

FILED

2015 MAR 17 PM 12: 08 COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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

STATE OF OHIO :

Plaintiff : **CASE NO. 2009 CR 00212**

vs. : **Judge McBride**

SCOTT FITZGERALD HUMES : **DECISION/ENTRY**

Defendant-Petitioner :

Nicholas A. Horton, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Scott Fitzgerald Humes, defendant-petitioner appearing *pro se*, #A606-394, Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036.

This cause is before the court for consideration of "Defendant-Petitioner's Pro Se Motion for Resentencing Pursuant to R.C. 2941.25" and "Defendant-Petitioner's Pro Se Motion to Accept, Agree and Sign the Correct Guilty Plea Agreement[.]" filed on December 19, 2014 and December 22, 2014, respectively.

The court entered a briefing schedule as to the motions on December 30, 2014. The motions were taken under advisement when the final memorandum was filed by the defendant on January 27, 2015. That memorandum was not filed within the deadline

set forth in the briefing schedule but the court will nevertheless consider the arguments contained in the memorandum.

Upon consideration of the motions, the record of the proceeding, the written arguments of counsel and the *pro se* party, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On September 14, 2009, the defendant-petitioner Scott Fitzgerald Humes entered pleas of guilty to and the court found the defendant guilty of four counts of Aggravated Robbery in violation of R.C. 2911.01(A)(1), felonies of the first degree, and one count of Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the second degree.¹ In exchange for the defendant's pleas of guilty, the state dismissed counts one through nine of the indictment.²

On appeal, the Twelfth District Court of Appeals summarized the facts as follows:

"These convictions arose from five robberies that took place in April 2008 and February 2009. In April 2008, appellant was armed with a knife when he entered a Taco Bell restaurant in Clermont County and demanded money from an employee. Although appellant obtained no money, he cut the employee with his knife, causing injury. * * *

On February 5, 2009, appellant * * * robbed a CVS Pharmacy in Hamilton County. He entered the pharmacy with a handgun and took \$335 in cash.

¹ Written Plea of Guilty, filed September 14, 2009 and Judgment Entry on Finding of Guilty and Ordering Pre-Sentence Investigation, filed September 22, 2009.

² Id.

The next day, on February 6, 2009, appellant was armed with a handgun and entered a Huntington Bank in Clermont County. He left the bank with \$2995 in cash.

On February 10, 2009, appellant robbed a U.S. Bank in Hamilton County. He was again armed with a handgun and took an undisclosed amount of money from the bank.

The final robbery occurred on February 18, 2009. Appellant * * * robbed a PNC Bank located in Clermont County. Appellant entered the bank with a handgun and made off with over \$5,000.³

The court sentenced the defendant to prison terms of ten years on each of the aggravated robbery counts and a prison term of eight years on the felonious assault count, with all of those prison terms to be served consecutively to one another.⁴ This amounted to a total stated prison term of forty-eight years⁵, which was the maximum term to which the defendant could be sentenced.

The defendant filed a notice of appeal to the Twelfth District Court of Appeals.⁶ The defendant raised three assignments of error in that appeal, challenging the court's imposition of the maximum term of imprisonment, the court's imposition of consecutive sentences, and the order of restitution.⁷ The restitution order was vacated and remanded but the remaining assignments of error were overruled.⁸

After the defendant's re-sentencing on the issue of restitution, the defendant filed an application to reopen his appeal, which was denied by the appellate court.⁹

LEGAL ANALYSIS

³ *State v. Humes*, 12th Dist. Clermont No. CA2009-10-057, 2010-Ohio-2173, ¶¶ 4-8.

⁴ Judgment Entry Sentencing Defendant to Prison, filed October 1, 2009.

⁵ *Id.*

⁶ Notice of Appeal, filed October 1, 2009.

⁷ *Humes*, *supra*, at ¶¶ 11, 13, and 23.

⁸ *Id.* at ¶¶ 21 and 32.

⁹ Entry Denying Application to Reopen Appeal, CA2009-10-057, filed, Oct. 20, 2010.

The court first notes that the defendant filed a “Motion for Appointment of Counsel at State Expense” on January 26, 2015.

“An indigent petitioner has neither a state nor federal constitutional right to be represented by an attorney in a post-conviction proceeding.”¹⁰ “Nevertheless, pursuant to R.C. 120.16(A)(1) and (D), an indigent petitioner is statutorily entitled to representation by a public defender on a post-conviction petition if the public defender concludes that the issues raised by the petitioner have arguable merit.”¹¹ “Conversely, a trial court does not err by denying a post-conviction petitioner’s motion for appointment of counsel when the court determines that the petitioner is not entitled to an evidentiary hearing.”¹²

As will be discussed below, the court finds that the petition does not have merit and there is nothing in the petition that would entitle the petitioner to an evidentiary hearing. As such, the motion for appointment of counsel shall be denied.

The arguments set forth in the two motions are not entirely clear but they appear to distill down to three arguments: (1) the defendant was “coerced” by his trial counsel to enter a guilty plea, believing that he would receive only twenty years in prison; (2) there was a single animus for the offenses at issue and, as such, the offenses were subject to merger; and (3) the defendant has “changed his mind about the not guilty plea” because his co-defendant was given a shorter prison sentence. The defendant

¹⁰ *State v. Shedwick*, 10th Dist. Franklin No. 12AP-954, 2013-Ohio-2778, ¶ 7, citing *State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652 (1991), citing *Pennsylvania v. Finley* (1987), 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539.

¹¹ *Id.*, citing *State v. Madison*, 10th Dist. Franklin No. 08AP-246, 2008-Ohio-5223, ¶ 15.

¹² *Id.*

cites to various constitutional amendments throughout the motions and argues that his rights guaranteed under those amendments were violated.

First, the court finds that the two motions at issue are, in fact, petitions for post-conviction relief.

A motion will meet the definition of a petition for post-conviction relief if it is (1) filed subsequent to the defendant's direct appeal; (2) claims a denial of constitutional rights; (3) seeks to render the judgment void; and (4) asks for vacation of the judgment and sentence.¹³

"Where a criminal defendant, subsequent to his direct appeal, files a motion seeking vacation or correction of his sentence on the basis that his constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21."¹⁴ "The remedy set forth in R.C. 2953.21 is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case."¹⁵

In the present case, the defendant filed the motions after his direct appeal. He claims to have been denied several of his constitutional rights and seeks to have the court vacate the judgment and sentence, merge the offenses, and sentence the defendant to the twenty years in prison he believed he was going to receive. As such, the court will consider the motions to be petitions for post-conviction relief.

R.C. 2953.21 provides in relevant part as follows:

"(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims

¹³ *State v. Chattams*, 12th Dist. Butler No. CA2009-01-011, 2009-Ohio-6172, ¶ 14, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131, 1997-Ohio-304.

¹⁴ *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 14, citing *Reynolds*, supra, at syllabus.

¹⁵ *Id.* at ¶ 15, citing, *State v. Bush*, 96 Ohio St.3d 235, 238, 2002-Ohio-3993, 773 N.E.2d 522.

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, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, 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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, 'actual innocence' means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

* * *

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

The present petitions were not filed within 180 days after the date the trial transcript was filed in the defendant’s direct appeal. As such, the petitions were not timely filed.

R.C. 2953.23 provides in pertinent part as follows:

“(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, 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 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.

(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 or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, 'actual innocence' has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and 'former section 2953.82 of the Revised Code' has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code."

The petitioner in the case at bar has not shown that he was unavoidably prevented from discovering any facts on which he bases his requests for relief, nor has he shown by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses. The petitioner also has not presented any DNA evidence pursuant to R.C. 2953.23(A)(2).

Therefore, this court does not have jurisdiction to entertain the present untimely-filed petitions. As a result, they shall be dismissed.

The court would note for the record that, even if it could reach the merits of the petitions, which it cannot, they would be denied.

First, the merger arguments would be barred by the doctrine of *res judicata*. The defendant's allied offenses and merger arguments could have been raised on direct

appeal. The defendant's failure to raise those issues on direct appeal prevents those issues from being raised in support of post-conviction relief.¹⁶

Secondly, as set forth above, each of the five offenses of which the defendant was convicted took place on different days and involved separate victims. As such, these offenses were not committed by the same conduct, meaning a single act committed with a single state of mind.¹⁷ The offenses constituted five separate acts, occurring on different days in entirely different locations. As such, these offenses would not have been allied offenses of similar import under *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314.

Finally, the court does not find that the "motion to accept, agree and sign the correct guilty plea agreement" is a post-sentence motion to withdraw the petitioner's guilty plea. Instead, the petitioner simply seeks to have the court impose the twenty-year prison sentence he believes he should have received. As a result, the court considered the motion to be a petition for post-conviction relief and it was examined above in conjunction with the other motion/petition. However, even if this motion could be read as a motion to withdraw the petitioner's guilty plea, the motion would be unsuccessful.

"A post-sentence motion to withdraw guilty plea may be made only to correct a manifest injustice."¹⁸ The defendant has the burden of establishing the existence of a

¹⁶ *State v. Garnett*, 10th Dist. Franklin No. 12AP-594, 2013-Ohio-1210, ¶ 9, citing, *State v. Norris*, 7th Dist. Monroe No. 11-MO-4, 2013-Ohio-866, ¶ 15; and *State v. Rutledge*, 10th Dist. Franklin No. 11AP-853, 2012-Ohio-2036, ¶ 13.

¹⁷ *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, ¶ 49.

¹⁸ *State v. Beavers*, 10th Dist. Franklin No. 11AP-1064, 2012-Ohio-3654, ¶ 7, citing Crim.R. 32.1.

manifest injustice.¹⁹ "A manifest injustice 'is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process.'²⁰ "A post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases * * * ."²¹

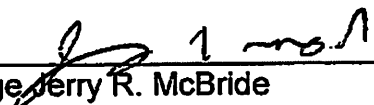
In this case, there was no manifest injustice. The written plea of guilty indicates that the state would be *recommending* a prison sentence of twenty years. There was absolutely no agreement by this court that this would be the sentence imposed, as this court does not enter into any plea agreements regarding sentencing as a matter of policy. The court explained to the defendant the potential sentences for each offense and indicated that any of those sentences could be ordered. The defendant cannot withdraw his guilty plea now simply because he did not like the sentence he received.

CONCLUSION

Based on the above analysis, the two motions, considered to be petitions for post-conviction relief, are not well-taken and are hereby dismissed.

IT IS SO ORDERED.

DATED: 3-17-15



Judge Jerry R. McBride

¹⁹ *State v. Eberle* (Aug. 2, 2010), 12th Dist. Clermont No. CA2009-10-065, 2010-Ohio-3563, ¶ 55, quoting *State v. Degaro*, 12th Dist. Butler No. CA2008-09-227, 2009-Ohio-2966, ¶ 10, quoting *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

²⁰ *Id.*, quoting *State v. McMahon*, 12th Dist. Fayette No. CA2009-06-008, 2010-Ohio-2055, ¶ 6, citing *State v. Moncrief*, 10th Dist. Franklin No. 08AP-153, 2008-Ohio-4594, ¶ 11.

²¹ *Id.*, citing *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 11.