[Cite as *State v. Barnette*, 2023-Ohio-2377.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LORENZA BARNETTE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0076

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2009 CR 1122

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Lorenza Barnette, Pro se, #620463, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43301, Defendant-Appellant

Dated: June 30, 2023

WAITE, J.

{¶1} Appellant Lorenza Barnette appeals a February 17, 2022 judgment entry of the Mahoning County Court of Common Pleas denying his postconviction petition. Appellant argues that his petition is timely because a new judgment entry filed after the matter was before the trial court on limited remand regarding imposition of postrelease control revived his ability to appeal his original conviction. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On October 1, 2009, Appellant was indicted on two counts of aggravated murder in violation of R.C. 2903.01(A)(F) with death penalty specifications; two counts of aggravated murder in violation of R.C. 2903.01(B)(F) with death penalty specifications; two counts of kidnapping in violation of R.C. 2905.01(A)(2); two counts of aggravated robbery in violation of R.C. 2911.01(A)(3)(c); and arson in violation of R.C. 2909.03(A)(1)(B)(2). These charges stemmed from the allegations that Appellant and his co-defendants murdered two men while committing or attempting to commit a robbery and left their bodies in a car, which he then set on fire.

{¶3} A jury convicted Appellant on all four counts of aggravated murder, two counts of kidnapping, and one count of arson. However, the jury found him not guilty on both counts of aggravated robbery.

{¶4} The trial court sentenced Appellant to life imprisonment without parole on the aggravated murder convictions, ten years on each of the kidnapping convictions, and eighteen months on the arson conviction. The court ordered all sentences to be served consecutively.

{¶5} On direct appeal, we affirmed Appellant's conviction and sentence. *State v. Barnette*, 7th Dist. Mahoning No. 11 MA 196, 2014-Ohio-5673, appeal not allowed, 143 Ohio St.3d 1405, 2015-Ohio-2747, 34 N.E.3d 133 ("*Barnette I*"). We denied Appellant's subsequent application for reopening in *State v. Barnette*, 7th Dist. Mahoning No. 11 MA 196, 2015-Ohio-1280 ("*Barnette II*"). Appellant then filed an appeal regarding the trial court's decision to deny his motion for a new trial, which this Court affirmed in *State v. Barnette*, 7th Dist. Mahoning No. 15 MA 0160, 2016-Ohio-3248 ("*Barnette III*"). Appellant then appealed the trial court's denial of his first postconviction petition in *State v. Barnette*, 7th Dist. Mahoning No. 17 MA 0027, 2017-Ohio-9074 ("*Barnette IV*"). Next, Appellant appealed a resentencing entry which we reversed and issued a limited remand, instructing the court to hold a hearing solely on the issue of postrelease control. *State v. Barnette*, 7th Dist. Mahoning No. 19 MA 0114, 2020-Ohio-6817 ("*Barnette V*"). Thereafter, Appellant filed his third application for reopening which was denied in *State v. Barnette*, 7th Dist. Mahoning No. 11 MA 0196, 2021-Ohio-2484 ("*Barnette VI*"). Appellant then filed a writ of mandamus, which this Court denied in *State ex rel. Barnette v. Sweeney*, 7th Dist. Mahoning No. 22 MA 0040, 2022-Ohio-3425 ("*Barnette VII*").

{¶6} Relevant to the instant action, Appellant filed yet another petition to vacate or set aside the judgment of conviction or sentence, which was construed as a postconvction petition. The trial court denied the petition as untimely. It is from this judgment that Appellant now appeals.

{¶7} We note Appellant has filed several additional motions after he filed the instant appeal. It is unclear whether Appellant has appealed any of the decisions on those motions.

Postconviction Petition

{¶8} In order to successfully assert a postconviction petition, "the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions." *State v. Agee*, 7th Dist. Mahoning No. 14 MA 0094, 2016-Ohio-7183, ¶ 9, citing R.C. 2953.21(A)(1).

{¶9} The petitioner bears the burden of demonstrating "substantive grounds for relief" through the record or any supporting affidavits. *Agee* at ¶ 9. However, as a postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, *res judicata* bars many claims. *Agee* at ¶ 10.

Timeliness

{¶10} R.C. 2953.21(A)(2) requires a petitioner to file his or her petition within one year after the trial transcripts are filed in the court of appeals. In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition:

> [S]hall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction[.] * * * If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

{¶11} Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he or she meets the criteria found in R.C. 2953.23(A)(1)(a)-(b).

Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show the petitioner: "was unavoidably prevented from discovery of the facts upon which the petitioner 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 persons in the petitioner's situation, and the petition asserts a claim based on that right."

{¶12} Appellant's trial transcripts were filed in this Court on June 15, 2012. His instant petition was filed on February 7, 2022, well beyond the established deadline. Appellant has provided no explanation for his tardiness. Likewise, he has not alleged that he was unavoidably prevented from discovering evidence or that a new law applies retroactively to a person in his situation. Thus, his petition is untimely.

ASSIGNMENT OF ERROR NO. 1

> The Trial Court abuse [sic] its discretion when it considerate [sic] the Appellant's post-conviction relief as untimely.

{¶13} Appellant argues the trial court improperly deemed his petition untimely. Appellant explains that this Court remanded his case for a limited sentencing hearing to correctly impose postrelease control, which he believes restarted the time he had to file a postconviction petition in accordance with *King v. Morgan,* 807 F.3d 154 (6th Cir.2015).

{¶14} In response, the state argues that any appeal from this resentencing is limited to the issue of postrelease control, in accordance with *State v. Fischer,* 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. Because the arguments in Appellant's petition are far broader than the scope of that resentencing mandate, he must explain his delay in filing a petition based on these allegations, and he failed.

{¶15} While Appellant frames this issue as one regarding the timeliness of filing his petition, his argument actually addresses the scope of his appeal. The Ohio Supreme Court has held that "[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, overruled on other grounds by *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248.

{¶16} In fact, in a prior appeal, Appellant raised an argument that the trial court improperly held a full resentencing hearing instead of a limited hearing solely on the issue of postrelease control. *Barnette V*, ¶ 21. We agreed with Appellant and remanded the matter for the purpose of holding a hearing limited solely to the matter of postrelease control. Thus, this record shows Appellant clearly understood his remand was for the limited purpose of addressing postrelease control.

{¶17} The Fifth District has held that "[t]he scope of an appeal from a resentencing hearing in which a mandatory term of post-release control is imposed is limited to issues arising at the resentencing hearing." *State v. Mathews*, 5th Dist. Richland No. 18 CA 50, 2018-Ohio-3839, ¶ 18, citing *State v. Cottrill*, 5th Dist. Licking No. 10-CA-28, 2011-Ohio-4599, ¶ 15; *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph four of the syllabus.

{¶18} The *King* case cited by Appellant involves a specific federal law that was raised in a habeas corpus petition. The *King* court specifically noted that habeas, unlike other filings, allows review of claims that could or should have been raised in earlier court filings. *Id.* at 159-160. A petition seeking all other postconviction relief operates differently than habeas corpus, and *res judicata* does apply in all other postconviction petitions. In

addition, the *King* court recognized that the specific law under review, the Anti-Terrorism and Effective Death Penalty Act, provided a new entry filed pursuant to this Act did reset the statute of limitations clock. However, this provision narrowly applies only to this Act. *Id.* at 159-160.

{¶19} As such, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> In violation of the Six Amendment Appellant's Trial Counsel was Ineffective for failing to proper investigate before promising Sherrica Barnette as a witness in opening statements.

{¶20} Appellant argues that he received ineffective assistance of counsel when his trial counsel promised the jury during counsel's opening statements that it would hear from Appellant's sister that he was at home at the time of the incident. Appellant explains that his sister travelled from out-of-state to testify but was not called as a witness because his counsel developed concerns regarding her credibility. Appellant argues that these concerns should have been investigated before the jury was informed that they would hear her testify. Appellant claims that *res judicata* cannot apply because he had the same attorney both at trial and on his direct appeal. Because he believes no attorney would acknowledge a mistake made at trial by arguing on appeal that his or her own trial assistance was ineffective, he cannot be barred from raising this allegation now.

{¶21} The state responds that, regardless, *res judicata* bars Appellant's arguments.

{¶22} The record reveals that even if Appellant's argument regarding the difficulty in having the same attorney represent a criminal defendant both at trial and on appeal were sufficient to overcome *res judicata,* he has filed six appeals in addition to his direct appeal and never attempted to raise this specific argument in any of those appeals. In one of his previous appeals Appellant sought to introduce new evidence in the form of an affidavit from a man who allegedly had information regarding Appellant's case but was never called. *Barnette III*, ¶ 19. Yet, Appellant made no attempt to discuss his sister's alleged testimony in that appeal.

{¶23} There is no question that Appellant knew his counsel had told the jury his sister would testify and present alibi evidence. He also knew that counsel did not call her as a witness. Clearly, this matter does not involve evidence *de hors* the record and Appellant has not explained why he has waited twelve years since his conviction, and seven earlier appeals later, to raise this issue. As such, it is apparent *res judicata* bars his arguments, now. Accordingly, Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶24} Appellant argues that his petition is timely because a new judgment entry revived his ability to appeal his entire original conviction. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are 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 waived.

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.