

[Cite as *State v. Branco*, 2010-Ohio-3856.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RAFAEL VERNON BRANCO

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2010 CA 00098

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 91-1164

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 16, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Rafael Vernon Branco appeals the denial of his motion to vacate/correct his 1991 conviction and sentence for aggravated murder in the Court of Common Pleas, Stark County. The Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows

{¶2} In 1991, appellant was convicted and sentenced, following a jury verdict of guilty, on one count of aggravated murder, one count of aggravated burglary, one count of aggravated robbery, and one count of kidnapping, in violation of R.C. 2903.01(B), 2911.11, 2911.01, and 2905.01, respectively. The charges against appellant arose out of the killing of 88-year-old Dimitru Cook in the early morning hours of February 17, 1991. Appellant, along with Anton L. Wyche and Edgrick Shipman, broke into Cook's residence in Alliance, Ohio, bound and gagged the elderly man, ransacked his house, and strangled him to death before leaving.

{¶3} Appellant was sentenced to a term of life imprisonment, with parole eligibility after twenty years, for the aggravated murder conviction, as well as consecutive indeterminate prison terms of ten to twenty-five years for the aggravated burglary and aggravated robbery convictions, to be imposed consecutively to the aforesaid life imprisonment term.

{¶4} Appellant filed a direct appeal to this Court; we affirmed his convictions and sentences. See *State v. Branco* (June 8, 1992), Stark App.No. CA-8618, 1992 WL 147437. Appellant thereafter unsuccessfully sought a delayed appeal to the Ohio Supreme Court. See *State v. Branco* (1994), 71 Ohio St. 3d 1413. In the meantime, appellant filed a petition for post-conviction relief, which the trial court denied in 1993.

{¶15} On December 4, 2009, appellant filed a pro se motion to “correct void judgment” or reconsider his aggravated murder conviction and sentence, alleging that the jury form was defective under R.C. 2945.75. The State filed a response on March 17, 2010. On April 12, 2010, the trial court denied appellant’s motion.

{¶16} On April 28, 2010, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶17} “I. DEFENDANT/APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION, AMENDMENT 14, WHEN THE TRIAL COURT DENIED HIM THE RELIEF HE SOUGHT FROM A VOID JUDGMENT THAT DID NOT COMPLY WITH STATUTE 2945.75.

{¶18} “II. THE STATE COMMITTED PLAIN AND PREJUDICIAL ERROR WHEN IT FAILED TO FOLLOW THE MANDATE OF *STATE V. PELFREY* IN VIOLATION OF APPELLANT’S CONSTITUTIONAL RIGHT TO FUNDAMENTALLY FAIR PROCEEDINGS AND HIS RIGHTS TO BE SENTENCED IN COMPLIANCE WITH ALL STATUTES.

{¶19} “III. IF THE COURT FINDS THAT THERE ARE INFERIOR DEGREES OF AGGRAVATED MURDER, MURDER, AND VOLUNTARY MANSLAUGHTER, THEN THE JUDGMENT OF APPELLANT IS VOID AND HE MUST BE REMANDED FOR RESENTENCING ACCORDING TO *STATE V. PELFREY*.”

I., II., III.

{¶110} In all three of his assigned errors, appellant essentially contends the trial court erred in denying his motion to vacate his aggravated murder conviction, on the basis that said conviction constitutes a void judgment. We disagree.

{¶11} Appellant premises his arguments on R.C. 2945.75(A)(2), which states as follows:

{¶12} “When the presence of one or more additional elements makes an offense one of more serious degree[,] \* \* \* [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

{¶13} Specifically, appellant argues that the alleged non-compliance by the trial court with R.C. 2945.75(A)(2), supra. Appellant further urges application of the Ohio Supreme Court's decision regarding R.C. 2945.75 in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, in which the Court held that “ \* \* \* a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” *Id.* at the syllabus.

{¶14} Recently, in *State v. Brown*, Richland App.No. 09 CA 137, 2010-Ohio-2757, we rejected similar arguments presented by a defendant who had been convicted of aggravated murder in 2005. We first refused to apply *Pelfrey* to Mr. Brown's appeal of a postconviction motion for resentencing, noting that the procedural stance of *Pelfrey* was a direct appeal from a conviction (albeit subsequent to an application to reopen appeal under App.R. 26(B)). *Brown* at ¶ 17. We secondly recognized (making the assumption arguendo that the “void judgment” rationale is applicable to some R.C. 2945.75 issues) that murder (R.C. 2903.02) and aggravated murder (R.C. 2903.01) are both unclassified felonies to which no degree of offense is

attached. Id. at ¶ 18. Finally, we noted that Mr. Brown did not seek to present his motion for resentencing as an untimely petition for postconviction relief under R.C 2953.23(A)(1), and found “no basis to override the general rule in Ohio that a trial court has no authority to reconsider a final valid judgment in a criminal case.” Id. at ¶ 19, citing *State v. Moore*, Highland App.No. 03CA18, 2004-Ohio-3977.

{¶15} Applying our foregoing rationale in *Brown* to the case sub judice, we find appellant’s arguments to be without merit. The trial court did not err in denying appellant’s motion to vacate/reconsider.

{¶16} Appellant’s First, Second, and Third Assignments of Error are therefore overruled.

{¶17} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

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JUDGES

