

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JERMAINE BUNN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0126

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16-CR-378

BEFORE:

Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed

Atty. Paul Gains, Prosecutor, *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Jermaine Bunn, (PRO SE), Inmate No. 701-745, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, Ohio 44030, for Defendant-Appellant.

Dated:
September 28, 2020

Donofrio, J.

{¶1} Defendant-appellant, Jermaine Bunn, appeals the judgment of the Mahoning County Common Pleas Court denying his motion to dismiss the indictment against him on speedy trial grounds.

{¶2} In 2009, the trial court found appellant guilty of felonious assault and sentenced him to seven years of incarceration and three years of post-release control. *State v. Bunn*, 7th Dist. Mahoning No. 10 MA 10, 2011-Ohio-1344 (*Bunn I*).

{¶3} Appellant was released from prison on post-release control a few days prior to April 2, 2016. *State v. Bunn*, 7th Dist. Mahoning No. 17 MA 0125, 2019-Ohio-2703, ¶ 5 (*Bunn II*). In the late hours of April 2, 2016 to the early hours of April 3, 2016, Thomas Mays was having a birthday party for himself at his home in Youngstown. *Id.* at ¶ 4. Mays' cousin Michael Pete attended this party. *Id.* Appellant also attended this party. *Id.* at ¶ 5.

{¶4} At some point during the party, appellant and Pete were having a conversation alone on the porch of Mays' home. *Id.* at ¶ 6. While the two were talking, gunfire erupted which resulted in Pete being shot in the side and appellant being shot in the face. *Id.* Pete died as a result of his gunshot wound. *Id.* at ¶ 9.

{¶5} A Mahoning County Grand Jury indicted appellant on four felonies related to the shooting at Mays' house: murder, improperly discharging a firearm into a habitation, possession of a weapon while under a disability, and tampering with evidence. *Id.* at ¶ 10.

{¶6} On April 4, 2016, the Ohio Adult Parole Authority (APA) sent the Mahoning County Justice Center an "order of hold" regarding appellant. This order stated that, pursuant to R.C. 2967.15, appellant was under the supervision of the APA and was to be held until released by appellant's parole officer.

{¶7} On June 30, 2016, the trial court held a pretrial hearing regarding appellant not receiving a copy of the APA's order of hold. The primary discussion during this hearing was what effect the APA's order of hold had on appellant's speedy trial right. The

trial court held that based on the order of hold, the triple-count provision of the speedy trial statute did not apply and plaintiff-appellee, the State of Ohio, had 270 days from appellant's arrest to bring him to trial.

{¶8} On July 25, 2016, appellant filed a pro se motion to dismiss all charges on the basis that his right to a speedy trial had been violated. On November 2, 2016, appellant filed a supplemental pro se motion to dismiss all charges on the basis that his right to a speedy trial had been violated. The trial court did not rule on either of these motions. On November 9, 2016, appellant filed a limited waiver of his right to a speedy trial in order to continue the trial to the agreed upon date of January 9, 2017.

{¶9} On July 24, 2017, appellant filed another pro se motion to dismiss all charges on the basis that his right to speedy trial had been violated. On August 2, 2017, appellant filed a supplemental pro se motion to dismiss all charges on the basis that his right to a speedy trial had been violated. The trial court denied these motions.

{¶10} On August 14, 2017, appellant's jury trial commenced and the jury found him not guilty of murder and improperly discharging a firearm into a habitation but found him guilty of possession of a weapon while under a disability and tampering with evidence. *Id.* at ¶ 11.

{¶11} The trial court sentenced appellant to three years of incarceration on each conviction. *Id.* at ¶ 12. The trial court also sentenced appellant to an additional three years of incarceration for violating his post-release control in *Bunn I*. *Bunn II* at ¶ 12. The trial court ordered all sentences to run consecutively for an aggregate prison term of nine years. *Id.*

{¶12} Appellant appealed to this court asserting four assignments of error that challenged his sentence on multiple grounds and his conviction for possession of a weapon while under a disability. *Id.* at ¶ 13, 33, 46, 57. This court sustained appellant's first assignment of error which challenged his sentence for violating post-release control. *Id.* at ¶ 14-33. This court found that appellant's sentence for violating post-release control was void because the sentencing entry in *Bunn I* violated the Ohio Supreme Court's ruling in *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700, and violated this court's pre-*Grimes* case law. *Bunn II* at ¶ 28-29. This court reversed and vacated appellant's post-release control sentence. *Id.* at ¶ 65.

{¶13} After our resolution of *Bunn II*, on October 7, 2019, appellant filed a motion to “vacate sentence/dismiss all charges.” Appellant argued that because our *Bunn II* opinion held that his post-release control was void, the APA’s order of hold was also void. As such, appellant argued that because he was incarcerated the entire time prior to trial in *Bunn II*, his trial should have been held within 90 days of April 4, 2016, the date of his arrest in *Bunn II*.

{¶14} On October 10, 2019, the trial court overruled appellant’s motion. Appellant timely filed his notice of appeal on November 12, 2019. Appellant now raises one assignment of error.

{¶15} Appellant’s sole assignment of error states:

APPELLANT’S CONSTITUTUTIONAL [sic] RIGHTS TO A SPEEDY TRIAL WERE VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION AND THE CHARGES WERE NOT DISMISSED.

{¶16} Appellant’s argument is as follows. Appellant was incarcerated the entire time pending trial in *Bunn II* beginning on April 4, 2016. On the same day, the APA issued its order of hold because appellant was on post-release control from his conviction in *Bunn I*. At the June 30, 2016 pretrial hearing, the trial court held that because of the order of hold, the triple-count provision of the speedy trial statute, R.C. 2945.71(E), did not apply and the state had 270 days to bring appellant to trial pursuant to R.C. 2945.71(C)(2). Appellant’s trial in *Bunn II* did not occur until August 14, 2017. *Bunn II* at ¶ 11. The trial court sentenced appellant to nine years of incarceration which included a three-year sentence for violating post-release control in *Bunn I*. *Bunn II* at ¶ 12.

{¶17} This court then held that the imposition of post-release control was void because the judgement entry in *Bunn I* was insufficient to notify appellant regarding post-release control. *Bunn II* at ¶ 33. Appellant now argues that because his post-release control is void, the APA’s order of hold was also void which makes the triple-count provision of R.C. 2945.71(E) apply. With the triple-count provision applying, appellant argues that his speedy trial right was violated because he was not brought to trial within 90 days of his arrest on April 4, 2016.

{¶18} Pursuant to R.C. 2953.21, a petition for postconviction relief is a petition brought by “[a]ny person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States[.]” Appellant’s motion argued that his sentence is void because his right to a speedy trial under the Sixth Amendment to the United States Constitution was violated. Thus, his is a petition for postconviction relief.

{¶19} “[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment.” *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). “Therefore, a petitioner receives no more rights than those granted by the statute.” *Id.*

{¶20} Appellate courts review a trial court’s ruling on a petition for postconviction relief for abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Abuse of discretion implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 21.

{¶21} We must first address the state’s argument that we lack jurisdiction to hear this appeal. The state contends that appellant failed to follow the proper postconviction relief procedure of R.C. 2953.21(A)(2). Pursuant to this statute, a petition for postconviction relief shall be filed no later than 365 days after the transcripts have been filed in the court of appeals during the direct appeal. The transcripts in *Bunn II* were filed on October 10, 2017. Appellant filed his petition in the trial court on October 7, 2019. Thus, appellant filed his petition later than 365 days after the transcripts were filed in *Bunn II*.

{¶22} There is a two-part exception to the 365-day requirement of R.C. 2953.21(A)(2). Pursuant to R.C. 2953.21(A)(1)(a), the petitioner must show that (1) he was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief or the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner’s situation and (2) the petition asserts a claim based on that right.

{¶23} This court did not issue its *Bunn II* decision until June 14, 2019, after the 365-day requirement had already expired. Appellant’s petition is based exclusively on the impact *Bunn II* had on this action which held that his post-release control and his subsequent sentence for violating post-release control were void. Thus, appellant was unavoidably prevented from discovering the facts upon which he relies on for his petition.

{¶24} Appellant’s petition also asserts a claim that is based on this court’s *Bunn II* decision voiding his post-release control that was issued in *Bunn I*. Because appellant’s petition satisfies R.C. 2953.21(A)(1)(a), this court has jurisdiction to consider this appeal.

{¶25} The Fifth District has addressed a similar issue as the one presented in this case. In *State v. Henderson*, 5th Dist. Ashland No. 07COA031, 2008-Ohio-5007 (*Henderson I*), Terrence Henderson was on post-release control when a grand jury indicted him for felony possession of marijuana. *Id.* at ¶ 1, 4. Henderson filed a motion to dismiss on speedy trial grounds which the trial court denied. *Id.* at ¶ 3. A jury found Henderson guilty and the trial court sentenced Henderson to five years of incarceration, revoked his post-release control, and sentenced him to a consecutive 659-day prison term for violating post-release control. *Id.* at ¶ 4.

{¶26} Henderson filed a direct appeal arguing, among other things, that the trial court erred in denying his motion to dismiss on speedy trial grounds. *Id.* at ¶ 6, 9. The Fifth District held that, for speedy trial purposes, only 214 days had run on Henderson’s speedy trial clock. See *Id.* at ¶ 15. Relevant to the appeal, 79 days Henderson was incarcerated prior to trial were not triple-counted because he was incarcerated for a post-release control violation. *Id.* at ¶ 9. The Fifth District overruled all of Henderson’s assignments of error and affirmed his conviction and sentence.

{¶27} After his direct appeal, Henderson filed a motion to correct a void sentence arguing that his 659-day sentence for violating post-release control was void because the original imposition of post-release control was improper. *State v. Henderson*, 5th Dist. Ashland No. 10-COA-012, 2011-Ohio-1971, ¶ 5 (*Henderson II*). The trial court denied this motion and Henderson appealed. *Id.* at ¶ 7, 9.

{¶28} The Fifth District reversed finding that Henderson was not properly advised regarding post-release control and, therefore, the imposition of post-release control was

void. *Id.* at ¶ 22. The Fifth District held that Henderson’s 659-day sentence for violating post-release control was error and remanded the matter for resentencing. *Id.* at ¶ 22-24.

{¶29} After resentencing, Henderson appealed again arguing, among other things, that his speedy trial right was violated because he was being held pending trial partly based on a post-release control violation that was subsequently voided. *State v. Henderson*, 5th Dist. Ashland No. 11-COA-045, 2012-Ohio-2709, ¶ 19 (*Henderson III*). Henderson argued that because the post-release control was void, he was entitled to the triple-count provision of R.C. 2945.71(E) for the above referenced 79 days he was incarcerated on a post-release control violation in *Henderson I*. *Id.* at ¶ 19-21.

{¶30} The Fifth District overruled Henderson’s argument holding that the triple-count provision of R.C. 2945.71(E) only applies if a defendant “is held in jail in lieu of bail on the pending charge.” *Id.* at ¶ 42 (emphasis deleted). Even though Henderson’s post-release control was later voided, at the time of the events in *Henderson I*, he was being held in jail for a post-release control violation and not in lieu of bail on the pending charge for the above referenced 79 days. *Id.* at ¶ 43.

{¶31} We find *Henderson* persuasive. The triple-count provision of the speedy trial statute, R.C. 2945.71(E), only applies to days “during which the accused is held in jail in lieu of bail *on the pending charge*.” (Emphasis added). In this case, appellant was not held in jail in lieu of bail on the pending charge. He was held in jail pursuant to the APA’s order of hold, which was valid at the time it was issued. Because appellant was not held in jail in lieu of bail on the pending charge during *Bunn II*, R.C. 2945.71(E)’s triple-count provision does not apply and the trial court did not abuse its discretion by denying appellant’s motion.

{¶32} Accordingly, appellant’s sole assignment of error is without merit and is overruled.

{¶33} For the reasons stated above, the trial court’s judgment is hereby affirmed.

Robb, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.