[Cite as *State v. Wilson*, 2009-Ohio-2347.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. DANIEL WILSON Appellant	C. A. Nos. 09CA009559 and 09CA009562 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 91CR040383

DECISION AND JOURNAL ENTRY

Dated: May 21, 2009

MOORE, Presiding Judge

{¶1} Appellant, Daniel Wilson, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} The procedural history of this case is long and complicated. The following facts provide an overview of the factual and procedural history necessary to understand the discussion of the narrow issues that follow.

{¶3} Appellant, "Daniel Wilson, killed Carol Lutz by locking her in the trunk of her car, puncturing the gas tank, and setting the car on fire. Wilson then walked away, allowing Carol Lutz to be baked alive." *State v. Wilson* (1996), 74 Ohio St.3d 381, 381. Wilson was indicted on three aggravated murder counts: aggravated murder by prior calculation and design; felony-murder (kidnapping); and felony-murder (aggravated arson). Each aggravated murder count had three death specifications. Specification one charged murder to escape "detection,

apprehension, trial, or punishment" for kidnapping; specification two charged murder during kidnapping; and specification three charged murder during an aggravated arson. Wilson was also indicted for kidnapping and aggravated arson. Id. at 383.

{¶4} At trial, Wilson claimed intoxication as a defense. The jury found Wilson guilty on all counts. At the penalty phase, the State elected to proceed to sentencing only on the prior calculation and design count and only on the first death specification, evading detection or punishment for another offense in violation of R.C. 2929.04(A)(3). For purposes of sentencing, neither the trial court nor the jury considered the other aggravated murder counts or death specifications. Id. at 383. Following the penalty phase, Wilson was sentenced to death.

{¶5} Wilson appealed to this Court, which affirmed, *State v. Wilson* (Oct. 12, 1994), Lorain App.No. 92CA005396, and to the Ohio Supreme Court, which also affirmed. *Wilson* (1996), 74 Ohio St.3d 381. Relevant to the matter currently before this Court, the Ohio Supreme Court held that the trial court improperly instructed the jury during the guilt phase of the trial because the instruction on intoxication shifted the burden of proof from the State to Wilson. Id. at 394. The Supreme Court, however, found the error to be harmless. Id.

{¶6} Wilson then pursued other remedies. This Court affirmed the trial court's denial of his petition for postconviction relief. *State v. Wilson* (1998), Lorain App.No. 97CA006683. This Court also denied Wilson's motion to reopen his direct appeal. Wilson then sought federal habeas corpus relief.

{¶7} The United States District Court denied Wilson's petition for writ of habeas corpus. The Sixth Circuit Court of Appeals affirmed the District Court's judgment. *Wilson v. Mitchell* (C.A.6 2007), 498 F.3d 491. The Sixth Circuit reviewed a number of claims, but its

analysis of the jury instruction claim prompted Wilson to return to state court to again seek postconviction relief and to move for resentencing.

{¶8} In his federal habeas corpus action, Wilson argued that the intoxication jury instruction improperly shifted the burden of proof to him and that this error was not harmless. Id. at 499. The Sixth Circuit reviewed the instruction and the Ohio Supreme Court's analysis of it in Wilson's direct state appeal. Id. at 499-502. The Sixth Circuit considered this argument as it related not only to the *guilt*-phase instruction – as reviewed by the Ohio Supreme Court – but also as it related to the *penalty*-phase. Id. at 499. One sentence of the Sixth Circuit's decision forms the basis of Wilson's claims: "Instead, we assume that the instruction was erroneous with regard to the evading-kidnapping specification and address whether it was harmless." Id. at 501.

{¶9} In his petition for postconviction relief, and on appeal to this Court, Wilson argues that the Sixth Circuit's decision invalidated the only aggravating circumstance presented to the sentencing jury and, therefore, he is no longer eligible for the death penalty. Wilson further argues that the Sixth Circuit's decision is a new "fact" that he was unavoidably presented from discovering so that he may be permitted to file a successive, untimely petition for postconviction relief. R.C. 2953.23(A)(1)(a).

{¶10} Wilson also moved for resentencing. The trial court combined the motion for resentencing and petition for postconviction relief and considered them as one petition for postconviction relief. Wilson's resentencing argument, however, was that the Sixth Circuit invalidated the sole aggravating circumstance the jury considered so that he is no longer eligible for the death penalty. Wilson argued that he is now subject to a void sentence and the trial court always has jurisdiction to correct a void sentence.

{¶11} The trial court denied Wilson's petition and motion. Wilson filed two separate appeals, one challenging the denial of his petition for postconviction relief and another challenging the trial court's failure to resentence him. This Court consolidated the appeals. We first address the denial of the petition for postconviction relief and then consider the motion for resentencing.

II.

A. Postconviction Relief Appeal

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY DISMISSING THE APPELLANT'S SUCCESSOR PETITION FOR POSTCONVICTION RELIEF PURSUANT TO R.C. 2953.21 AS WILSON MET THE GATEWAY REQUIREMENTS OF R.C. 2953.23(A)(1).

{¶12} Wilson argues that he met the requirements to file a successor postconviction relief petition. We do not agree.

{¶13} R.C. 2953.21 authorizes a person convicted of a criminal offense to petition the trial court to set aside the judgment or sentence. R.C. 2953.23 imposes limitations on a person's ability to seek postconviction relief:

> "(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
>
> "(1) Both of the following apply:
>
> "(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, * * *.
>
> "(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the

> sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence."

Wilson acknowledges that he filed a successive petition for postconviction relief. He further recognizes that he must meet the requirements of R.C. 2953.23(A)(1) to proceed or the trial court could not consider the petition.

{¶14} Wilson argues that the Sixth Circuit's decision is a new "fact" upon which he relies to present his claim for relief. According to Wilson, therefore, he falls under R.C. 2953.23(A)(1)(a) to allow the trial court to consider his successive petition.

{¶15} The Sixth Circuit's decision is not a "fact" within the meaning of R.C. 2953.23(A)(1)(a). The court did not make a factual finding in deciding his appeal. Rather, the Sixth Circuit's decision is based on facts that were available to Wilson and that Wilson argued in his initial state appeals. While the Sixth Circuit may have analyzed those facts in a different way than the Ohio Supreme Court, that does not mean that Wilson was unavoidably prevented from discovering the facts upon which he relies.

{¶16} Furthermore, we question Wilson's reading of the Sixth Circuit's decision. Wilson cited to the last sentence of a paragraph to support his argument in the trial court and in this Court. Reviewing the entire paragraph, however, puts the last sentence in context:

> "We are not certain that an error regarding the knowledge element of a kidnapping offense necessarily translates into an error regarding the knowledge element of an *evading-kidnapping* specification. In other words, one might say it is conceivable that a person could lack the requisite knowledge to commit kidnapping, yet have the requisite knowledge to commit murder to evade detection for kidnapping-for example, where the person believes he has committed kidnapping (but actually has not, perhaps because of earlier intoxication), and then commits murder to *evade detection* for the kidnapping he (erroneously) believes took place. But we do not decide this question. Instead, we assume that the instruction was erroneous with regard to the evading-kidnapping specification and address whether it was harmless." (Emphasis sic.) *Wilson*, 498 F.3d at 501.

This paragraph begins with the Sixth Circuit's recognition of its uncertainty that there even was an error that affected the specification. The paragraph concludes by *assuming* there was an error in order to address whether that assumed-error was harmless. Assuming the existence of an error for purposes of harmless error review is not the same as deciding, as a factual matter, that the instruction was erroneous and that Wilson's constitutional rights were violated. Assuming the existence of an error does not create a "fact" and it is not tantamount to a finding of fact. The Sixth Circuit reached a legal conclusion – that the assumed error was harmless – based on facts that were available in the record from the time of the trial.

{¶17} Wilson cannot show that he was unavoidably prevented from discovery of facts upon which he must rely to present the claim for relief, as required by R.C. 2953.23(A)(1)(a). Thus, he failed to meet the requirements of R.C. 2953.23(A)(1) to file a successive petition. The trial court properly denied the petition for postconviction relief. The assignment of error is overruled.

B. Motion for Resentencing Appeal

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY FAILING TO RESENTENCE THE APELLANT FOR A CONVICTION OF AGGRAVATED MURDER WITHOUT A CAPITAL SPECIFICATION.

{¶18} Wilson argues that the trial court erred because it failed to resentence him. We do not agree.

{¶19} Wilson moved for resentencing because, according to his argument, the Sixth Circuit held that the sole aggravating specification was invalid, making his death sentence void. Following a hearing on the motion to resentence in the Common Pleas Court, Wilson petitioned for postconviction relief, as the trial court had suggested. Following a second hearing on both

the motion and the petition, the Common Pleas Court issued one journal entry that addressed the motion and petition together. As noted earlier, Wilson filed two separate appeals, one challenging the trial court's decision on the postconviction petition addressed above, and one challenging the trial court's ruling on his motion for resentencing, which we address now.

{¶20} Wilson succinctly stated his position in an overview of his argument: "Ohio trial courts have always maintained jurisdiction to correct an illegal sentence. If the burden-switching instruction was constitutional error, the capital specification was invalid. Without a valid statutory aggravating factor, the death penalty is no longer a legal sentence. Thus, the trial court maintains the inherent jurisdiction to correct the sentence." (Wilson's Brief at 7-8).

{¶21} We agree with Wilson's legal premise. The Ohio Supreme Court has held that "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. The Supreme Court has applied this standard a number of times in recent years. See, e.g., *State v. Boswell*, Slip Op.No. 2009-Ohio-1577; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; and *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶22} Although we agree with Wilson's statement of the law about void sentences, we disagree with its application in this case. As we discussed when reviewing his postconviction appeal, we do not agree with Wilson's argument that the Sixth Circuit Court of Appeals invalidated the aggravating circumstance that supported imposition of the death penalty. The Sixth Circuit assumed, for purposes of harmless error analysis, that there was error, but it did not decide – either as a matter of fact or as a matter of law – that there was error.

{¶23} The Sixth Circuit did not decide that Wilson's sentence was void because of an invalid aggravating circumstance. As that was the sole basis of his argument, Wilson failed to

demonstrate that his sentence is void. Accordingly, the trial court lacked jurisdiction to consider his motion for resentencing. The assignment of error is overruled.

III.

{¶24} Wilson's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DAVID L. DOUGHTEN, Attorney at Law, for Appellant.

ALAN C. ROSSMAN, Assistant Federal Defender, for Appellant.

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