

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

KEHINDE MCALLISTER,

Defendant-Appellant.

Case No. 07-0922

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-843

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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DEFENDANT-APPELLANT

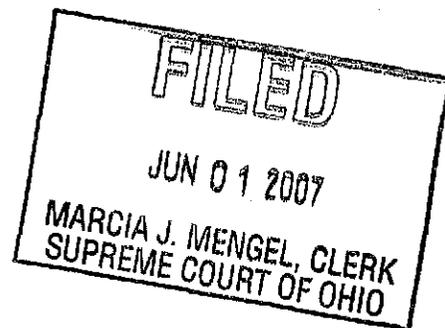


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

In 2003, a Franklin County Grand Jury indicted Kehinde McAllister for one count of aggravated murder and one count of kidnapping in connection with the death of John Busby-Garner. McAllister pled guilty to one charge of voluntary manslaughter and the trial court sentenced him to eight years incarceration on December 21, 2004. McAllister never filed a direct appeal but filed a “motion for resentencing hearing” in June 2006. The trial court denied the motion and McAllister appealed that ruling to the Tenth District Court of Appeals. On April 17, 2007, the Tenth District affirmed the trial court’s ruling. *State v. McAllister*, 10th Dist. No. 06AP-843, 2007-Ohio-1816.

ARGUMENT

RESPONSE TO PROPOSITIONS OF LAW NOS. ONE, TWO AND THREE:

MCALLISTER'S MOTION FOR RESENTENCING
CONSTITUTED A PETITION FOR POSTCONVICTION
RELIEF AND THE TRIAL COURT PROPERLY
DENIED THE MOTION.

As they are related, propositions one, two and three will be addressed together. McAllister claims that his motion for resentencing should have been granted because the trial court violated the holding in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, which required that certain statutory findings be made on the record at sentencing.

The State asserts that McAllister's motion constituted an untimely petition for postconviction relief barred by R.C. 2953.23 and the doctrine of res judicata.

In *State v. Reynolds* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, this Court set forth the standard for courts to deal with irregular "no-name" motions such as a motion to modify sentence. See *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶ 10. The Court in *Reynolds* wrote: "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."¹ R.C. 2953.21(A)(2) provides that petitions for postconviction relief must be filed within 180 days after the time for filing a direct appeal has expired. A trial court may not entertain

¹ The Supreme Court limited *Reynolds* in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522; however, none of those issues are relevant in this appeal.

an untimely postconviction petition unless it meets the requirements of R.C. 2953.23(A)(1)(a) and (b).

Furthermore, in *State v. Perry* (1967), 10 Ohio St.2d 175, 180, 30 O.O.2d 189, 226 N.E.2d 104, the Court held that res judicata bars a defendant from raising, in any proceeding except an appeal from that judgment, any defense or lack of due process claim that could have been raised on appeal.

McAllister filed his postconviction petition well beyond the 180-day timeframe in R.C. 2953.21. His brief does not address the requirements of R.C. 2953.23 or the reasons for the delay and, accordingly, the trial court lacked jurisdiction to entertain the petition. Further, res judicata bars McAllister from collaterally attacking his sentence when that issue could have been raised on direct appeal.

As to the merits of McAllister's resentencing motion, the Tenth District Court has held that sentencing errors such as a *Comer* violation are waived if the defendant failed to directly appeal the sentence. *State v. Wilson*, 10th Dist. Nos. 05AP-939, 05AP-940, 05AP941, 2006-Ohio-2750, at ¶ 10; citing *State v. Henderson*, 10th Dist. No. 01AP-414, 2001-Ohio-3939; *State v. Combs* (1991) 73 Ohio App.3d 823, 598 N.E.2d 815. Lastly, "[t]he judicial factfinding that *Comer* mandated at sentencing hearings for consecutive or non-minimum sentences, however, no longer survives . . . [because] [i]n *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, [the court] held that certain felony sentencing statutes were unconstitutional to the extent that they required judicial factfinding before imposition of a sentence greater than the 'statutory maximum'["] *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 26. Therefore, even if

the trial court had jurisdiction to consider McAllister's motion for resentencing, it would not have been required to comply with the mandates of *Comer*.

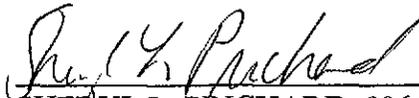
McAllister also seeks resentencing under *Foster*. However, McAllister's case was not pending on direct review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 1, 2007, to KEHINDE MCALLISTER #486-727, Noble Correctional Inst., 15708 McConnelsville Rd., Caldwell, Ohio 43724; Defendant-Appellant.



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Assistant Prosecuting Attorney
