

[Cite as *State v. Everson*, 2016-Ohio-3419.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 MA 0072
V.	)	
	)	OPINION
REGINALD EVERSON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 08CR429
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JUDGMENT:	Reversed and Remanded
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APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph Rivera Assistant Prosecutor 21 West Boardman St., 6 <sup>th</sup> Floor Youngstown, Ohio 44503-1426
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For Defendant-Appellant	Reginal Everson, Pro –se #630-775 5701 Burnett Road P.O. Box 901 Leavittsburg, Ohio 44430
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JUDGES:

Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Carol Ann Robb

Dated: June 10, 2016

[Cite as *State v. Everson*, 2016-Ohio-3419.]  
DONOFRIO, P.J.

{¶1} Defendant-appellant, Reginald Everson, appeals from a Mahoning County Common Pleas Court judgment denying his petition for postconviction relief.

{¶2} This court set out the facts giving rise to this case in appellant's direct appeal as follows:

On March 30, 2008, Terrell Roland ("Terrell") was shot and killed outside his mother's home at 117 East Avondale in Youngstown, Mahoning County, Ohio. He was 18 years old. Terrell was sitting on the driveway next to his friend Mickele Glenn ("Glenn") when someone in a black vehicle drove by and shot him. Glenn ran inside the house and told the victim's mother, Carol Roland ("Carol"), about the shooting and she ran outside. Terrell told his mother that "Reg shot me," and he asked her to call 911. Terrell then lost consciousness and was unresponsive when police arrived. He died later that evening at the hospital.

Youngstown Police Officers Kelly Lamb and Robert DiMaiolo were two of the officers who responded to the shooting. Officer Lamb determined that Glenn had witnessed the shooting and she placed him in Officer DiMaiolo's cruiser. Glenn initially stated that he had not seen the crime, but admitted he was a witness after being placed in the police cruiser. He identified the shooter as a man he knew named "Reg," and he gave a description of the car used in the shooting: a black, four-door Buick Regal. He did not know Reg's last name. Glenn told Officer DiMaiolo that Reg lived at 114 West Chalmers Avenue in Youngstown. Officer DiMaiolo took Glenn to the police station for further questioning and asked Officer Michael Quinn to investigate the 114 West Chalmers Avenue address. Officer Quinn went to the location and spoke with Marion Everson, Appellant's uncle, who stated that Appellant lived with him and had access to a black Buick Regal.

It was later determined that Glenn and the victim were friends,

and they both knew Appellant. On the afternoon of the shooting, Glenn was at 117 East Avondale to get his hair cut. He was wearing a bullet proof vest and was carrying a firearm because of a feud he was having with one of Appellant's cousins. He was standing outside the house in the driveway and Terrell was sitting next to him when a black Buick Regal drove up to the house and stopped. Shots were fired from the vehicle and hit Terrell. Glenn recognized the shooter as Reg and saw that there was no one else in the vehicle. He later picked Appellant out of a photo array as the person who shot Terrell.

*State v. Everson*, 7th Dist. No. 12 MA 128, 2016-Ohio-87, ¶ 2-4.

{¶3} A Mahoning County Grand Jury indicted Appellant on one count of aggravated murder, a first-degree felony in violation of R.C. 2903.01(A)(F), with an accompanying specification, and having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13(A)(2)(b). The matter was bifurcated and proceeded to a jury trial on the aggravated murder charge and accompanying specification. The jury found Appellant guilty. The trial court then held a bench trial on the having a weapon while under disability charge and found Appellant guilty. The court sentenced Appellant to 30 years to life for aggravated murder, five years for the firearm specification, and three years for having a weapon while under disability, to be served consecutively for a total sentence of 38 years to life.

{¶4} Appellant filed a direct appeal on July 11, 2012. On appeal, this court affirmed Appellant's convictions for aggravated murder and the specification. *Everson*, at ¶ 71. But we reversed his conviction for having a weapon while under a disability finding that Appellant never waived his right to a jury trial on this charge. *Id.*

{¶5} Appellant, acting pro se, filed a motion for postconviction relief on July 12, 2013. Appellant argues in his petition that he was denied effective assistance of counsel because his trial counsel "erred" by (1) failing to subpoena several witnesses, (2) failing to "put on a case" to corroborate Appellant's alibi, and (3) denying Appellant his right to testify at trial. In support of his petition, Appellant

offered only his own affidavit. In his affidavit, Appellant complains that, although he told trial counsel he was elsewhere at the time of the murder, counsel failed to call witnesses to corroborate Appellant's story and that despite numerous requests, trial counsel refused to allow Appellant to testify on his own behalf about his whereabouts on the day of the murder.

{¶6} The State responded on August 20, 2013, with a motion for judgment on the pleadings arguing that Appellant failed to offer any evidence dehors the record to support his claims, his actual innocence, or a constitutional violation. On September 25, 2013, the trial court, without an evidentiary hearing, denied Appellant's petition because Appellant's pleadings and affidavit failed to demonstrate that trial counsel was ineffective. Thus, the trial court concluded that Appellant's constitutional rights were not violated.

{¶7} Appellant filed a motion for leave to file delayed appeal from the September 25, 2013, denial of his petition on December 23, 2013, which this court granted on January 17, 2014. That appeal is numbered 13 MA 0192.

{¶8} On February 28, 2014, Appellant filed a motion to dismiss his appeal claiming there was no final appealable order as the trial court's September 25, 2013, order failed to set forth findings of fact and conclusions of law.

{¶9} On March 6, 2014, Appellant filed, with the trial court, a motion for leave to amend his petition for postconviction relief. In it, Appellant asserts an "additional claim for relief" which includes an affidavit from Carlos Valentin. Valentin's affidavit was signed on December 3, 2013, almost five months after Appellant's petition for postconviction relief was filed. Valentin claims that he was across the street from the scene of the crime at the time of the murder, that he never saw a black vehicle in the area, and that upon entering his home he heard shots and fell to the floor. When he looked out he saw Glenn with a gun standing over the victim. This motion for leave to amend was overruled by the trial court on March 10, 2014. The trial court indicated it reviewed and considered the file and Appellant's motion and that, based on the facts and the law, the motion was without merit.

**{¶10}** On April 22, 2014, this court continued Appellant's February 28, 2014, motion to dismiss his appeal and issued a limited remand for 30 days to allow the trial court to state with specificity its findings of fact and its conclusions of law.

**{¶11}** On May 9, 2014, Appellant filed another motion for leave to amend his petition for postconviction relief again attaching the affidavit of Valentin. This motion is essentially the same as the one filed on March 6, 2014.

**{¶12}** On May 19, 2014, the State filed a response to the motion for leave to amend. On the same day, the State filed proposed findings of fact and conclusions of law. In its response to Appellant's motion for leave to amend, the State noted that appellant's original petition failed to provide adequate evidentiary support and, since the overruling of that petition was appealed prior to the motion for leave to amend, the trial court "is in all likelihood without jurisdiction to allow Defendant to amend his petition at this time." The State did not address the Valentin affidavit.

**{¶13}** On May 22, 2014, the trial court denied Appellant's May 9, 2013, second motion for leave to amend his motion for postconviction relief. The court stated it was without jurisdiction to consider the motion.

**{¶14}** On the same day, the trial court filed a judgment entry adopting the State's proposed findings of fact and conclusions of law. It appears the Valentin affidavit was not considered as the entry indicates that Appellant submitted his own affidavit in support of his motion and mentions no other affidavit. However, the judgment entry also indicates that Appellant failed to meet his burden even with his "supporting *affidavits*" (emphasis added). Nonetheless, it seems clear the Valentin affidavit was not considered by the trial court in its denial of Appellant's petition for postconviction relief. The trial court's findings of fact and conclusions of law contain no reference to the Valentin affidavit.

**{¶15}** On June 13, 2014, since the trial court provided findings of fact and conclusions of law, this court overruled Appellant's motion to dismiss his appeal.

**{¶16}** On June 23, 2014, Appellant filed another notice of appeal, this one from the trial court's judgment entry (findings of fact and conclusions of law) filed May

22, 2014. Appellant's second notice of appeal was assigned case number 14 MA 0072.

{¶17} After some miscommunication regarding the timely filing of briefs, this court filed a judgment entry merging case number 13 MA 0192 into 14 MA 0072, stating - "For purposes of judicial economy and clarity this appeal [13 MA 192] is merged into Case No. 14 MA 72. For records and report purposes this appeal [13 MA 192] is dismissed and will proceed under Case No. 14 MA 72."

{¶18} Appellant, still acting pro se, raises four assignments of error. We first consider Appellant's fourth assignment of error.

{¶19} Appellant's fourth assignment of error states:

TRIAL COURT ERRED WHEN IT DID NOT ADDRESS THE DEFENDANT'S MOTION FOR LEAVE TO AMEND PETITION FOR POST-CONVICTION RELIEF FILED WHILE FINAL JUDGMENT FOR THE PETITION WAS PENDING. TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR THE STATE OF OHIO BASED ON THE ERRONEOUS FACT THAT PETITIONER FAILED TO ATTACH AFFIDAVITS IN SUPPORT OF HIS PETITION WHEN AN UNSOLICITED, MATERIAL AFFIDAVIT WAS FILED, BUT IGNORED, VIOLATING APPELLANT'S DUE PROCESS RIGHTS.

{¶20} In his fourth assignment of error, Appellant asserts that it was error for the trial court to grant the State "summary judgment" on Appellant's petition for postconviction relief indicating in its findings of fact and conclusions of law that the only evidence submitted in support of his petition was his own affidavit, despite the fact that Appellant filed two motions for leave to amend his petition both of which include the Carlos Valentin affidavit.

{¶21} R.C .2953.21 governs postconviction proceedings. Postconviction relief is a civil collateral attack on a criminal judgment. *State v. Calhoun*, 86 Ohio St.3d

279, 281, 1999-Ohio-102, 714 N.E.2d 105. It affords appellant no rights beyond those provided by statute.

{¶22} A criminal defendant is not automatically entitled to a postconviction hearing. *State v. Smith*, 7th Dist. No. 06-BE-64, 2007-Ohio-5244, ¶ 12, citing *State v. Calhoun* at 283; *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). The trial court must first determine if there are substantive grounds to believe “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\* \* \*” R.C. 2953.21(A)(1); *Smith*, ¶ 12. Absent a showing by the petitioner of substantive grounds to believe there was such an infringement of the petitioner’s Constitutional rights, the trial court may dismiss the petition without a hearing. R.C. 2953.21(C).

{¶23} In reviewing a trial court’s judgment on a petition for postconviction relief, the standard of review to be applied by this court is abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. The term “abuse of discretion” connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); *State v. Madison*, 10th Dist. Franklin No. 08AP-246, 2008-Ohio-5223, ¶ 8. Thus, this court must consider whether the trial court’s dismissal of Appellant’s petition for postconviction relief was unreasonable, arbitrary, or unconscionable.

{¶24} Appellant filed two motions for leave to amend his petition for postconviction relief, the first on March 6, 2014, and the second on May 9, 2014. Both motions included the Valentin affidavit. The March 6, 2014 motion was overruled by the trial court on March 10, 2014, as being “without merit.” The May 9, 2014 motion was overruled on May 22, 2014, because the trial court concluded “that it lacks jurisdiction to hear said motion.”

{¶25} The ability to amend a petition for postconviction relief is governed by R.C. 2953.21(F) which provides:

At any time before the answer or motion is filed, the petitioner may

amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

**{¶26}** Appellant's two motions for leave to amend his petition were denied. The question presented now is whether he needed leave to file his motions. To answer this question, this court must determine what is meant by the words "the answer or motion." If an answer or motion was filed, this cut off Appellant's right to amend his petition without leave of court.

**{¶27}** R.C. 2953.21(D) provides for the filing of "the answer or motion" referred to in R.C. 2953.21(F). It states, in pertinent part:

Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion.

**{¶28}** Appellant's petition was filed on July 12, 2013. The State did not timely file the mandatory answer or motion within ten days. However, the State did file, on August 20, 2013, what it styled as a motion for judgment on the pleadings. The State asserted that its motion was based upon R.C. 2953.21 and Civ.R. 12(C). Thus, this court must determine if the State's Civ.R. 12(C) motion for judgment on the pleadings was an "answer or motion" within the meaning of R.C. 2953.21(D) and (F) which would cut off Appellant's ability to amend his petition without leave of court.

**{¶29}** Before considering this issue, there is another complicating event that should be discussed. Before Appellant filed either of his two motions for leave to amend his petition, the trial court, on September 25, 2013, denied Appellant's July 12, 2013, petition. Appellant was granted leave by this court to file a delayed appeal. Appellant then filed a motion to dismiss his appeal since the trial court failed to issue findings of fact and conclusions of law. This court issued a limited remand for this purpose and, on May 22, 2014, the trial court filed findings of fact and conclusions of



law. Appellant filed a second notice of appeal and this court consolidated his two appeals.

**{¶30}** While these events occurred, Appellant filed his two motions for leave to amend his petition. Thus, the original denial of Appellant's petition on September 25, 2013, had no effect on Appellant's two motions for leave to amend filed with the trial court, since the September 25, 2013 entry was not a final appealable order. *State ex rel. Ferrell v. Clark*, 13 Ohio St.3d 3, 469 N.E.2d 843 (1984); *State v. Hostacky*, 8th Dist. No. 101282, 2015-Ohio-419. Thus, there was no final appealable order from the trial court until May 22, 2014.

**{¶31}** We now return to the issue of whether Appellant needed leave of court to file his amended petitions under sections (D) and (F) of R.C. 2953.21. Appellant cites *State v. Wilkins*, 127 Ohio App.3d 306, 712 N.E.2d 1255 (2nd Dist.1998) for the proposition that the trial court could not ignore the Valentin affidavit attached to his two motions for leave to amend. In *Wilkins*, defendant filed a petition for postconviction relief but attached no affidavits. The state moved for summary judgment arguing that defendant's petition was defective because it contained no affidavits. Defendant asked for additional time to submit affidavits. Before the court ruled on defendant's motion for additional time, and without leave of court, defendant filed an amended petition with two affidavits. The state moved to strike the amended petition arguing it was not timely filed. Without ruling on the motion to strike, the trial court granted the state's motion for summary judgment without considering the two affidavits.

**{¶32}** The court in *Wilkins* observed that a proceeding under R.C. 2953.21 is a civil proceeding and that the Rules of Civil Procedure apply "unless by their nature they would clearly be inapplicable." *Wilkins* at 310; Civ.R. 1(C). The court noted that under Civ.R. 5(A), a party "may amend his pleading as a matter of course at any time before a responsive pleading is served." This, *Wilkins* concluded, is what is meant by the words "answer or motion" in R.C. 2953.21(F), i.e., "answer or motion" means a responsive pleading. Citing *State ex rel. Hanson v. Guernsey Cty. Commrs.* (1992),

65 Ohio St.3d 545, 549, 605 N.E.2d 378 and *Steiner v. Steiner* (1993), 85 Ohio St.3d 513, 620 N.E.2d 152, the *Wilkins* court concluded that a Civ.R. 12(B)(6) motion to dismiss is not a responsive pleading for purposes of Civ.R. 15(A). Using this reasoning, the *Wilkins* court concluded:

We hold that a motion for summary judgment that the state files is not a responsive pleading that cuts off a petitioner's right to amend his petition pursuant to Civ.R. 15(A) and R.C. 2953.21(F).

The *Wilkins* court accordingly held that the trial court erred when it ignored the affidavits attached to defendant's amended complaint since defendant did not need leave to file the same. *Id.* at 312.

{¶33} Here, the State filed a Civ.R. 12(C) motion for judgment on the pleadings which is considered a belated Civ.R. 12(B)(6) motion and, accordingly, not a responsive pleading that cuts off Appellant's right to amend his petition without leave of court. *Maynard v. Norfolk S. Railway*, 4th Dist. No. 08CA3267, 2009-Ohio-3143, ¶ 11; *Dolan v. Glouster*, 173 Ohio App.3d 617, 2007-Ohio-6275, 879 N.E.2d 838, ¶ 7, citing *State ex rel. Holloman v. Phillips*, 100 Ohio St.3d 70, 2003-Ohio-5063, 796 N.E.2d 524, ¶ 8, fn. 3. Thus, Appellant did not need leave of court to file either of his two motions to amend his petition, both of which include the Valentin affidavit.

{¶34} The State responds, relying on *State v. Phillips*, 9th Dist. No. 18940, 1999 WL 58961, at \*4, (Feb. 3, 1999), that the trial court has discretion to deny motions to amend petitions and that this court should not disturb the decision of the trial court absent an abuse of discretion. See also, *State v. Byrd*, 145 Ohio App.3d 318, 333-334, 762 N.E.2d 1043 (2001). However, the court in *Phillips* denied defendant's motion to amend "[b]ecause the State had answered defendant's petition before he sought leave to amend." *Phillips*, at \*4. (The decision in *Phillips* does not specifically describe the "answer" filed there with any specificity. Rather, it simply states an answer was filed). *Byrd* involved a successive motion to amend where the trial court concluded it had no jurisdiction. Thus, *Wilkins* is more persuasive here.

Appellant did not need leave of court to amend his original petition to include the Valentin affidavit.

{¶35} Accordingly, Appellant's fourth assignment of error has merit and is sustained. We find Appellant did not need leave of court to file his amended petitions and, thus, the trial court abused its discretion when it denied Appellant's petition for post-conviction relief without considering Appellant's amended petitions which include the affidavit of Carlos Valentin. The decision of the trial court denying Appellant's petition for post-conviction relief is reversed and remanded. On remand, the trial court shall consider Appellant's two amended petitions for postconviction relief which include the affidavit of Carlos Valentin and issue findings of fact and conclusions of law regarding the amended petitions. This decision renders Appellant's first three assignments of error moot. Accordingly, they are not addressed here.

Waite, J., concurs.

Robb, J., concurs.