

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

State of Ohio

Court of Appeals No. L-10-1120

Appellee

Trial Court No. CR0200601328

v.

Andre Delawrence Rice

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This accelerated appeal is from the April 12, 2010 judgment of the Lucas County Court of Common Pleas, which denied the petition of appellant, Andre Rice, for postconviction relief. Upon consideration of the assignment of error, we affirm the

decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "The trial court's entry of October 27, 2006 is void for its failure to comply with the requirements of *State v. Baker*."

{¶ 3} Appellant was sentenced on September 18, 2006, after his guilty plea to involuntary manslaughter and aggravated robbery were accepted by the court. In that judgment, a visiting judge who presided over the plea hearing indicated that the remaining counts, 1 and 3, were dismissed as agreed by the parties. An appeal was taken from that judgment on October 25, 2006. The sitting judge issued a nunc pro tunc entry on October 30, 2006, correcting the entry to indicate that Counts 1 and 5 were dismissed rather than Counts 1 and 3. On March 12, 2010, appellant filed a postconviction relief motion asserting that these two entries were void because they did not comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. The trial court denied the motion.

{¶ 4} On appeal, appellant argues that the nunc pro tunc entry was void because it was not signed by the sentencing judge and it does not constitute a final judgment of sentencing because it does not comply with *State v. Baker*, supra.

{¶ 5} The Ohio Constitution at Section 5(A)(3), Article IV, provides, "[t]he chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof * * *." Crim.R. 25(B) provides that: "If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the

court after a verdict or finding of guilt, another judge designated by the administrative judge, * * *, may perform those duties. * * *." Furthermore, the acting judge, "by having 'colorable' authority, is deemed a de facto judge with all the power and authority of a proper de jure judge." *City of Eastlake v. Reithmann*, 11th Dist. App. No. 2003-L-076 and 2003-L-079, 2005-Ohio-137, ¶ 11, citing *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 134. A party, who objects to the assignment of a judge, must raise his objections at the earliest opportunity to do so or the objection is waived. *WSOS Community Action Comm., Inc. v. Bessman* (Aug. 20, 1993), 6th Dist. No. S-93-2, at 2, certiorari denied (1994), 513 U.S. 938, citing *State ex rel. Sowell v. Lovinger* (1983), 6 Ohio St.3d 21, 23. The appellate court does not have jurisdiction over the issue of disqualification if it is raised in the context of voiding or reversing the judgment of the trial court. *Beer v. Griffith* (1978), 54 Ohio St.2d 440. Finally, Crim.R. 36 provides that the trial court has jurisdiction to correct its judgment at any time.

{¶ 6} In the case before us, a visiting judge presided over the plea hearing and issued a final judgment of conviction and sentencing. Later, it was discovered that the judgment of conviction and sentencing did not accurately set forth the agreement of the parties as to the counts against the defendant which were dismissed. Pursuant to Crim.R. 25, the sitting judge corrected the judgment. Appellant did not challenge the judge's authority to act at that time. Even if we would find that the judge erred by issuing this judgment, any such error would have been harmless because appellant has not shown any

prejudice. Clearly, appellant benefited by having a judgment that correctly indicated that the remaining charges against him were dismissed.

{¶ 7} Appellant next asserts that the judgment of conviction and sentencing does not include the nature and length of postrelease control as required by R.C. 2929.19(B). Appellee argues that appellant has waived this issue and we agree. Appellant raised the issue in his October 7, 2009 postconviction relief motion to correct void judgment of conviction and sentence and the court denied the motion on February 25, 2010.

Appellant sought an appeal from that judgment on April 1, 2010, but his appeal was dismissed on April 14, 2010, for being untimely filed. In the interim, appellant filed another postconviction motion for correction of a void sentencing entry which is the subject of this appeal. Because this issue was raised in a prior postconviction relief motion, denied by the lower court, and appellant failed to appeal that decision, the issue is now barred under the doctrine of res judicata. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95-96.

{¶ 8} Therefore, appellant's sole assignment of error is not well-taken.

{¶ 9} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, 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:
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