

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-13-029

Appellee

Trial Court No. 2004-CR-450

v.

Herbert L. Henson, Jr.

DECISION AND JUDGMENT

Appellant

Decided: November 1, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Herbert L. Henson, Jr., pro se.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Herbert L. Henson, Jr. appeals from the July 7, 2011, judgment of the Erie County Court of Common Pleas denying appellant's motion for sentencing pursuant to *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735. On consideration of appellant's assignments of error, we affirm.

{¶ 2} On November 9, 2005, appellant was convicted of three counts of rape with force and five counts of gross sexual imposition and was sentenced to life imprisonment. This appellate court affirmed the conviction and sentence on July 13, 2007. Appellant did not assert on appeal any issue related to the jury verdict. *State v. Henson*, 6th Dist. Erie No. E-06-021, 2007-Ohio-3567.

{¶ 3} On February 18, 2010, appellant filed a Civ.R. 60(B) motion to vacate the judgment of conviction and sentencing on the ground that the jury verdict did not specify the degree of the felony or the necessary elements to support his conviction and sentence. Further, he argued that there was no jury finding of guilt as to the enhancements. Therefore, he argued, the court could not sentence him to more than the sentence possible for the least degree of the offense. Appellant relied upon *State v. Pelfrey*. The trial court denied appellant's motion on March 19, 2010. Appellant sought an appeal from that decision on April 19, 2010, but the appeal was dismissed on July 19, 2010, for failure to file a brief.

{¶ 4} On June 28, 2011, appellant filed another motion for resentencing on the ground that the sentence was not supported by the jury verdict because the jury verdict form did not include the degree of the offense. The trial court denied the motion on July 7, 2011, and appellant sought an appeal from the judgment. On August 17, 2012, we affirmed the decision of the trial court finding that any error in the jury verdict form would not render the verdict void and that the issue of whether the jury verdict complied with R.C. 2945.75(A)(2) was barred by the doctrine of res judicata because the issue could

have been raised on direct appeal. We further found that the issue was raised in the February 18, 2010 motion, which was denied by the trial court, and the appeal from that decision was dismissed. Furthermore, we found that appellant's motions relating to that appeal constituted untimely petitions for postconviction relief. *State v. Henson*, 6th Dist. Erie No. E-11-068, 2012-Ohio-3730, ¶ 22.

{¶ 5} On March 16, 2013, appellant filed yet two additional motions pursuant to Crim.R. 52(B) asserting that the trial court committed plain error and his conviction was contrary to law pursuant to R.C. 2945.75(A)(2) and sought resentencing pursuant to R.C. 2941.25.

{¶ 6} In two separate judgments, both journalized on April 29, 2013, the trial court denied appellant's March 16, 2013 motions. Appellant sought an appeal from these judgments and asserts the following assignments of error:

Assignment of Error No: 1 Trial Court erred by failing to grant defendant's Motion pursuant to RC 2945.75(A)(2) Conviction was contrary to Ohio Law.

Assignment of Error No: 2 Trial Court committed reversible error pursuant to R.C. 2941.25 by sentencing defendant to multiple sentences for the same conviction as provided by Ohio Law.

{¶ 7} We find these two assignments of error are barred by the doctrine of res judicata. The issue of the defective verdict could have been raised in appellant's direct appeal, but was not. Furthermore, the issue was raised in a prior postconviction relief

motion, which was denied by the trial court and the decision was affirmed on appeal. *State v. Henson*, 6th Dist. Erie No. E-11-068, 2012-Ohio-3730, ¶ 18-28. Therefore, the issue has been reviewed by both the trial court and the appellate court and found not well-taken.

{¶ 8} Appellant’s first and second assignments of error are not well-taken.

{¶ 9} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.