[Cite as *State v. Turner-Frantz*, 2015-Ohio-2111.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 JE 33
V.	)	
	)	OPINION
DAVID J. TURNER-FRANTZ,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 08CR135
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Jane M. Hanlin Prosecuting Attorney 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant	David Turner Frantz – Pro-se #574-783 P.O. Box 740 1851 State Route 56 London, Ohio 43140

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: May 29, 2015

[Cite as *State v. Turner-Frantz*, 2015-Ohio-2111.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, David Turner-Frantz, appeals from a Jefferson County Common Pleas Court judgment convicting him of voluntary manslaughter, felonious assault, and tampering with evidence.

{¶2} On October 1, 2008, a Jefferson County Grand Jury indicted appellant on one count of murder in violation of R.C. 2903.02(A), and one count of murder in violation of R.C. 2903.02(B), both first-degree felonies. The indictment stemmed from charges that appellant purposely caused the death of Chandra Lee Wilkins or recklessly caused the death of Chandra Lee Wilkins while committing a felonious assault against her. Appellant initially pleaded not guilty.

{¶3} On November 16, 2009, appellant entered into a negotiated plea agreement with plaintiff-appellee, the State of Ohio. Pursuant to the terms of the plea agreement, appellant entered a guilty plea to the amended charges of voluntary manslaughter, a first-degree felony in violation of R.C. 2903.03(A); and felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(1). Appellant also entered a guilty plea to a charge of tampering with evidence, a third-degree felony in violation of R.C. 2921.12(A)(1), which involved his concealment of Ms. Wilkins' body.

{¶4} The plea agreement included the following provisions:

> 3. The State of Ohio and the Defendant have specifically agreed that the Defendant will waive any argument that the crimes of Voluntary Manslaughter and Felonious Assault are allied offenses of similar import.
>
> 4. Defendant specifically waives the right to a hearing to determine whether the offenses of Voluntary Manslaughter and Felonious Assault are offenses of similar import and specifically waives any appellate argument that he could only be convicted of either Voluntary Manslaughter or Felonious Assault. The State of Ohio does not concede that, in this case, the offenses of Voluntary Manslaughter and Felonious Assault are allied offenses of similar import. Rather, it is the intention of both parties to waive any hearing on the issue.

5. The State of Ohio and Defendant, through counsel, have reviewed the case of State of Ohio v. Jackson, 2006 Ohio 3165; 2006 Ohio App. LEXIS 3044, and a copy of this Decision has been provided to the Trial Court. The State of Ohio and Defendant specifically agree that if the Trial Court imposes a net sentence of twenty (20) years as identified in the preceding paragraphs, Defendant has no right to appeal such a sentence. The parties specifically agree that Ohio Revised Code Section 2953.08(D) prohibits Defendant from appealing a sentence of twenty (20) years in prison as outlined above.

6. Defendant specifically agrees that he suffers no prejudice by entering into the Plea Agreement because as indicted, he faced two (2) counts of Murder, both punishable by life imprisonment. Defendant specifically acknowledges that pleading guilty to Voluntary Manslaughter and Felonious Assault, as well as a single count of Tampering with Evidence, in exchange for a 20-year sentence, is a better deal than the potential of life in prison.

7. Defendant acknowledges that he is – by choice – not raising the issue of allied offenses of Voluntary Manslaughter and Felonious Assault because he specifically requests that the Trial Court accept the negotiated plea and recommended sentence in this case.

8. Defendant specifically advises the Court that he is inviting any error regarding the issue of whether Voluntary Manslaughter and Felonious Assault would be determined to be allied offenses of similar import in this case in order that the Court will approve the Plea Agreement as presented.

{¶5} The trial court accepted the negotiated plea agreement. It then held a sentencing hearing. The trial court stated that it would follow the agreed recommendation of sentence. Therefore, it sentenced appellant to nine years for voluntary manslaughter, seven years for felonious assault, and four years for

tampering with evidence, to be served consecutively for a net sentence of 20 years in prison.

{¶6} Appellant did not file an appeal from this judgment.

{¶7} Almost two years later, on October 4, 2011, appellant, now acting pro se, filed a Motion to Void Judgment asking the trial court to void its judgment because the charges he was convicted of were allied offenses of similar import.

{¶8} The trial court overruled appellant's motion. In so doing, it noted that it sentenced appellant in accordance with the negotiated plea agreement, appellant did not file an appeal from his conviction, and appellant did not file a motion for post-conviction relief.

{¶9} Approximately two-and-a-half years later, on July 21, 2014, appellant filed a motion termed "Motion for Re-Sentencing Pursuant to R.C. 2941.25(A) Trial Court Committed Plain Error Crim.R. 52(B)." He asserted that the state erred in requiring him to waive his right to an allied-offense hearing and that his sentence was contrary to law because it contained sentences for allied offenses.

{¶10} The trial court denied appellant's motion. It found that the issues regarding allied offenses were specifically addressed by appellant and the state in the negotiated plea agreement and appellant was completely aware of the terms and waived any claims regarding this issue.

{¶11} Appellant filed a timely notice of appeal from this judgment on October 7, 2014.

{¶12} Appellant, still acting pro se, now raises two assignments of error. His first assignment of error states:

> TRIAL COURT ERRED IN FAILING TO HOLD A MANDATORY MERGER HEARING.

{¶13} Appellant argues the trial court's duty to merge allied offenses of similar import was mandatory regardless of what he agreed to in his plea agreement. He urges that the Ohio Supreme Court has held that the trial court's duty to merge allied

offenses of similar import is mandatory, not discretionary.

{¶14} Initially, we note that appellant failed to file a direct appeal in this case. We also mention that appellant filed the motion giving rise to this appeal approximately four-and-a-half years after the trial court entered his judgment of sentence. Thus, although appellant claims his motion is not a petition for postconviction relief, in substance it is a postconviction motion.

{¶15} The Ohio Supreme Court has held that when a criminal defendant, subsequent to his direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his constitutional rights were violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21. *State v. Reynolds*, 79 Ohio St. 3d 158, 1997-Ohio-304, 679 N.E.2d 1131, syllabus.

{¶16} Appellate courts have extended the *Reynolds* Court's holding to apply to cases where the defendant failed to file a direct appeal and the time for filing a direct appeal has expired. See, *State v. Young*, 6th Dist. No. E-08-041, 2009-Ohio-1118, ¶16; *State v. Reynolds*, 10th Dist. No. 06AP-1006, 2007-Ohio-2189, ¶6; *State v. Harrison*, 12th Dist. No. CA99-07-077, 2000 WL 979282, at *2 (July 17, 2000). These courts have construed the defendants' variously-captioned motions as postconviction petitions.

{¶17} Likewise, in this case, we will treat appellant's "Motion for Re-Sentencing Pursuant to R.C. 2941.25(A) Trial Court Committed Plain Error Crim.R. 52(B)" as a postconviction petition.

{¶18} Appellant's postconviction was untimely. When no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the postconviction petition shall be filed no later than 180 days after the expiration of the time for filing the appeal. R.C. 2953.21(A)(2). [1] Appellant's petition was filed several years beyond this time limit.

{¶19} Pursuant to R.C. 2953.23(A), a court may not entertain a postconviction

1 Sub.H.B. No. 663, effective March 23, 2015, amended R.C. 2953.21 to extend the time for filing a postconviction petition to 365 days.

petition filed after the expiration of the period prescribed in R.C. 2953.21(A)(2) unless division R.C. 2953.23(A)(1) or (2) 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, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.
>
> (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 * * *.
>
> (2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code * * *.

{¶20} R.C. 2953.23(A)(2) does not apply in this case because it does not deal with DNA testing.

{¶21} R.C. 2953.23(A)(1) does not apply either. Appellant has not asserted he was unavoidably prevented from discovering facts upon which he bases his claim for relief. Nor has he asserted that the United States Supreme Court has recognized a new right in his favor.

{¶22} Because appellant's petition was untimely, the trial court should not have considered it. Accordingly, appellant's first assignment of error is without merit.

{¶23} Appellant's second assignment of error states:

TRIAL COURT FAILED TO PROPERLY IMPOSE MANDATORY POST RELEASE CONTROL.

{¶24} Here appellant asserts the trial court incorrectly advised him that he "may be" subject to five years of post-release control following his prison sentence. He states that his post-release control was mandatory and the court failed to advise him of such.

{¶25} Appellant did not raise this issue in his "Motion for Re-Sentencing Pursuant to R.C. 2941.25(A) Trial Court Committed Plain Error Crim.R. 52(B)." Thus, appellant cannot now raise it as a new issue on appeal.

{¶26} Moreover, the sentencing entry properly advised appellant of post-release control. It correctly informed him that he "will be" subject to five years of post-release control. It does not use the words "may be subject to" as appellant contends. Accordingly, appellant's second assignment of error is without merit.

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

Waite, J., concurs.

Robb, J., concurs.