

[Cite as *State v. Jones*, 2017-Ohio-9376.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 MA 0192
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
AARON L. JONES, SR.)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2006 CR 95

JUDGMENT: Affirmed. Limited Remand.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Aaron L. Jones, Sr., *Pro se*
#511-342
Grafton Correctional Institution
2500 S. Avon-Belden Road
Grafton, Ohio 44044

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 19, 2017

[Cite as *State v. Jones*, 2017-Ohio-9376.]
WAITE, J.

{¶1} Appellant Aaron L. Jones, Sr. appeals a December 13, 2016 Mahoning County Common Pleas Court judgment entry denying his “*Pro Se Motion for Relief from Void Sentence VIA ORC 2967328(B) [sic].*” Appellant raises several alleged errors, including sufficiency of the evidence, manifest weight of the evidence, a speedy trial violation, consecutive sentencing, contradicting verdicts, refusal of the trial court to provide transcripts, and failure to provide proper postrelease control notification. Only Appellant’s postrelease control argument has merit. The remaining aspects of Appellant’s appeal are untimely and the judgment of the trial court is affirmed as to those. The matter is remanded solely for the limited purpose of obtaining a *nunc pro tunc* entry to correct the postrelease control error.

Factual and Procedural History

{¶2} On May 25, 2006, Appellant was convicted of one count of aggravated robbery, a felony of the first degree in violation of R.C. 2911.01(A)(1), (C), and one count of aggravated burglary, a felony of the first degree in violation of R.C. 2911.11(A)(1), (B). The trial court sentenced him to an aggregate total of twenty years of incarceration.

{¶3} Appellant filed a direct appeal where he argued that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, the trial court failed to provide curative instructions following defense objections, his speedy trial rights were violated, error occurred in various sentencing issues, and that his counsel provided ineffective assistance. *State v. Jones*, 7th Dist. No. 06 MA 109, 2008-Ohio-1541 (“*Jones I*”). We found no merit to Appellant’s

arguments and affirmed his convictions and sentence. Appellant filed a delayed appeal to the Ohio Supreme Court, which was denied. *State v. Jones*, 120 Ohio St.3d 1414, 2008-Ohio-6166, 897 N.E.2d 650.

{¶14} Since Appellant's direct appeal, he has filed several postconviction motions. On January 5, 2007, Appellant filed a "Petition to Vacate or Set Aside Sentence" while his direct appeal was pending. In this motion, he raised sufficiency of the evidence and speedy trial arguments. On March 27, 2008, after *Jones I* was released, Appellant filed a motion for a new trial. The trial court denied this motion and no appeal was taken.

{¶15} On July 23, 2008, Appellant filed a postconviction petition to "Set Aside or Vacate Judgment of Conviction or Sentence." In his petition he asserted a speedy trial violation and an ineffective assistance of counsel claim. Two weeks later, Appellant filed an identical petition. The trial court denied the petitions and no appeal was taken.

{¶16} On February 25, 2009, Appellant filed a "Motion for Acquittal," arguing that his convictions were not supported by sufficient evidence. The trial court denied the motion and no appeal was taken.

{¶17} On November 18, 2009, Appellant filed a "Motion for Void Judgment" where he argued that his indictment was defective. On December 28, 2009, Appellant filed a postconviction petition to "Set Aside or Vacate Judgment of Conviction or Sentence." On January 7, 2010, Appellant filed a second postconviction petition to "Set Aside or Vacate Judgment of Conviction or Sentence."

The trial court denied all three motions. Appellant appealed this denial in *State v. Jones*, 7th Dist. No. 10 MA 47, 2011-Ohio-1002 (“*Jones II*”). We ruled that Appellant’s petition was both successive and untimely filed and affirmed the trial court’s decision.

{¶8} On December 5, 2011, Appellant filed a “Motion to Correct Judgment and/or Vacate and Resentence Pursuant to H.B. 86.” The trial court denied this motion and we affirmed the trial court in *State v. Jones*, 7th Dist. No. 13 MA 53, 2014-Ohio-2592 (“*Jones III*”).

{¶9} On January 3, 2013, Appellant filed a “Motion for Resentencing.” On March 4, 2013, he filed a “Motion to Have Trial Transcripts at State’s Expense.” Also on March 4, 2013, he filed “Leave to File a Delayed Motion for a New Trial.” The trial court denied all three motions. Appellant filed two notices of appeal. The first notice related to the trial court’s denial of his request for trial transcripts. This appeal was denied in a May 16, 2014 judgment entry (“*Jones IV*”). In his second notice he appealed the trial court’s denial of his January 3, 2013 and March 4, 2013 motions. We affirmed the trial court’s decision in *State v. Jones*, 7th Dist. No. 14 MA 46, 2015-Ohio-1707 (“*Jones V*”).

{¶10} Finally, on October 28, 2016 Appellant filed a “*Pro Se* Motion for Relief for Void Sentence VIA ORC 2967328(B) [sic].” On December 13, 2016, the trial court denied the motion. This appeal followed.

Postconviction Petition

{¶11} A motion not specifically authorized under the Ohio Rules of Criminal Procedure is classified as a postconviction petition if “it is a motion that (1) was filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” *State v. Hudson*, 7th Dist. No. 16 JE 0007, 2017-Ohio-4280, ¶ 9, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). Appellant's motion meets this criteria, as his motion was filed subsequent to direct appeal, asserts a violation of a constitutional right, claims that his sentence is void, and asks for his sentence to be vacated.

{¶12} 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. No. 14 MA 0094, 2016-Ohio-7183, ¶ 9, citing R.C. 2953.21(A)(1). The petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). Pursuant to R.C. 2953.21(C), the petitioner bears the burden of demonstrating “substantive grounds for relief” through the record or any supporting affidavits. 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.

{¶13} The doctrine of *res judicata* “bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal.” *State v. Croom*, 7th Dist. No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v.*

Ishmail, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). However, where “an alleged constitutional error is supported by evidence that is de hors the record, *res judicata* will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal.” *State v. Green*, 7th Dist. No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). To overcome the *res judicata* bar, the petitioner must demonstrate that the claim could not have been appealed based on the original trial record. *Agee* at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

Timeliness

{¶14} The state contends that the trial court properly dismissed Appellant's postconviction petition as successive and untimely. R.C. 2953.21(A)(2) and R.C. 2953.23(A)(1) require a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. The state argues that failure to comply with these statutes is fatal to a petition unless the petitioner can show that he was unavoidably prevented from discovering facts necessary to his claim or that the U.S. Supreme Court has recognized a new retroactive right and no reasonable factfinder could find him guilty but for the alleged error. The state notes that Appellant has filed this petition eight years after the one-year period expired and has failed to provide an explanation of his delay.

{¶15} In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition “shall 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.” Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he 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 that 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 persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶16} Pursuant to R.C. 2953.23(A)(1)(b), the petitioner must show “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.”

{¶17} This record reflects that Appellant filed hearing transcripts with this Court on December 14, 2006 and sentencing transcripts on August 16, 2007. Appellant filed his postconviction petition on October 28, 2016. Pursuant to R.C. 2953.21(A)(2), this petition is untimely unless Appellant can show that his case falls within the exception provided by R.C. 2953.23(A)(1)(a)-(b). Appellant does not provide an explanation for his untimeliness. As such, the trial court correctly determined that Appellant's petition was untimely and his untimeliness was not excused pursuant to R.C. 2953.23(A)(1)(a)-(b). However, this does not end our inquiry, as a court must entertain an untimely postconviction relief petition under certain circumstances.

Postrelease Control

{¶18} “[I]f ‘a sentence is void for failure to include proper postrelease-control notification, the trial court—or the reviewing court—has an obligation to recognize the void sentence, vacate it, and order resentencing.’ ” *State v. Dawson*, 2d Dist. No. 2012-CA-54, 2013-Ohio-1817, ¶ 8, citing *State v. Harrison*, 2d Dist. No. 24471, 2011-Ohio-6803, ¶ 20. “[A] trial court, confronted with an untimely or successive petition for postconviction relief that challenges a void sentence, must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant.” *State v. Brown*, 4th Dist. No. 16CA3770, 2017-Ohio-4063, ¶ 28, citing *State v. Hartley*, 10th Dist. No. 15AP–192, 2016-Ohio-2854, ¶ 28; *State v. Bandy*, 8th Dist. Nos. 101785, 101786, 2015-Ohio-1033, ¶ 11; *State v. Hudson*, 2d Dist. No. 2014 CA 53, 2014-Ohio-5368, ¶ 19; *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶ 19 (9th Dist.). Thus, even though Appellant’s motion is an untimely postconviction petition, we must address his postrelease control arguments.

{¶19} Throughout his brief, Appellant argues that the trial court failed to notify him of the consequences to him should he violate postrelease control. Although the state claims that the trial court properly notified Appellant of postrelease control during the hearing, the sentencing hearing transcript is not part of this appellate record. In the absence of a transcript, a reviewing court will presume regularity of the proceedings in the trial court. *State v. Dumas*, 7th Dist. No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *State v. Johnson*, 9th Dist. No. 02CA008193, 2003-Ohio-6814, ¶ 9.

{¶20} However, the record does reveal that the trial court failed to notify Appellant of the consequences of violating postrelease control within his sentencing entry. While a trial court must incorporate the postrelease control notification into the sentencing entry, the failure to do so is correctable by means of a *nunc pro tunc* entry so long as the error is corrected before the expiration of the defendant's prison term. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 19, 24. As such, the matter is remanded for the sole purpose of obtaining a *nunc pro tunc* entry to correct the sentencing entry.

ASSIGNMENT OF ERROR NO. 1

TRIAL COURT JUDGE ABUSED HER DISCRETION IN THIS MATTER
AS ILLUSTRATED IN THE FILED ACTION DICTA.

ASSIGNMENT OF ERROR NO. 2

TRIAL COURT JUDGE DISREGARDS MANDATES FROM THE OHIO

ASSIGNMENT OF ERROR NO. 3

APPELLANT-DEFENDANT IS ESTABLISHING THAT THIS CASE HAS
NO EVIDENCE AGAINST HIM, VIA THE PRELIMINARY HEARING
TRANSCRIPTS THAT HE DOES HAVE!

{¶21} Even if Appellant's postconviction petition were timely, his arguments are barred by *res judicata*. Appellant previously raised arguments regarding his speedy trial rights in *Jones I*, and arguments regarding his transcripts in *Jones IV* and *Jones V*. As these arguments have previously been raised, *res judicata* bars

Appellant from raising them yet again. We also note that Appellant is not entitled to obtain transcripts at the state's expense for a postconviction petition, which is civil in nature. Further, Appellant's manifest weight, sufficiency of the evidence, and consecutive sentencing arguments are barred by *res judicata* as they could have been, and were, raised in his direct appeal. See *State v. Brown*, 7th Dist. No. 13 MA 176, 2014-Ohio-4008. Accordingly, Appellant's arguments in this regard are without merit and are overruled.

Conclusion

{¶22} Appellant asserts several arguments challenging the sufficiency and manifest weight of the evidence against him, raising a speedy trial violation, a consecutive sentencing error, that there were contradicting verdicts, that the trial court refused to provide transcripts, and error in his postrelease control notification. As Appellant's motion amounts to an untimely, successive postconviction petition, the majority of his arguments are without merit and the judgment of the trial court is affirmed. However, his postrelease control argument does have merit. This matter is remanded solely for the limited purpose of entering a *nunc pro tunc* entry to correct this error.

Donofrio, J., concurs.

DeGenaro, J., concurs.