

IN THE SUPREME COURT OF OHIO

07-0922

state of Ohio
PLAINTIFF-APPELLEE

S. CT CASE NO. _____

VS

ON APPEAL FROM THE 10 DIST
COURT OF APPEALS. Franklin
COUNTY OHIO.

Kehinde McAllister
DEFENDANT-APPELLANT

COURT OF APPEALS CASE NO.
06 AP 843

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

Kehinde McAllister # 486-727
NAME AND NUMBER (DEFENDANT-APPELLANT)

Noble C. I.
ADDRESS

15708 McConnellville Rd.
Caldwell, Ohio 43724

RON O'Brien
PROSECUTION (PLAINTIFF-APPELLEE)

Franklin Co. Pros.
ADDRESS

369 South High St.
Columbus, Ohio 43215

FILED
MAY 17 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

ON MAY 7 2007 A TRUE COPY WAS SENT TO
THE PROSECUTOR OF Franklin COUNTY OHIO BY U.S. MAIL

BY: K. Mallett

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STATE V. *McAllister* (~~2006~~) APP. NO. *06AP843*

WHY THIS CASE SHOULD BE CONSIDERED

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

IN A CIVILIZED SOCIETY OF LAWS EXISTENCE OF THE GOVERNMENT WILL BE
IMPERILED IF IT FAILS TO OBSERVE THE LAWS SCRUPULOUSLY.

THE DEPRIVAL OF THE RIGHTS SECURED BY WAY OF A RE-SENTENCING HEARING WAS MADE IN
REFERENCE TO THIS COURT'S ORDER IN FOSTER. AND WHEN THE LOWER COURTS FAILED TO
ABIDE IN THE ORDER IT PLACED MY RIGHTS IN ERROR.

THE SENTENCE IS CONTRARY TO LAW AND THE DEPRIVAL OF THE SIXTH AMENDMENT WHICH
GUARANTEES A FAIR TRIAL AND THE FOURTEENTH AMENDMENT OF TRUTH IN SENTENCING AS WELL
AS PROTECTION FROM MULTIPLE PUNISHMENT IS THE QUESTION WHICH NEEDS ADDRESSED IN THIS
CASE.

THESE ACTS VIOLATE BOTH FEDERAL AND STATE CONSTITUTIONAL RIGHTS SECURED.

STATEMENT OF THE CASE

APPELLANT WAS INDICTED: Agg Murder, Kidnapping

APPELLANT PLED: GUILTY / NOT GUILTY & PROCEEDED TO JURY TRIAL / OR OTHER
(IF THE MATTER PROCEEDED TO JURY TRIAL:)

THE ~~VERDICT~~ VERDICT WAS ~~GUILTY~~ OF: Vol Manslaughter

THE COURT THEN SENTENCED APPELLANT TO A CONSECUTIVE / CONCURRENT SENTENCE OF:

8 yrs IN THE OHIO DEPT. OF REBILITATION.

A NOTICE OF APPEAL WAS FILED AND THIS CASE IS NOW BEFORE THIS COURT ON APPEAL
IN RE: TO THE JUDGMENT OF 10th Dist ENTERED ON Apr. 17, 2007

STATEMENT OF THE FACTS

IN OCTOBER 2003 I WAS INDICTED FOR ONE CT. AGG. MURDER AND ONE CT. OF KIDNAPPING

IN OCTOBER 2004 I ENTERED A GUILTY PLEA FOR VOL. MANSLAUGHTER.

ON DECEMBER 21 2004 I WAS SENTENCED)CONTRARY TO LAW) TO (8) YEARS IN PRISON

ON JUNE 16th 2006 (DUE TO ATTORNEY NOT FILEING AN APPEAL NOR INSTRUCTING ME OF SUCH RIGHT TO ARGUE MY SENTENCE) I FILED A RESENTENCING HEARING BASED ON THE COMER DECISION AND FOSTER, BLAKELY OUTCOME.

ON _____ THE TRIAL COURT DENIED SUCH RELIEF

ON _____ I FILED A TIMELY APPEAL

ON APRIL 17th 2007 THE APPEALS COURT DENIED RELIEF CONTRARY TO LAW

I AM NOW IN THIS HONORALBE COURT FOR FAIR REVIEW

PROPOSITION(S) OF LAW

PROPOSITION NO: ONE

THE TRIAL COURT IMPROPERLY DENIED RELIEF SOUGHT

THE TRIAL COURT DENIED RELIEF PURSUANT TO R.C.2953.21 WHICH DEPRIVED ME THE RIGHT TO ADDRESS THE "NEW SENTENCING RULEINGS" WHICH PURSUANT TO R.C.2953.23 THE TRIAL COURT COULD HAVE GRANTED RELIEF.

PROPOSITION NO: TWO:

THE SENTENCE IS CONTRARY TO COMER, FOSTER, BLAKELY

THE SENTENCE IS CONTRARY TO LAW AND THE HOLDINGS ABOVE WHICH SUCH SENTENCE SHOULD BE MINIMIZED AND/OR DISMISSED AND A REHEARING HELD PURSUANT TO THE HOLDINGS.

PROPOSITION NO: THREE:

THE APPEALS COURT IMPROPERLY RENDERED THERE DECISION AND ABUSED THEIR DISCRETION WHICH CAUSED A MISCARRIAGE OF JUSTICE

THE APPEALS COURT, EVEN IN LIGHT FAVORABLE TO THE STATE, SHOULD HAVE ENTERTAINED THE SENTENCEING HEARING TO PREVENT A MISCARRIAGE OF JUSTICE FROM OCCURRING, THE APPEALS COURT DENIED RELIEF BASED "ONLY" ON R.C. 2953.21 WHICH THE SECTION 2953.23 WOULD OF RENDERED A DIFFERENT OUTCOME.

THE FOSTER DECISION CONCLUDED THAT "ALL" PENDING AND NOT DECIDED SENTENCEING APPEALS AND/OR SENTENCEING ARGUMENTS (EMP ADDED) WERE TO BE GIVEN A RESENTENCEING HEARING IN LIGHT OF THE FOSTER, BLAKELY DECISION. WHICH COMER DECISION ALSO SUPPORTS THIS OUTCOME. A SENTENCE MAY BE ADDRESSED AS OF RIGHT WHEN A SENTENCE IS CONTRARY TO LAW SEE R.C.2953.08. THIS STATUTE IS THE "TRUE" STATUTE INWHICH RELIEF IS SOUGHT AND FOR THE APPEALS COURT AND TRIAL COURT TO NEGLECT SUCH STATUTE WHICH WOULD OF RENDERED RELIEF , CAUSED A CONTINUEING COURSE OF MISCARRAIGE OF JUSTICE.

THEREFORE

THIS SUPREME COURT SHOULD GRANT SUCH JURISIDCITION TO REVIEW THE SENTENCEING AND TO DETERMINE BASED ON THE CONSTITUTIONAL RIGHTS SECURED THAT INDEED A RESENTENCEING HEARING IS PROPERLY SOUGHT.

RESPECTFULLY SUBMITTED

K McAllister

CONCLUSION

FOR THE REASONS DISCUSSED, I APPELLANT RESPECTFULLY REQUEST THAT THIS COURT GRANT JURISDICTION AND ALLOW THIS CASE TO BE HEARD SO THAT THE IMPORTANT ISSUES PRESENTED IN THIS MATTER WILL BE FAIRLY REVIEWED ON THE MERITS.

IN FINAL:

IT SHOULD BE KNOWN AND HAS BEEN KNOWN THAT A PRISONER WHOM PRO SE FILES MOTIONS TO FIGHT FOR HIS CONSTITUTIONAL RIGHTS SHOULD BE HELD AT LESS STRENGEST STANDARDS THEN THOSE ARTFULLY SUBMITTED BY COUNSEL. AND THE COURTS BELOW KNOW THE RULES AND PROCEDURES WHICH GOVERN SENTENCEING AND IT IS LIGHT OF THE R.C.2953.08 WHICH GIVES ONE THE RIGHT TO SEEK RELIEF FROM A SENTENCE WHICH IS CONTRARY TO LAW. AND EVEN THE POST REMEDY STATUTE OPENS SUCH DOOR THROUGH 2953.23 WHICH THE APPEALS COURT NOR TRIAL COURT CARED TO VISIT. THEREFORE THIS COURT SHOULD RENDER A DECISION TO A RESENTENCEING HEARING TO BE HELD SO TO PREVENT A MISCARRIAGE OF JUSTICE FROM CONTINUEING.

THE SENTENCE IS CONTRARY TO LAW AND THE HOLDINGS FROM " THIS COURT " AND SEVERAL INMATES HAVE SOUGHT AND RECIEVED THE SAME RELIEF IN THE SAME FILED MANNER, AND FOR ME TO NOT HAVE SUCH RIGHT TO ATLEAST PRESENT SUCH RELIEF AND HAVE A HEARING, IS NOT ONLY DISCRIMINATION BUT UNCONSTITUTIONAL.

THEREFORE I SEEK EQUAL PROTECTION OF THE LAWS WHICH GUARNTTEE EQUAL PROTECTION OF THE LAW.

I PRAY THAT SUCH REVIEW BE GRANTED IN THIS CASE.

RESPECTFULLY SUBMITTED,

K. Mallet
DEFENDANT-APPELLANT

INSTITUTIONAL NUMBER 486-727

ADDRESS

Noble C.F.
15708 McClannabville Rd.
Caldwell, Ohio 43724

END

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO

2007 APR 17 PM 3:50

CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 06AP-843
	:	(C.P.C. No. 03CR10-7392)
v.	:	
	:	(ACCELERATED CALENDAR)
Kehinde McAllister,	:	
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 17, 2007, defendant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against defendant.

PETREE, J., SADLER, P.J., & BROWN, J.

BY Charles R. Petree

Judge Charles R. Petree

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2007 APR 17 PM 3:48

CLERK OF COURTS

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 06AP-843
 : (C.P.C. No. 03CR10-7392)
 v. :
 : (ACCELERATED CALENDAR)
 Kehinde McAllister, :
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on April 17, 2007

Ron O'Brien, Prosecuting Attorney, and *Jennifer Stamp Gutmore*, for appellee.

Kehinde McAllister, pro se.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Defendant-appellant, Kehinde McAllister, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for resentencing filed June 16, 2006. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} In October 2003, the Franklin County Grand Jury indicted defendant on one count of aggravated murder and one count of kidnapping. In October 2004, defendant pled guilty to the stipulated lesser-included offense of voluntary manslaughter, and a nolle prosequi was entered as to the kidnapping count. On December 21, 2004, the trial court sentenced defendant to eight years in prison.

{¶3} Defendant did not file a direct appeal, but on June 16, 2006, he filed in the trial court a document titled "Motion for Re-Sentencing Hearing." By said motion, defendant argued that his sentence was contrary to law, and in violation of the Supreme Court of Ohio's decision in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. Defendant further argued that he was entitled to a resentencing hearing. The trial court construed defendant's motion as a petition for postconviction relief, and overruled the petition as untimely.

{¶4} Defendant timely appeals, and sets forth the following single assignment of error for our review:

THE TRIAL COURT IMPROPERLY DENIED A RESENTENCING HEARING FOR A SENTENCE THAT IS CONTRARY TO LAW.

{¶5} Defendant argues that the trial court improperly denied his motion for resentencing because it erroneously treated his motion for resentencing as a postconviction petition pursuant to R.C. 2953.21. We disagree with that assertion.

{¶6} Defendant's June 16, 2006 motion did not specify the criminal rule or statutory provision pursuant to which the motion was filed. Consequently, the trial court was required to categorize the motion in order to determine its possible merit. Furthermore, "[i]t is well-settled that a vaguely titled motion to correct or vacate a sentence * * * should be construed as a motion for post-conviction relief under R.C. 2953.21." *State v. Chapman*, Franklin App. No. 03AP-1208, 2004-Ohio-4222, at ¶4, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶10 (construing *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, syllabus). Thus, we conclude that it was

not error for the trial court to construe defendant's motion challenging the validity of his eight-year prison sentence as a petition for postconviction relief pursuant to R.C. 2953.21.

{¶7} R.C. 2953.21(A)(2) establishes the time limitations for filing a petition for postconviction relief. If no direct appeal is taken, a petition for postconviction relief shall be filed no later than 180 days after the expiration of the time for filing the appeal, except as provided in R.C. 2953.23. R.C. 2953.21(A)(2). Furthermore, a "trial court has no jurisdiction to entertain an untimely petition for post-conviction relief unless the petitioner demonstrates that one of the exceptions contained in R.C. 2953.23(A) applies." *State v. Franks*, Franklin App. No. 04AP-1370, 2005-Ohio-5923, at ¶7, citing *State v. Halliwell* (1999), 134 Ohio App.3d 730. "The burden of establishing an R.C. 2953.23(A) exception is upon the petitioner." *Franks*, at ¶7, citing *State v. Poindexter* (Aug. 29, 1997), Hamilton App. No. C-960780. In the case at bar, defendant did not timely pursue a direct appeal of his sentencing, and his June 16, 2006 motion was filed more than 180 days after the expiration of the time for filing the appeal. Additionally, defendant has not alleged the applicability of any of the exceptions set forth in R.C. 2953.23. Therefore, we conclude that the trial court did not err in overruling defendant's June 16, 2006 motion.

{¶8} Moreover, the doctrine of res judicata precluded defendant from raising, in his June 16, 2006 motion, the alleged sentencing error. Under the doctrine of res judicata, a final judgment bars a convicted defendant 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 the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Because defendant

could have brought his challenge to the propriety of his eight-year sentence in a direct appeal, the doctrine of res judicata bars him from asserting his sentencing challenge in any subsequent proceeding. See *Chapman*, at ¶8. On that additional basis, we conclude that the trial court did not err in overruling defendant's June 16, 2006 motion.

{¶9} Based on the foregoing, we overrule defendant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, P.J., and BROWN, J., concur.
