement state only that Appellant is appealing from the trial court’s entry denying his motion to vacate payment of fines and court costs, we shall only address the assignments of error raised in the brief designated as Brief #2.

**I., II., III. and IV.**

{¶26} We shall address Appellant's assignments of error simultaneously as they all address the trial court's denial of his motion to vacate fines and court costs.

{¶27} As set forth above in the procedural history of this case, Appellant, on September 22, 2004, filed a motion for "Modification of Sentence to Vacate Payment of Fines" which the trial court denied on November 1, 2004, after conducting a hearing.

{¶28} Upon review, we find that the issue raised in Appellant's September 22, 2004, "Modification of Sentence to Vacate Payment of Fines" was cognizable on direct appeal. *Sellers v. Kiger*, 5<sup>th</sup> Dist. App. No. 2004CA00005, 2004-Ohio-7270.

{¶29} Appellant failed to file a direct appeal from this ruling or a direct appeal of his conviction or sentence. Appellant did not file a petition for post-conviction relief pursuant to R.C. §2953.21.

{¶30} It is well-settled that a party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal.

{¶31} It is well settled that a Civ.R. 60(B) motion cannot be used as a substitute for a direct appeal of a judgment and cannot be used to circumvent the requirement of App.R. 4(A) that an appeal be filed within 30 days from the entry of the order appealed. *Shepler v. Jacobs*, (July 28, 1992) Ashland County App. No. CA-1002, 1992 WL 195352 (citing *Bosco v. Euclid*, (1974), 38 Ohio App.2d 40, 311 N.E.2d 870); *Doe v. Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605, paragraph two of the syllabus. It has been held that failure to take such a timely appeal "interposes an insuperable impediment to the re-opening of [the] case on motion to vacate." *Bosco v. City of Euclid*, supra.

{¶32} Having found that the issue raised in this appeal could have been raised on direct appeal, consideration of such issue now is barred under the doctrine of res judicata.

{¶33} Accordingly, Appellant's assignments of error are overruled.

{¶34} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking 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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