

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. CT 2010-0001
	:	
EUGENE B. McCALL	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR 2000-0194 & CR 2000-0157

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Eugene McCall, appeals a judgment of the Muskingum County Common Pleas Court overruling his motion to correct an illegal sentence. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On October 25, 2000, appellant Eugene McCall was indicted by the Muskingum County Grand Jury in Case No. CR2000-0194 on one count of Aggravated Robbery, in violation of Ohio Revised Code Section 2911.01(A)(1), a felony of the first degree, and on one count of Robbery, in violation of Ohio Revised Code Section 2911.02(A)(2), a felony of the second degree. Subsequent to jury trial, appellant was convicted as charged. On February 12, 2001, Appellant was sentenced to the maximum stated prison term of ten (10) years.

{¶3} On March 9, 2001, Appellant appealed his conviction and sentence to this Court. The issues before the Court at that time were whether the out-of-court identification of appellant by a victim was unduly suggestive and whether the verdict of the jury was against the manifest weight of the evidence. By Opinion and Judgment Entry dated October 10, 2001, this Court affirmed appellant's conviction and sentence.

{¶4} On March 21, 2002, appellant filed an Application for Delayed Reopening of Appeal pursuant to Ohio Rule of Appellate Procedure 26. This Application was denied by an Order dated May 2, 2002.

{¶5} In January of 2003, appellant filed a Writ of Habeas Corpus in the United States District Court. This Writ was also denied.

{¶6} In January of 2004, appellant filed a Motion for Delayed Appeal in the Ohio Supreme Court. However, this appeal was never perfected and no further action transpired.

{¶7} On June 7, 2004, appellant filed an Application for DNA Testing in the trial court. This Application was denied on January 13, 2005, the trial court finding that DNA Testing would not be "outcome determinative."

{¶8} Appellant filed a Petition for Redress of Grievances and to Vacate the Void Judgment on August 30, 2004. This petition was denied by an Order dated January 13, 2005, wherein the trial court held that the said issues should have been raised by a Motion for Post-Conviction Relief and that the time for filing such relief had lapsed. Appellant appealed this entry. This Court affirmed the trial court's denial of the petition on January 10, 2006.

{¶9} On March 3, 2005, appellant filed a Motion for Post-Conviction Relief pursuant to R.C. §2953.21. That matter was stayed pending the resolution of the pending appeal at the time.

{¶10} On March 20, 2006, Appellant was resentenced to the maximum stated prison term of ten (10) years by the trial court pursuant to *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. He appealed to this Court, assigning as error the failure to give him reasonable notice of the resentencing hearing. This Court affirmed the sentence. *State v. McCall*, Muskingum App. No. CT2006-0032, 2007-Ohio-1081.

{¶11} Appellant was indicted in Case No. CR2000-0157 on September 6, 2000, on two counts of passing bad checks, in violation of R.C. 2913.11, and one count of

theft by deception in violation of R.C. 2913.02(A)(3). Appellant pleaded guilty on February 20, 2001, and was sentenced to one year on each count. The sentences were to run concurrently to each other but consecutively to the sentence in CR2000-194. Appellant did not appeal this conviction and sentence.

{¶12} On March 23, 2007, appellant filed a motion for judicial release, which was denied on April 17, 2009. He filed a second motion for judicial release on September 8, 2009, which was denied on September 16, 2009.

{¶13} On November 30, 2009, appellant filed a motion to correct an illegal sentence in both CR2000-157 and CR2000-194. He argued that the sentences were to run concurrently by operation of law because the sentencing entry filed in CR2000-194 on March 20, 2006, did not specify that the sentences were to run consecutively. The court overruled the motion in both cases, and appellant filed a notice of appeal in each case. He assigns two errors on appeal:

{¶14} "I. TRIAL COURT ERRORED (SIC) BY DENYING THE APPELLANT'S "MOTION TO CORRECT ILLEGAL SENTENCE" THUS VIOLATING THE APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAWS AS GUARANTEED (SIC) BY THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

{¶15} "II. TRIAL COURT DENIED THE APPELLANT THE ACCESS OF THE COURT BY ALLOWING THE STATE TO RESPOND IN CONTRA, AFTER THE PRESCRIBED TIME FOR DOING SO, AND RULING BEFORE APPELLANT COULD REBUT."

I

{¶16} In his first assignment of error, appellant argues that the court erred in overruling his motion to correct an illegal sentence. He argues that because his resentencing entry in CR2000-194 did not state that the sentence was to run consecutively to the sentence in CR2000-157, the sentences are to run concurrently by operation of law.

{¶17} Appellant's motion to correct the sentence is actually a petition for post-conviction relief under R.C. 2953.21. Where a criminal defendant, subsequent to direct appeal, files a motion seeking to vacate or correct his sentence on the basis that his constitutional rights were violated, such a motion is a petition for post-conviction relief under R.C. 2953.21. *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131, 1997-Ohio-304. Issues which were raised previously or could have been raised previously in an appeal but were not, are barred by the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Appellant could have raised the claimed error in the sentencing entry on direct appeal of his resentencing entry of March 20, 2006, but failed to do so. The issue raised by appellant in his motion to correct the sentence and direct appeal is therefore res judicata.

{¶18} Furthermore, the sentencing entry in CR2000-157 is the entry which specifies that the one year sentence imposed in that case is to be served consecutively to the sentence in CR 2000-194. That sentencing entry was not appealed and was not affected by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, pursuant to which appellant was resentenced in CR2000-194. The judgment of sentence in that case has

never been amended or altered and remains in full force and effect, requiring the sentence to be served consecutively to the sentence in CR2000-194. The court therefore did not err in overruling appellant's motion to change the sentencing entry in CR2000-194 to provide that the sentence was to be served concurrently to the sentence in CR2000-157 by operation of law.

{¶19} The first assignment of error is overruled.

II

{¶20} In his second assignment of error, appellant argues the court erred in allowing the state to file a late response to his motion and in ruling before he was given time to file a rebuttal to the state's response.

{¶21} On December 7, 2009, the trial court ordered the state to respond to appellant's motion within 14 days. The state responded on December 21, 2009, fourteen days later. The state's response was not late. Appellant's reply to the state's response merely restated the arguments raised in the original motion, and appellant has not demonstrated prejudice from the court's ruling on the motion prior to the filing of his rebuttal.

{¶22} The second assignment of error is overruled.

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

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/r0614

