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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WIGGENSEN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO	:	
Plaintiff	:	CASE NO. 2000 CR 00404
vs.	:	Judge McBride
JAMES C. NEFF	:	DECISION/ENTRY
Defendant	:	

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

James C. Neff, *pro se* defendant, Inmate No. 403-113, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601

This cause is before the court for consideration of a motion filed by the defendant James C. Neff on April 10, 2017 captioned: "Motion to Correct Sentence." The matter has been fully briefed by the parties.

Upon consideration of the motion, the record of this case, the written arguments of counsel for the state and the defendant, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On October 25, 2000, the defendant James C. Neff pled guilty to one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree.

In a separate and previous case, Case No. 1995-CR-005326, the defendant pled guilty on February 3, 1996 to one count of attempted felonious sexual penetration in violation of R.C. 2923.02 and R.C. 2907.12(A)(1)(b), an aggravated felony of the second degree, and one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree.

The sentencing hearing as to the guilty pleas entered on October 25, 2000 occurred on November 30, 2000. The court ordered that the defendant serve a prison term of ten years on the count of rape and five years each on the two separate counts of gross sexual imposition, with the prison terms to be served consecutively, for a total prison term of twenty years. The 20-year stated prison term was then ordered to be served consecutively to the sentence imposed in Case. No. 1995-CR-005326.

The defendant did not file a direct appeal. Instead, on June 16, 2005 he filed a motion for delayed appeal, which the Twelfth District Court of Appeals denied. In his motion, the defendant argued that he had "cause" for his appeal based on allegations that, although advised of his right to appeal at sentencing, no one advised him he only had thirty days to do so. According to the defendant, his trial counsel advised him to complete "some sex offense programs" in prison prior to seeking counsel to represent him on appeal.

After the appellate court's denial, the defendant next sought leave to appeal with the Ohio Supreme Court, claiming that the appellate court erred in denying his motion

for delayed appeal without determining whether he was indigent and had waived his right to counsel for the purpose of perfecting a timely appeal. The Ohio Supreme Court denied the defendant leave to appeal and dismissed the appeal.

The defendant filed a motion captioned "Void Motion For Re-sentencing Based Upon A Void Judgment" on March 31, 2016, which the court construed as a postconviction petition for relief. The defendant presented three arguments in support of his position that his sentence was void: (1) the court failed to notify the defendant at his sentencing hearing that a failure to pay all costs of the prosecution and court fees could result in the court ordering the defendant to perform community service, (2) the court failed to determine the defendant's present and future ability to pay the costs imposed, and (3) the trial court erred in finding that the defendant was subject to mandatory postrelease control for up to a maximum of five years.

Although the court had yet to issue its decision on the defendant's 2016 postconviction petition for relief, the defendant on July 7, 2016 filed a joint appeal in this case and also in Case No. 1995-CR-005326. In a judgment entry issued on March 27, 2017, the Twelfth District Court of Appeals found that the defendant's assignments of error related to the present case were not properly before it because this court had not issued a decision on the defendant's March 2016 postconviction petition for relief at the time the defendant filed the appeal.¹

This court issued a decision on the defendant's first postconviction petition for relief on October 5, 2016, which denied the postconviction petition for relief. The court concluded that the defendant's first and second arguments were untimely and barred by *res judicata*. As to the third argument, regarding postrelease control, the court found

¹ *State v. Neff*, 12th Dist. Clermont No. CA2016-07-048 (Mar. 27, 2017).

that the defendant had been properly advised of postrelease control during his sentencing hearing, although the sentencing entry did not accurately reflect that postrelease control would be mandatory for the defendant. As such, on October 6, 2016, the court issued a *nunc pro tunc* entry correcting the error in the sentencing entry so that it accurately reflected the court's statements in the sentencing hearing that postrelease control for the defendant would be mandatory for a term of up to five years. The court explained that the sentencing entry remained the same as was previously ordered, with the exception of the change regarding postrelease control.

On April 10, 2017, the defendant filed a motion captioned: "Motion to Correct Sentence" to "correct the nunc pro tunc judgment entry of October 6, 2016 * * *." The defendant posits that the entry contains "statutory defects and constitutional infirmities." More specifically, the defendant argues that the *nunc pro tunc* entry is void because his offenses should have merged as allied offenses of similar import.

The state filed a response in opposition on April 20, 2017. The defendant did not file a reply.

LEGAL ANALYSIS

The court finds that the defendant's motion should be construed as a petition for postconviction relief under R.C. 2953.21. A petition for postconviction relief is a motion by the defendant, "subsequent to his or her direct appeal," that seeks "vacation or correction of his or her sentence on the basis that his or her constitutional rights have

been violated.”² A motion is a petition for postconviction relief under R.C. 2953.21(A)(1) if it was “(1) 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 sentence.”³

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.”⁴ It is the motion’s “language, not its label” that “determines whether it satisfies the requirements of R.C. 2953.21.”⁵

The instant motion is a postconviction petition for relief because the defendant filed it subsequent to his motion for delayed appeal, the defendant claims his sentence contains “constitutional infirmities,” the motion seeks to render his sentence void, and the defendant asks for this court to vacate his judgment sentence.⁶

The procedure a defendant must use to seek postconviction relief is set forth in R.C. 2953.21 through R.C. 2953.23,⁷ which are “the means by which a convicted defendant may seek to have the trial court’s judgment or sentence vacated or set aside

² *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), at the syllabus. See *State v. Keith*, 12th Dist. Butler No. CA2015-12-213, 2016-Ohio-7359, ¶ 15, quoting *Reynolds*, 79 Ohio St.3d 158 (holding same).

³ *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12, quoting *Reynolds*, 79 Ohio St.3d at 160.

⁴ *Schlee*, 2008-Ohio-545 at ¶ 12, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. See *State v. Wilkins*, 12th Dist. Clinton No. CA2013-05-012, 2013-Ohio-5372, ¶ 10 (finding that 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 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).

⁵ *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).

⁶ *Wilkins*, 2013-Ohio-5372 at ¶ 10 (finding that the defendant’s motion was a postconviction petition for relief where the motion sought to vacate and set aside the defendant’s conviction on the basis that the court erred by imposing consecutive sentences and failing to merge his convictions as allied offenses of similar import).

⁷ *Wilkins*, 2013-Ohio-5372 at ¶ 12.

pursuant to a PCR petition.”⁸ Unlike an appeal of a criminal conviction, a petition for postconviction relief “is a collateral civil attack on a criminal judgment.”⁹ A petition for postconviction relief is not a “second opportunity” for the defendant to litigate the conviction.¹⁰

R.C. 2953.21 sets forth the general guidelines for postconviction relief:¹¹

“(A)(1)(a) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.”

Under the current version of R.C. 2953.21(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.¹² However, at the time the defendant was sentenced, R.C. 2953.21(A)(2) provided that a postconviction petition for relief could not

⁸ *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 14, citing *State v. Hibbard*, 12th Dist. Butler No. CA2013-03-051, 2014-Ohio-442, ¶ 12. See *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 15, citing *Bush*, 96 Ohio St.3d 235 (“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 criminal case.”).

⁹ *State v. McKelton*, 55 N.E.3d 26, 2016-Ohio-3116, ¶ 6 (12th Dist.), citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). See *State v. Wolf*, 12th Dist. Clermont No. CA2016-05-027, 2016-Ohio-8103, ¶ 7, citing *State v. Peters*, 12th Dist. Clermont No. CA2015-07-066, 2016-Ohio-5288, ¶ 9 (“A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral attack on a criminal judgment.”).

¹⁰ *McKelton*, 2016-Ohio-3216 at ¶ 6, citing *State v. Ibrahim*, 10th Dist. Franklin No. 14AP-355, 2014-Ohio-5307, ¶ 8. See *Rose*, 2012-Ohio-5957 at ¶ 16 (holding same).

¹¹ *Boles*, 2017-Ohio-786 at ¶ 15.

¹² R.C. 2953.21(A)(2).

be filed more than 180 days after the date the trial transcript is filed in the appellate court on direct appeal.¹³

There are two exceptions to the timeliness restriction, found under R.C. 2953.23(A)(1), which provides that a trial court may entertain an untimely filed or successive petition for postconviction 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.”¹⁴

If one of these two conditions is satisfied, then the defendant must also show by clear and convincing evidence 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.”¹⁵ If the timeliness requirements in R.C. 2953.21 or the timeliness exceptions listed in R.C. 2953.23 are unsatisfied, then the trial court lacks jurisdiction to consider the merits of the petition.¹⁶

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 would have been February 9, 2001. Hence, the defendant would have had until 180 days later

¹³R.C. 2953.21(A)(2) (1996). See *Wolf*, 2016-Ohio-8103 at ¶ 8 (noting that the applicable version of R.C. 2953.21(A)(2) is the one that was in effect when the defendant was convicted).

¹⁴ *Boles*, 2017-Ohio-786 at ¶ 15, citing R.C. 2953.23(A)(1)(A); See *Wilkins*, 2013-Ohio-5372 at ¶ 13 (holding same).

¹⁵ *McKelton*, 2016-Ohio-3216 at ¶ 8, citing R.C. 2953.23(A)(1)(b); See *State v. Chattams*, 12th Dist. Butler No. CA2009-01-011, 2009-Ohio-6172, ¶ 17 (holding same).

¹⁶ *McKelton*, 2016-Ohio-3216 at ¶ 17, citing *State v. Strunk*, 12th Dist. Butler No. CA2010-09-085, 2011-Ohio-417, ¶ 14. See *State v. Sheldon*, 12th Dist. Brown No. CA2016-04-010, 2016-Ohio-6984, ¶ 19, quoting *State v. Taylor*, 9th Dist. Lorain No. 14CA010549, 2014-Ohio-5738, ¶ 9 (“A defendant’s failure to either timely file a petition for post-conviction relief or meet his burden under R.C. 2953.23(A)(1) deprives the trial court of jurisdiction to entertain the petition.”).

to file for postconviction relief. However, the defendant filed the instant motion for postconviction relief on April 10, 2017, which is well beyond the 2002 deadline and is one of multiple, successive petitions for postconviction relief.

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, nor does he claim the United States Supreme Court has recognized a new federal or state right that applies retroactively to him. He thus fails to satisfy the requirements necessary to entertain an untimely and successive petition for postconviction relief, and therefore the court may not consider his argument that his sentence is void for failure to merge his offenses. In sum, because the defendant has not satisfied the timeliness requirements in R.C. 2953.21 or the timeliness exceptions listed in R.C. 2953.23, the court lacks jurisdiction to consider the merits of the defendant's petition.¹⁷

In addition to being untimely, the defendant's argument is barred by *res judicata*. A court may dismiss a petition for postconviction relief on the basis of *res judicata*.¹⁸ *Res judicata* prevents the defendant from raising "piecemeal claims in successive postconviction relief petitions * * * that could have been raised, but were not, in the first postconviction relief petition."¹⁹

"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

¹⁷ *McKelton*, 2016-Ohio-3216 at ¶ 17, citing *Strunk*, 2011-Ohio-417 at ¶ 14; See *Sheldon*, 2016-Ohio-6984 at ¶ 19, quoting *Taylor*, 2014-Ohio-5738 at ¶ 9.

¹⁸ *Sheldon*, 2016-Ohio-6984 at ¶ 30.

¹⁹ *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 53.

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."²⁰

Hence, a defendant may not raise an issue for postconviction relief when the defendant could have raised the issue on direct appeal.²¹ 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."²²

There is an "exception to the *res judicata* bar when the petitioner presents competent, relevant, and material evidence outside the record *that was not in existence and available to the petitioner in time to support the direct appeal.*"²³ As such, evidence that is outside of the record must show that the defendant "could not have appealed the constitutional claim based upon information in the original record and such evidence must not have been in existence and available to the petitioner at the time of trial."²⁴

The defendant did not file a direct appeal. He filed for leave to file an appeal out of time, which was denied, followed by a postconviction petition for relief, which was also denied. He now seeks to set aside his sentence on the basis that the trial court failed to merge his offenses as allied offenses of similar import. However, the defendant's argument is subject to *res judicata*. With respect to allied offense errors, the Ohio Supreme Court has opined as follows:

²⁰ (Emphasis original.) *Reynolds*, 79 Ohio St.3d at 161. See *Boles*, 2017-Ohio-786 at ¶ 20, citing *Lawson*, 2014-Ohio-3554 at ¶ 40 (holding same); *Wilkins*, 2013-Ohio-5372 at ¶ 15 (holding same).

²¹ *Reynolds*, 79 Ohio St.3d at 161, citing *State v. Duling*, 21 Ohio St.2d 13, N.E.2d 670 (1970).

²² *Rose*, 2012-Ohio-5957 at ¶ 20.

²³ (Emphasis original.) *Boles*, 2017-Ohio-786 at ¶ 20, citing *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 18. See *Sheldon*, 2016-Ohio-6984 at ¶ 30, quoting *Piesciuk*, 2013-Ohio-3879 at ¶ 18 (holding same).

²⁴ *Boles*, 2017-Ohio-786 at ¶ 20, citing *Piesciuk*, 2013-Ohio-3879 at ¶ 18.

"* * * [W]hen a trial court finds that convictions are not allied offenses of similar import, or when it fails to make any finding regarding whether the offenses are allied, imposing a separate sentence for each offense is not contrary to law and any error must be asserted in a in a timely appeal or it will be barred by the principles of res judicata."²⁵

In the present case, the court did not determine that the defendant's convictions were allied offenses of similar import. If the defendant believes that to be an error, he needed to file a direct appeal assigning that as an error. Additionally, the defendant did not raise this issue in his first postconviction petition for relief. As such, the doctrine of *res judicata* bars the defendant's present argument in his petition. The defendant's allied offense argument is precisely the sort of piecemeal litigation that *res judicata* is designed to guard against.

Moreover, the exception to the doctrine is inapplicable here because there is no evidence outside the record that did not exist and was unavailable to the petitioner in time to support his direct appeal. The defendant knew from the moment he was sentenced that his convictions had not been merged. He needed no new evidence in order to file a direct appeal of this issue. Accordingly, his present argument is barred by *res judicata*.

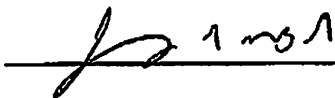
²⁵ *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26, citing *State v. Holdcraft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶¶ 8-9. By contrast, when a court concludes that a defendant has been found guilty of allied offenses of similar import, and it fails to impose a single sentence for the allied offenses, then that conviction is contrary to law and void. *Williams*, 2013-Ohio-5014 at ¶ 29.

CONCLUSION

For the foregoing reasons, the defendant's motion captioned "Motion to Correct Sentence" is not well-taken and is hereby denied.

IT IS SO ORDERED.


DATED: 8-11-17



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 11th day of August 2017 by e-mail to Katherine Terpstra, Assistant Prosecuting Attorney, at kterpstra@clermontcountyohio.gov, and by regular U.S. Mail to James C. Neff, #A403113, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601.



Judicial Assistant to Judge McBride