COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2002 CR 00320**
vs.	:	**Judge McBride**
CHRISTOPHER ALLEN HORTON	:	**DECISION/ENTRY**
Defendant	:	

Nick Horton, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Christopher A. Horton, *pro se* defendant, #A436934, Chillicothe Correctional Institution, P.O. Box 5500, 15802 State Route 104, Chillicothe, Ohio 45601

This cause is before the court for consideration of a motion filed by the defendant Christopher Allen Horton on May 29, 2015. The motion is captioned as "Motion For Re-Sentencing Based on Void Judgment". The matter has been fully briefed by the parties and the court now renders this written decision.

Upon consideration of the motion, the record of the proceeding, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On September 18, 2002, the defendant Christopher Allen Horton entered a guilty plea to one count of Attempted Aggravated Murder in violation of R.C. 2923.02/2903.01(E)(1), a felony of the first degree, with a three-year firearm specification, and one count of Aggravated Robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree. On October 22, 2002, the court sentenced the defendant to a twenty-three year stated prison, consisting of prison terms of ten years on each of the two counts and three years on the firearm specification, with all of the prison terms to be served consecutively. The court entered its judgment entry sentencing the defendant on October 24, 2002.

On March 31, 2003, the court denied leave for appeal because the appeal was not timely filed. The defendant filed a motion captioned "Post Conviction Motion to Have His Sentence Vacated/Set Aside" on April 20, 2005, which was overruled on May 5, 2005.

On June 20, 2006, the defendant filed a motion captioned "Motion to Vacate Void Sentence as Determined by State v. Foster as Permitted Pursuant to Civ.R. 60(B)(5), as Incorporated by Criminal Procedural Crim.R. 57(B)," which the court denied on August 2, 2006. The denial of the motion was appealed, and on February 26, 2007, the Twelfth District Court of Appeals affirmed this court's denial.

The defendant then filed a motion for leave to file a delayed appeal on October 18, 2011, which the court overruled on December 8, 2012. Next, the defendant filed a motion captioned "Motion to Withdraw Guilty Plea Pursuant to Crim. Rule 32.1" on

January 3, 2012, which the court overruled on June 28, 2012. The defendant appealed, and the appeal was dismissed.

On May 29, 2015 the defendant filed his motion captioned "Motion for Re-Sentencing Based on Void Judgment." The state filed a response in opposition to the motion on June 15, 2015.

In his present motion, the defendant makes three arguments (which he calls "assignments of error"):

> "1. The Trial Court violated R.C 2947.23(A)(1)(a), when the Court failed to notify the Defendant at the 'Sentencing hearing' that failure to pay Court costs, and all costs of the prosecution could result in the Trial Court Ordering the Defendant to perform Community Services.
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> 2. The Trial Court erred as a matter of law, by Ordering the Defendant to pay Restitution and other financial sanctions, without considering the Defendant's present and future ability to pay any of the Court-imposed sanctions pursuant to R.C. 2929.18(A)(4).
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> 3. The Trial Court erred as a matter of law, and entered a Void Judgment, when the Trial Court failed to notify the Defendant as to 'each offense,' of Counts [*sic*] Four (4) regarding Post-Release Control for each count as Statutory [*sic*] Required pursuant to R.C. 2929.19(B)(3)(c) through (e), R.C. 2929.14(F), and R.C. 2967.28."

LEGAL ANALYSIS

The Ohio Supreme Court has advised that a court "may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged."[1] It is the document's "language, not its label" that

[1] *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12 citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. *See State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131, at the syllabus ("Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis

"determines whether it satisfies the requirements of R.C. 2953.21."[2] In this regard, the court will construe the defendant's present motion as a motion for post-conviction relief under R.C. 2953.21.

(A) FIRST AND SECOND ARGUMENTS

The defendant's first and second "assignments of error" require similar inquiries and therefore will be dealt with together. The defendant argues that his sentence is void because (1) he was not notified that a failure to pay court costs could result in community service and (2) the trial court did not consider his present and future ability to pay fines or sanctions. The defendant's request to be re-sentenced on the basis of these two challenges is denied because his challenges were filed out-of-time and are barred by *res judicata.*[3]

The procedure a defendant must use to seek post-conviction relief is set forth in R.C. 2953.21 through 2953.23.[4] "R.C. 2953.21 is the exclusive remedy by which a person can bring a collateral challenge to the validity of a conviction or sentence in a

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that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21."); *State v. Wilkins*, 12th Dist. Clinton No. CA2013-05-012, 2013-Ohio-5372, ¶ 10 (holding same).

[2] *State v. Lawson*, 103 Ohio App.3d 307, 312, 659 N.E.2d 362 (12th Dist. 1995), citing *State ex rel. Carrion v. Harris*, 40 Ohio St.3d 19, 20, 530 N.E.2d 1330 (1988).

[3] Notably, the court did consider the defendant's present and future ability to pay the amount of any financial sanction which might be imposed. Order (Oct. 24, 2002) at pg. 2.

[4] *Wilkins*, 2013-Ohio-5372 at ¶ 12.

criminal case."[5] A petition for post-conviction is not a "second opportunity" for the defendant to litigate the conviction.[6]

Pursuant to R.C. 2953(A)(2), a petition for post-conviction relief cannot be filed more than 365 days after the date that the trial transcript is filed in the appellate court on direct appeal, or in cases where no appeal was taken, the petition must be filed no later than 365 days "after the expiration of the time for filing the appeal." Under App.R. 4, the defendant has 30 days from the entry of a final order to file his notice of appeal.

Under R.C. 2923.23(A)(1), a trial court may entertain an untimely filed petition for post-conviction relief when the defendant demonstrates either: "(1) he was unavoidably prevented from discovering the facts necessary for the claims of relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in the petitioner's situation and the petitioner asserts a claim based on that right."[7] If one of these two conditions is satisfied, then the defendant must also show that "but for the constitutional error at trial, no reasonable fact-finder would have found him guilty of the offenses of which he was convicted."[8]

In the instant case, the deadline for a timely appeal would have been 30 days after the court entered its judgment sentencing the defendant to prison, which was October 24, 2002. Hence, the defendant would have had until November 25, 2003 to file for post-conviction relief. However, the defendant filed the instant motion for post-conviction relief on May 29, 2015, which is well beyond the deadline, and is one of multiple, successive motions for post-conviction relief.

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[5] *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 15, citing *Bush*, 96 Ohio St.3d 235.
[6] *Rose*, 2012-Ohio-5957 at ¶ 16.
[7] *Wilkins*, 2013-Ohio-5372 at ¶ 13.
[8] *State v. Chattams*, 12th Dist. Butler No. CA2009-01-011, 2009-Ohio-6172, ¶ 17.

Moreover, the defendant does not satisfy either exception for filing out-of-time. He does not claim that he was unavoidably prevented from discovering the facts necessary for his claim of relief or that the United States Supreme Court has recognized a new federal or state right that applies retroactively to him. He therefore fails to satisfy the requirements necessary to entertain an untimely petition for post-conviction relief as to his first and second assignments of error.

In addition to being untimely, the defendant's first and second assignments of error are barred by *res judicata*. The doctrine of *res judicata* applies when determining whether a defendant warrants post-conviction relief pursuant to R.C. 2953.21.[9]

"Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or *could have been raised* by the defendant at trial, which resulted in that judgment of conviction, or *on an appeal*, from that conviction."[10]

Hence, a defendant may not raise an issue for post-conviction relief when the defendant could have raised the issue on direct appeal.[11] Phrased differently, the doctrine bars the defendant from "re-packaging" the evidence or issues that "either were or could have been raised in trial or direct appeal."[12] Moreover, when the defendant's

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[9] *State v. Franklin*, 4th Dist. Meigs No. 05CA9, 2006-Ohio-1198, ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, at the syllabus (1996).
[10] (Emphasis original.) *Reynolds*, 79 Ohio St.3d at 161. *See Wilkins*, 2013-Ohio-5372 at ¶ 15 (holding same). The application of *res judicata* may be precluded if the defendant produces material evidence outside the record. *State v. Hicks*, 12th Dist. Butler No. CA2004-07-170, 2005-Ohio1237, ¶ 10 citing *Lawson*, 103 Ohio App.3d 307 at 315.
[11] *Reynolds*, 79 Ohio St.3d at 161 citing *State v. Duling*, 21 Ohio St.2d 13, N.E.2d 670, 50 O.O.2d 40 (1970).
[12] *Rose*, 2012-Ohio-5957 at ¶ 20.

challenge should have been raised in a direct appeal, but the defendant did not take a direct appeal as of right, the defendant is still barred by *res judicata*.[13]

Courts have specifically held that the issue of court costs is one that can be raised on direct appeal.[14] The Ohio Supreme Court has held, contrary to the defendant's assertion, that a trial court's failure to notify the defendant of "court costs issues does not render the sentence void, but rather only constitutes reversible error."[15]

Thus, when a defendant raises the issue of costs for the first time in post-conviction relief, the issue is barred by *res judicata*.[16] For instance, in *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199 (2014), the petitioner challenged the court's imposition of fines without considering his ability to pay and the imposition of court costs without a hearing on his ability to pay.[17] The Court held that *res judicata* barred the issue of the imposition of fines and costs.[18]

The case of *State v. Graham*, 29 N.E.3d 239, 2015-Ohio-576, dealt with a trial court's failure to inform a defendant of the possibility of community service upon the defendant's failure to pay mandatory court costs. Because the defendant failed to raise this issue on direct appeal, *res judicata* applied and the defendant was barred from challenging the issue using a motion for post-conviction relief.[19]

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[13] *Franklin*, 2006-Ohio-1198 at ¶ 10.
[14] *State v. Francis*, 11th Dist. Trumbull No. 2011-T-0092, 2012-Ohio-3119, ¶¶ 13-16. *See State v. Pasqualone*, 140 Ohio App.3d 650, 658, 748 N.E.2d 1153 (11th Dist. 2000) (noting that the defendant could have raised costs issues on direct appeal, and as a result, *res judicata* applied).
[15] *State v. Graham*, 29 N.E.3d 239, 2015-Ohio-576, ¶ 15, citing *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278.
[16] *Francis*, 2012-Ohio-3119 at ¶ 15.
[17] *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199, ¶¶ 22, 25. (2014).
[18] *Id.*
[19] *Graham*, 2015-Ohio-576 at ¶¶ 16-17.

The defendant in the present case argues that his sentence is void because (1) he was not notified that a failure to pay court costs could result in community service and (2) the trial court did not consider his present and future ability to pay fines or sanctions.

As discussed, the Ohio Supreme Court has found that these two types of challenges could have been raised on direct appeal.[20] The defendant, however, did not file a direct appeal. He filed for leave to file out of time on two occasions, both of which were denied.

Also, the instant post-conviction motion is not the defendant's first. He has previously filed two post-conviction motions, neither of which addressed the issues raised in the present motion. Accordingly, the defendant's first two assignments of error are barred by *res judicata*.

For these reasons, the court denies the defendant's request to be "re-sentenced" based on his first two assignments of error.

(B) THIRD ARGUMENT

In his third argument, the defendant states: "The Trial Court erred as a matter of law, and entered a Void Judgment, when the Trial Court failed to notify the Defendant as to 'each offense,' of Counts [*sic*] Four (4) regarding Post-Release Control for each count as Statutory [*sic*] Required pursuant to R.C. 2929.19(B)(3)(c) through (e), R.C. 2929.14(F), and R.C. 2967.28." Although this "assignment of error" is not a model of

[20] *Ketterer*, 2014-Ohio-3973 at ¶¶ 22, 25; *Graham*, 2015-Ohio-576 at ¶¶ 16-17.

clarity, the court reads the defendant's challenge to mean that the court improperly failed to notify the defendant of post-release control as to each of his two convictions.

In contrast to the first two "assignments of error, *res judicata* does not apply to bar a challenge arguing that a sentence is void because it failed to include post-release control.[21] In addition, a challenge may be brought at any time through direct appeal or collateral attack.[22] A post-conviction proceeding is "a collateral civil attack on a criminal judgment."[23] Accordingly, the defendant's attack on the court's imposition of post-release control is not untimely.

When a sentence "does not include the statutorily mandated term of postrelease control [it] is void."[24] In such a case, only "that *part* of the sentence is void and must be set aside."[25] When "a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant."[26]

However, the portion of a sentence that advises the defendant of post-release control need not advise as to each offense if the convictions are subject to the same mandatory post-release control.[27] The Twelfth District Court of Appeals dealt with this issue in *State v. Barnes*, 12th Dist. Warren No. CA2014-03-049, 2015-Ohio-651. There, the defendant argued that the trial court erred in failing to advise him of post-release control as to each offense.[28]

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[21] *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 1 (2010).
[22] *Fischer*, 2010-Ohio-6238 at ¶ 1.
[23] *State v. Barnes*, 12th Dist. Warren No. CA2014-03-049, 2014-Ohio-651, ¶ 7 citing *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8.
[24] *Fischer*, 2010-Ohio-6238 at ¶ 1.
[25] (Emphasis original.) Id. at ¶ 26.
[26] Id. at ¶ 10, citing *State v. Beasley*, 14 Ohio St.3d 74, 471 N.E.2d 774, 14 OBR 511(1984).
[27] *State v. Barnes*, 12th Dist. Warren No. CA2014-03-049, 2015-Ohio-651, ¶ 21.
[28] *Barnes*, 2015-Ohio-651 at ¶ 21.

The court found that this failure "has no practical effect where the additional terms of postrelease control would be no greater than that which was imposed."[29] Each of the defendant's convictions was a second degree felony subject to the same mandatory term of post-release control of three years.[30] As such, the court held that the failure to advise the defendant as to each offense "had no practical effect" and was not void.[31]

In the case at bar, the court advised the defendant of his post-release control term, in pertinent part: "* * * [N]otice is hereby given to the defendant, that post-release control is mandatory in this case for five (5) years. * * *"[32]

The defendant has been convicted of two first-degree felonies. Felonies of the first degree are subject to a mandatory five-year term of post-release control.[33] As in *State v. Barnes*, there is "no practical effect where the additional terms of postrelease control would be no greater than that which was imposed."[34] Accordingly, the court finds that the portion of the defendant's sentence regarding post-release control is not void.

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[29] Id. citing *State v. Wiggins*, 12th Dist. Warren No. CA2009-09-119, 2010-Ohio-5959, ¶ 15.
[30] *Barnes*, 2015-Ohio-651 at ¶ 21.
[31] Id.
[32] (Emphasis added.) Order (Oct. 24, 2002) at pg. 6. Of note, the defendant has not argued that he failed to receive such notice during his sentencing hearing.
[33] R.C. 2967.28(B)(1).
[34] *Barnes*, 2015-Ohio-651 at ¶ 21 citing *State v. Wiggins*, 12th Dist. Warren No. CA2009-09-119, 2010-Ohio-5959, ¶ 15.

CONCLUSION

For the foregoing reasons, the defendant's "Motion for Re-Sentencing Based on Void Judgment" is not well-taken and is denied.

IT IS SO ORDERED.

DATED: 12-29-15

Judge Jerry R. McBride