

[Cite as *State v. King*, 2010-Ohio-798.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. CT2009-0047
RICHARD KING	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas, Case No. CR2004-0327

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: March 1, 2010

APPEARANCES:

For Defendant-Appellant:

RICHARD KING (#489-103)
Noble Correctional Institution
15708 McConnelsville Rd.
Caldwell, OH 43724

For Plaintiff-Appellee:

ROBERT L. SMITH
Assistant Prosecuting Attorney
27 North Fifth St.
Zanesville, OH 43701

Delaney, J.

{¶1} Defendant-Appellant Richard King appeals the October 14, 2009, decision of the Muskingum County Court of Common Pleas to deny Appellant's Motion to Correct Sentence/Re-Sentence Defendant. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant was indicted on one count of pandering obscenity involving a minor, a felony of the second degree, in violation of Ohio R.C. 2907.321(A)(1) and sixty-one counts of pandering obscenity involving a minor, felonies of the third degree, in violation of R.C. 2907.321(A)(5). Appellant pled not guilty to all counts contained in the indictment. On January 24, 2005, the State filed a motion to amend the indictment. The trial court granted the motion and amended counts two through sixty-two of the indictment to felonies of the fourth degree.

{¶3} A jury trial was held. Following the conclusion of evidence, the jury found Appellant guilty on sixty-one counts of the indictment. The remaining count was dismissed.

{¶4} On February 28, 2005, the trial court conducted a classification hearing finding Appellant to be a sexual predator and a habitual sex offender. The trial court sentenced Appellant to 36½ years in prison.

{¶5} Appellant timely appealed his conviction, sexual predator classification and sentence.

{¶6} By Judgment Entry and Opinion dated January 19, 2006, this Court affirmed the trial court's actions as to the errors raised in assignments I, II and III but remanded with instructions as to assignment of error IV which alleged error in

sentencing. *State v. King*, 5th Dist. No. CT05-17, 2006-Ohio-226. Appellant filed a timely appeal of the decision to the Ohio Supreme Court. On May 24, 2006, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. King* (2006), 109 Ohio St.3d 1482, 847 N.E.2d 1226.

{¶7} On February 6, 2006, Appellant was brought before the trial court for resentencing pursuant to our remand in *State v. King*, 5th Dist. No. CT05-17, 2006-Ohio-226. The trial court resentenced Appellant to a sentence of an aggregate of 36½ years in the Ohio Department of Corrections. The trial court did not journalize the resentencing conducted on February 6, 2006, due to the issuance of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 on February 27, 2006. The trial court held a resentencing hearing on March 6, 2006 pursuant to our remand and the requirements of *State v. Foster*, supra. The trial court resentenced Appellant to a sentence of an aggregate of 36½ years in the Ohio Department of Corrections. The resentencing entry was journalized and filed on March 8, 2006.

{¶8} Appellant appealed the March 8, 2006 resentencing. On November 13, 2006, this Court affirmed Appellant's sentence. *State v. King*, 5th Dist. No. 06-20, 2006-Ohio-6566. The Ohio Supreme Court declined to accept Appellant's appeal of that decision. *State v. King* (2007), 114 Ohio St.3d 1508, 2007-Ohio-4285.

{¶9} Additionally, on October 20, 2005, Appellant filed a petition for post-conviction relief in the trial court. On March 6, 2006, the trial court denied Appellant's post-conviction petition. Represented by new counsel, Appellant filed a timely appeal of the trial court's decision to this Court. On May 30, 2007, this Court affirmed the trial

court's decision dismissing Appellant's petition for post-conviction relief. *State v. King*, 5th Dist. No. CT2006-0021, 2007-Ohio-2810.

{¶10} On July 21, 2006, Appellant filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which was denied. *King v. Wolfe (S.D. Ohio)*, 2007 WL 666626.

{¶11} On August 15, 2006, Appellant filed a Motion for a New Trial claiming newly discovered evidence. On January 9, 2007, the trial court denied Appellant's motion. On September 28, 2007, this Court affirmed the trial court's decision denying Appellant's motion for new trial. *State v. King*, 5th Dist. No. 2007-CA-0004, 2007-Ohio-5297.

{¶12} On October 8, 2008, Appellant filed a "Motion For Relief From Judgment" pursuant to Civ.R. 60(B). On October 15, 2008, the trial court summarily denied Appellant's motion. Appellant appealed the trial court's denial of his motion and on January 29, 2009, this Court denied the appeal, finding that his arguments were barred by res judicata and that they were substantively without merit.

{¶13} Appellant then filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence" on March 13, 2009. On March 27, 2009, he filed a motion for evidentiary hearing. The State responded on March 30, 2009, and Appellant filed a motion to amend/supplement his post-conviction petition on March 31, 2009. On April 6, 2009, Appellant then filed a reply to the State's response. On April 8, 2009, the trial court issued an entry denying Appellant's motion. Appellant continued to file papers in this matter, filing a "Motion to Correct Record and Reconsideration" on April 23, 2009, and a "Reply to State's Response to Defendant's Motion to Correct Record and

Reconsideration.” On April 27, 2009, the trial court denied Appellant's motion. Appellant appealed the April 8, 2009 judgment entry denying his post-conviction petition.

{¶14} On July 30, 2009, this Court affirmed the decision of the trial court in *State v. King*, Muskingum App. No. 09 CA 22, 2009-Ohio-3854. Appellant filed a motion for reconsideration, which this Court denied on September 2, 2009. On October 5, 2009, Appellant filed a Notice of Appeal with the Ohio Supreme Court. The Ohio Supreme Court dismissed the appeal for want of prosecution on December 23, 2009.

{¶15} On September 15, 2009, Appellant filed a Motion to Correct Sentence/Re-Sentence Defendant with the trial court. The trial court issued its decision on October 14, 2009 denying Appellant's motion. It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶16} Appellant raises two Assignments of Error:

{¶17} “I. THE TRIAL COURT ERRED AND ABUSED IT'S [SIC] DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO RE-SENTENCE VIOLATING THE APPELLANT'S UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT AND OHIO CONSTITUTION ARTICLE I, SECTION 10 RIGHTS.

{¶18} “II. THE APPELLANT'S UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED THE APPELLANT'S MOTION TO RE-SENTENCE AS THE APPELLANT'S CURRENT SENTENCE IS A VOID SENTENCE AND APPELLANT MUST BE SENTENCED IN ACCORDANCE WITH THE LAWS THAT WERE IN EFFECT AT THE

TIME HIS CRIMES WERE BEING COMMITTED AND NOT UNDER THE FOSTER DECISION.”

{¶19} This matter comes to us on the accelerated calendar. App.R. 11.1 states in pertinent part: “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.”

I., II.

{¶20} We will address Appellant’s Assignments of Errors simultaneously in the interests of judicial economy. Appellant argues the trial court erred in not granting his motion to correct sentence/re-sentence based on Appellant’s resentencing on March 8, 2006. Appellant argues that because the trial court initially held Appellant’s resentencing hearing on February 6, 2006 pursuant to this Court’s remand in *State v. King*, 5th Dist. No. CT05-17, 2006-Ohio-226, the trial court was without authority to hold a second resentencing hearing on March 6, 2006. Appellant contends that because his case was not on direct review and his crimes were committed before *Foster*, the trial court could not resentence Appellant by hearing on March 6, 2006 and his current sentence is void. As a void sentence, the trial court should resentence Appellant to time served and be released or the trial court should resentence him to a concurrent sentence. We disagree.

{¶21} On April 5, 2006, Appellant appealed the trial court’s March 8, 2006 resentencing entry. Appellant was represented by counsel. In his sole Assignment of Error, Appellant argued that his sentence was inconsistent when compared to similar

offenders. We overruled Appellant's Assignment of Error in *State v. King* (Nov. 13, 2006), Muskingum App. No. CT06-0020 and affirmed the trial court's March 8, 2006 resentencing entry.

{¶22} As argued by Appellee, we find Appellant's claims in his latest appeal to be barred by the doctrine of *res judicata*. The Ohio Supreme Court has long recognized that "any issue that could have been raised on direct appeal and was not is *res judicata* and not subject to review in subsequent proceedings." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio1245, 846 N.E.2d 824, at ¶ 16 (holding that a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by *res judicata* from appealing that sentence following a remand for resentencing on other offenses).

{¶23} "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 * * * on an appeal* from that judgment." (Emphasis added.) *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶24} "Thus, the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, *res judicata* promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." (Citation omitted.) *Saxon*, 109 Ohio St.3d 176, 2006-Ohio1245, 846 N.E.2d 824, at ¶ 18.

{¶25} Appellant claims that the trial court improperly utilized *Foster* to resentence Appellant in March 2006 could have been raised in his direct appeal of the March 8, 2006 resentencing entry. Appellant did not; therefore, his arguments today are barred by the doctrine of res judicata.

{¶26} Appellant's Assignments of Error are overruled.

{¶27} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
RICHARD KING	:	
	:	
	:	
	:	Case No. CT2009-0047
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE