

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee

vs.

Ronald J. Dority,

Appellant

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S. Ct. Case No. 14-0630

C.A. Case No. E-13-065

C.P. Case No. 2008-CR-352

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APPEAL FROM THE SIXTH APPELLATE DISTRICT  
ERIE COUNTY, OHIO

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MEMORANDUM IN OPPOSITION OF JURISDICTION

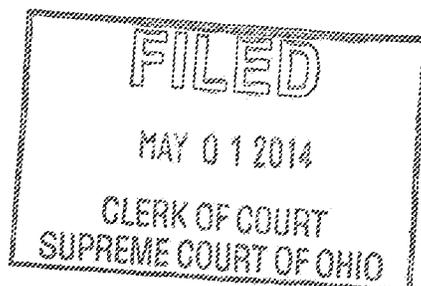
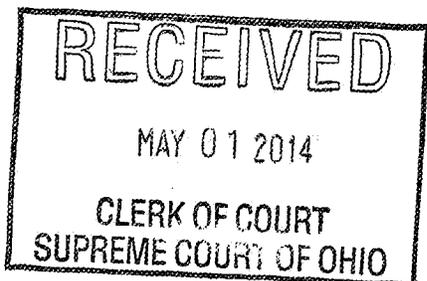
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## WHY LEAVE TO APPEAL SHOULD BE DENIED

In his Memorandum in Support of Jurisdiction, Appellant proposes a single proposition of law. However, Appellant has failed to demonstrate in his Memorandum that this case involves any substantial constitutional question or one that is of public or great general interest.

The Sixth District Court of Appeals properly considered Appellant's motion for allied offenses determination as a petition for post-conviction relief pursuant to State v. Reynolds (1997), 70 Oho St. 3d 158. The reviewing court held that the petition was to be filed no later than one hundred eighty days after the trial transcript was to be filed in the court of appeals. The Sixth District recognized that the transcripts were filed on August 10, 2009. Thus, Appellant's petition was not timely filed, and the trial court was prohibited from entertaining Appellant's motion. Furthermore, the Sixth District recognized that Appellant's circumstances did not support the application under either of the exceptions found under Ohio Rev. Code §2953.23 (hereinafter "O.R.C."). As a result, the Sixth District never addressed Appellant's issue of allied offenses of similar import.

The Sixth District noted that Appellant attempted to avoid the issue of post-conviction relief by attempting to classify his sentence as void and, thereby, it could be attacked at any time. It has been well established that the doctrine of res judicata will bar a defendant from raising an allied offenses argument when he had the opportunity to do so in his direct appeal but failed to do so. In his sole proposition of law Appellant urges this Honorable Court to find that the failure to raise the issue of allied offenses on direct appeal does not waive said issue and, therefore, is not subject to the doctrine of res judicata. However, Appellant's proposition has been answered and universally agreed upon by Ohio appellate courts. Multiple Ohio appellate courts have held that "[t]he failure to merge allied offenses at sentencing does not render a sentence void, merely

voidable.” State v. Yee, 2013-Ohio-5184, ¶14 (Ohio App. 6 Dist.). See also State v. Moore, 2013 Ohio App. LEXIS 1332, 2013-Ohio-1431, ¶15 (Ohio App. 7 Dist.); State v. Garnett, 2013 Ohio App. LEXIS 1092, 2013-Ohio-1210, ¶10 (Ohio App. 10 Dist.); State v Miller, 2012 Ohio App. LEXIS 1678, 2012 Ohio 1922, ¶6 (Ohio App. 4 Dist.); State v. Parson, 2012 Ohio App. LEXIS 634, 2012-Ohio-730, ¶9 (Ohio App. 2 Dist.). As such, failure to raise the issue of allied offenses on direct appeal renders the issue barred by the doctrine of res judicata. See Yee.

Appellant failed to raise the merger issue in his direct appeal back in 2010. As a result, the Sixth District correctly determined that his petition for post-conviction relief was not only untimely, but that he was also barred by the doctrine of res judicata from doing so in the instant appeal.

It has been well-established that the doctrine of res judicata will bar a defendant from raising an allied-offenses argument in post-conviction proceedings when the defendant could have, but did not, raise said issue on direct appeal. Therefore, this is not an issue that presents this Honorable Court with a substantial constitutional question, or one that is of public or great general interest.

#### **STATEMENT OF THE CASE AND FACTS**

Appellant, Ronald J. Dority, was indicted on July 11, 2008, by the Erie County Grand Jury for the offenses of felonious assault, a felony of the second degree under Count No. One of the indictment; a violation of a protection order, a felony of the third degree, under Count No. Two; attempted murder, a felony of the first degree, under Count No. Three; kidnapping, a felony of the first degree, under Count No. Four; having a weapon under a disability, a felony of the third degree, under Count No. Five; and domestic violence, a felony of the third degree, under Count No. Six of the indictment. Further, a gun specification was found by the grand jury

as to Count Nos. One, Two and Six.

On February 20, 2009, after full discovery was exchanged and pretrials were conducted, Appellant entered into a plea agreement. Appellant pled guilty to a violation of a protection order, kidnapping, and felonious assault. The remaining counts were dismissed.

On May 1, 2009, a sentencing hearing was held and Appellant was sentenced to a total term of twelve years. **See Judgment Entry Journalized May 5, 2009.** On May 19, 2009, Appellant filed a notice of appeal in The Sixth District Court of Appeals on the entry journalized May 5, 2009. **See Notice of Appeal filed May 19, 2009.**

On September 17, 2009, appellate counsel filed a notice of voluntary dismissal based on recent case law, and Appellant's appeal was dismissed by entry journalized September 21, 2009. On March 3, 2010, Appellant filed an application to reopen his appeal. This Honorable Court granted the motion for delayed reopening on April 6, 2010. **State v. Dority**, 2010 Ohio App. LEXIS 1322, 2010-Ohio-1596 (Ohio App. 6 Dist.).

On June 15, 2010, appellate counsel filed a motion to withdraw and a brief pursuant to **Anders v. California** (1967), 386 U.S. 738. As evidenced by entry filed on September 7, 2010, the motion to withdraw was granted. Further, Appellant hired new counsel, and this Honorable Court allowed counsel to file a brief on behalf of Appellant.

On May 20, 2011, the judgment of the Erie County Court of Common Pleas was affirmed by this Honorable Court. **See State v. Dority**, 2011 Ohio App. LEXIS 2081, 2011-Ohio-2438 (Ohio App. 6 Dist.). In his appeal, Appellant never raised the issue of the trial court's failure to conduct an allied offenses determination. **See Id.**

Appellant filed a notice of appeal with the Supreme Court of Ohio on July 5, 2011 on the judgment entry filed May 20, 2011. Said appeal was dismissed on October 19, 2011.

On August 30, 2013, Appellant filed a Motion to for an allied offenses determination with the trial court. The trial court denied Appellant's motion. **See Judgment Entry filed September 26, 2013.**

On October 18, 2013, Appellant filed a Notice of Appeal on the trial court's judgment entry filed September 26, 2013. **See Notice of Appeal filed October 18, 2013.** The Sixth District determined that Appellant's Motion was to be construed as a Petition for Post-Conviction relief that was untimely filed, and that, in the alternative, Appellant's claim on this point was barred by the doctrine of res judicata. **See State v. Dority**, 2014 Ohio App. LEXIS 876, 2014-Ohio-966 (Ohio App. 6 Dist.).

Appellant has filed a Notice of Appeal in the Ohio Supreme Court on the decision of the Sixth District Court of Appeals in **State v. Dority**, 2014 Ohio App. LEXIS 876, 2014-Ohio-966 (Ohio App. 6 Dist.).

### **ARGUMENT**

#### **PROPOSITION OF LAW NO. ONE: A DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF, ASSERTING THAT THE TRIAL COURT ERRED BY FAILING TO MERGE MULTIPLE CONVICTIONS AT SENTENCING, WILL BAR THE TRIAL COURT FROM ENTERTAINING THE PETITION IF IT IS UNTIMELY FILED.**

The Sixth District properly classified Appellant's Motion for Allied Offense Determination as a petition for post-conviction relief that was untimely for failure to meet the statutory requirements set forth in O.R.C. §2953.21(A).

O.R.C. §2953.21(A)(1) states that "[a]ny 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 the sentence...and ask the court to

vacate or set aside the judgment.” The Ohio Supreme Court has held that, despite what its caption reads, a motion filed subsequent to a defendant’s direct appeal “seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated” is a petition for post-conviction relief under R.C. §2953.21(A)(1). State v. Reynolds, 79 Ohio St.3d 158, 160 (1997). As such, the Sixth District properly affirmed Appellant’s motion as a petition for post-conviction relief governed by O.R.C. §2953.21.

In order for such petition to be considered timely filed it must “be filed no later than one hundred and 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.” R.C. 2953.21(A)(2). In the case at bar, the trial transcripts in the direct appeal were filed in on August 10, 2009. Appellant filed this petition for post-conviction relief on August 30, 2013, well beyond the 180 day statutory time period set forth in O.R.C. 2953.21(A)(2).

When a defendant files a motion for post-conviction relief outside the statutory time period, a trial court may not entertain said motion. O.R.C. §2953.23(A). However, O.R.C. §2953.23 sets forth two narrow instances in which a defendant may file a motion for post-conviction relief, outside the statutory time-limit. O.R.C. 2953.23 states, in relevant part, that:

(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)<sup>1</sup> of this section applies:

(1) Both of the following apply:

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<sup>1</sup> R.C. 2953.23(A)(2), which pertains to post-conviction petitions based on statutory applications for DNA testing, does not apply here.

- (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.

While a failure to establish either of the prongs set forth in O.R.C. §2953.23(A)(1) would have been fatal to a defendant in filing his petition outside the statutory time period, in the case at bar, Appellant had failed to establish that either prong had been met. The Sixth District further determined that “the circumstances of appellant’s case [did] not support application of the exception.” **State v. Dority**, 2014 Ohio App. LEXIS 876, 2014-Ohio-966, ¶10 (Ohio App. 6 Dist.).

When a defendant’s petition for post-conviction relief is filed outside the statutory time period set forth in O.R.C. §2953.21, and he has failed to satisfy either of the exceptions provided under O.R.C. §2353.23, Appellant’s petition is to be deemed untimely and a trial court lacks jurisdiction to consider the merits of the petition. As a result, Appellant has failed to establish that this issue raises a substantial constitutional question, or that it is a matter of public or great general interest, and jurisdiction should be denied.

**PROPOSITION OF LAW NO. TWO: THE FAILURE TO MERGE ALLIED OFFENSES AT SENTENCING DOES NOT RENDER A SENTENCE VOID, MERELY VOIDABLE; THEREFORE FAILURE TO RAISE SAID ISSUE ON DIRECT APPEAL IS BARRED BY THE DOCTRINE OF RES JUDICATA.** **State v. Yee**, 2013-Ohio-5184, 2013 Ohio App. LEXIS 5395, ¶14 (Ohio App. 6 Dist.).

O.R.C. §2941.25 states that a person may be charged, but not convicted of crimes that

constitute allied offenses of similar import. O.R.C. §2941.25 provides, in relevant part, that:

**§2941.25: Multiple counts**

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

The thrust of Appellant's sole proposition of law is that failure to merge said convictions renders a sentence void. However, this runs contrary to the majority of appellate district courts that have addressed this issue. Multiple Ohio appellate district courts have held that "[t]he failure to merge allied offenses at sentencing does not render a sentence void, merely voidable." State v. Yee, 2013-Ohio-5184, ¶14 (Ohio App. 6 Dist.). See also State v. Garnett, 2013 Ohio App. LEXIS 1092, 2013-Ohio-1210, ¶10 (Ohio App. 10 Dist.); State v. Moore, 2013 Ohio App. LEXIS 1332, 2013-Ohio-1431, ¶15 (Ohio App. 7 Dist.); State v. Currie, 2013 Ohio App. LEXIS 5429, 2013-Ohio-5223 ¶20 (Ohio App. 5 Dist.); State v. Grant, 2013 Ohio App. LEXIS 3517, 2013-Ohio-3421 ¶18 (Ohio App. 1 Dist.) State v Miller, 2012 Ohio App. LEXIS 1678, 2012 Ohio 1922, ¶6 (Ohio App. 4 Dist.); State v. Parson, 2012 Ohio App. LEXIS 634, 2012-Ohio-730, ¶9 (Ohio App. 2 Dist.). As such, failure to raise the issue of allied offenses on direct appeal renders the issue barred by the doctrine of res judicata. See Yee.

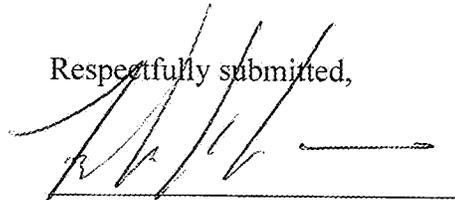
It has been well established that failure to merge allied offenses at sentencing renders a sentence voidable, but not void and is therefore barred by the doctrine of res judicata if said error is not raised on direct appeal. Since Appellant failed to raise an allied offenses argument in his direct appeal, the Sixth District correctly held that said argument was barred by the doctrine of res judicata. As a result, the Sixth District never entertained the argument of whether Appellant's conviction should have been merged since the issue was barred by the doctrine of res judicata.

Based on the foregoing, Appellant has failed to establish that this issue raises a substantial constitutional question, or that it is a matter of public or great general interest, and jurisdiction should be denied.

**CONCLUSION**

Because Appellant has failed to demonstrate that this Honorable Court has original or appellate jurisdiction, or why this case involves a substantial constitutional question, or that this case is one of public or great general interest, Appellee respectfully moves that Appellant's memorandum in support of jurisdiction be dismissed.

Respectfully submitted,

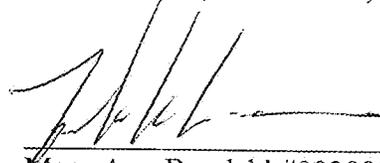


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**CERTIFICATION**

This is to certify that a copy of the foregoing Memorandum in Opposition of Jurisdiction was mailed to Ronald J. Dority, #552-012, M.C.I., P.O. Box 57, Marion, OH 43301, this 30<sup>th</sup> day of April, 2014, by regular U.S. Mail.



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