[Cite as *State v. McIntyre*, 2023-Ohio-2228.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. LEROY L. MCINTYRE Appellant	C.A. No. 30047 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 91 01 0135

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

SUTTON, Judge.

{¶1} Defendant-Appellant, Leroy L. McIntyre appeals the judgment of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms.

I.

Relevant Procedural Background

{¶2} In *State ex rel. McIntyre v. Summit Cty. Ct. of Common Pleas*, 144 Ohio St.3d 589, 2015-Ohio-5343, ¶ 2-11, the Supreme Court of Ohio set forth the following background information relevant to this appeal:

* * *

> In February and July 1991, [Mr.] McIntyre was indicted on two counts of felonious assault and one count of aggravated burglary, plus specifications. Before trial, the trial court granted an oral motion to amend one of the felonious-assault counts to add a second victim.
>
> The jury convicted [Mr.] McIntyre of aggravated burglary and one count of felonious assault. The jury was unable to reach a verdict as to the amended felonious-assault count.

> The trial court issued a sentencing entry on September 9, 1991. That entry did not dispose of the amended felonious-assault charge on which the jury failed to reach a verdict. The entry also failed to address two new indictments that had been added to the case and were pending at the time.
>
> The [S]tate later indicted [Mr.] McIntyre on two new charges, again under the same case number. On May 22, 1992, the trial court issued a sentencing entry memorializing a plea deal involving the four posttrial indictments. Once again, however, the entry failed to address the unresolved felonious-assault charge from the trial.
>
> Finally, on June 28, 2012, [the trial court] signed an entry dismissing the felonious-assault charge as well as a related firearm specification. However, the court's order dismissed the felonious-assault charge *as indicted*, without disposing of the charge as amended before trial.
>
> * * *
>
> None of the documents in this case is a final, appealable order. The September 9, 1991 sentencing entry did not dispose of the felonious-assault charge, nor did it address the two new indictments that were pending at the time under the same case number. Likewise, the May 22, 1992 entry memorializing the plea bargain failed to reference the earlier verdicts and also left the felonious-assault charge unresolved. And finally, [the trial court's] June 28, 2012 order dismissing the felonious-assault charge did not recount the prior dispositions.
>
> In order to fashion a final, appealable order, then, one would have to consult at least three separate documents in violation of the *Baker* one-document rule. Moreover, at least one claim, the felonious-assault charge that was amended to add a second victim, has never been addressed in any court order.
>
> For this reason, we * * * issue a peremptory writ pursuant to S.Ct.Prac.R. 12.04(C) directing the county to issue a final, appealable order disposing of all the charges against [Mr.] McIntyre.
>
> * * *

{¶3} The trial court, on February 3, 2016, issued a sentencing entry, pursuant to the Supreme Court of Ohio's directive, which consolidated the previous sentencing entries and addressed the prior deficiencies to create a final, appealable order. Mr. McIntyre appealed from the February 3, 2016 sentencing entry and this Court overruled Mr. McIntyre's assignments of

error. In so doing, this Court, in a 2-1 opinion, indicated "the doctrines of res judicata and law of the case bar us from considering any of [Mr.] McIntyre's arguments that were or could have been raised on direct appeal in 1991. Accordingly, [Mr.] McIntyre's first, third, fourth, fifth, sixth, seventh, [eighth], and ninth assignments of error are overruled." *State v. McIntyre*, 9th Dist. Summit No. 28125, 2018-Ohio-2001, ¶ 25 ("*McIntyre* 2018"). We also determined Mr. McIntyre's second assignment of error was moot based upon our resolution of the other assignments of error. *Id*. at ¶ 26. The dissent, however, reasoned:

> Because the Ohio Supreme Court has determined that the trial court's original sentencing entries were not final, appealable orders, the doctrine of res judicata cannot be applied to Mr. McIntyre's arguments. In addition, because the defects in the entries go beyond what can be characterized as mere "clerical omission[s,]" the trial court could not correct them through a nunc pro tunc order. This Court should address Mr. McIntyre's arguments on their merits. I, therefore, respectfully dissent.

(Internal citations omitted.) *McIntyre* at ¶ 28, (Hensal J., dissenting.)

{¶4} On November 28, 2017, Mr. McIntyre filed a petition for post-conviction relief arguing his constitutional rights to due process and effective assistance of counsel "were violated in the State's path in obtaining a judgment or conviction against him." Mr. McIntyre, on August 2, 2018, then filed a motion to amend his petition for post-conviction relief based upon this Court's decision in *McIntyre* 2018. In denying Mr. McIntyre's petition for post-conviction relief, the trial court determined, pursuant to R.C. 2953.23(A)(1)(a) and (b), it did not have jurisdiction to adjudicate the merits of an untimely or successive post-conviction petition. Further, the trial court indicated, even if it had jurisdiction, Mr. McIntyre's claims are barred by the doctrine of *res judicata*.

{¶5} Mr. McIntyre now appeals raising five assignments of error for our review. To better facilitate our review and analysis, we reorder and group certain assignments of error.

II.

ASSIGNMENT OF ERROR I

THE FEBRUARY 3, 2016 ORDER FAILS TO DISPOSE ALL CHARGES, THUS IS NOT FINAL, MEANING THERE IS STILL NO FINAL APPEALABLE ORDER DISPOSING OF ALL CHARGES. THUS, UNDER *STATE V. CRAIG*, THE NINTH DISTRICT HAS NEVER HAD AND STILL HAS NO JURISDICTION OVER [MR. MCINTYRE'S] CASE, INCLUDING THIS APPEAL.

{¶6} In his first assignment of error, Mr. McIntyre argues the February 3, 2016 sentencing entry is not a final, appealable order because it does not properly dispose of the firearm specification for aggravated burglary. Mr. McIntyre bases his argument, in large-part, upon *State v. Craig*, 159 Ohio St.3d 398, 2020-Ohio-455. We, however, are not persuaded.

{¶7} "A judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus. "A 'firearm specification is merely a sentence enhancement, not a separate criminal offense.'" *State ex rel. Rodriguez v. Barker*, 158 Ohio St.3d 39, 2019-Ohio-4155, ¶ 10, quoting *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶ 17. "Thus, a trial court's failure to address a specification does not affect the finality of the order." *Id*. *See also State v. Baker*, 9th Dist. Summit No. 29943, 2021-Ohio-3991, ¶ 13. In *Craig* at ¶ 21, the Supreme Court of Ohio stated, "a conviction on one count of a multicount indictment is not a final, appealable order when other counts remain pending after a mistrial." However, *Craig, supra,* does not address the issue before us, which is whether a failure to dispose of a firearm *specification* to a count in the indictment affects finality. As such, although Mr. McIntyre contends otherwise, the *Craig* decision does not dictate the outcome of this assignment of error.

{¶8} Therefore, based upon *Rodriguez, supra*, *Ford, supra,* and *Baker*, *supra,* the trial court's failure to properly address the firearm specification for aggravated burglary does not affect the finality of the February 3, 2016 sentencing entry.

{¶9} Accordingly, Mr. McIntyre's first assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY APPLYING *RES JUDICATA* BASED ON THE NINTH DISTRICT COURT OF APPEALS' ERRONEOUS AND UNCONSTITUTIONAL REFUSAL TO ADDRESS [MR. MCINTYRE'S] DIRECT APPEAL ON THE MERITS.

{¶10} In his third assignment of error, Mr. McIntyre argues the trial court erred in not addressing his arguments on the merits and in applying res judicata.

{¶11} As previously indicated, the Supreme Court of Ohio, in *State ex. rel. McIntyre* at ¶ 2-11, concluded, in 2016, a final, appealable order did *not yet exist* in this matter. In so doing, the Supreme Court issued a peremptory writ directing the Summit County Court of Common Pleas to issue a final, appealable order disposing of all the charges against Mr. McIntyre. The Summit County Court of Common Pleas complied by issuing a final, appealable order on February 3, 2016.

{¶12} Subsequent to the Supreme Court of Ohio's ruling regarding finality, this Court, in *McIntyre* 2018, determined a final, appealable order existed prior to 2016. In *McIntyre* 2018, this Court determined a final, appealable order existed in 1991, which was then corrected through a series of nunc pro tunc entries. Further, in *McIntyre* 2018, this Court concluded Mr. McIntyre had his direct appeal in 1992. Mr. McIntyre appealed this Court's 2018 ruling to the Supreme Court of Ohio, arguing, in relevant part, the law of the case doctrine should apply to collateral actions that determine an issue in the direct action. The Supreme Court of Ohio, without comment, declined to accept jurisdiction on this specific issue.

{¶13} However, in *Craig*, 2020-Ohio-455, at ¶ 15, the Supreme Court of Ohio referenced *State ex. rel. McIntyre* as follows:

> this [C]ourt has on numerous occasions indicated that all counts of an indictment must be resolved before a judgment entry of conviction may become a final, appealable order. We have granted a peremptory writ of mandamus directing a trial court to issue a final order "disposing of all" charges. *See State ex rel. McIntyre* at ¶ 11.

On the issues of finality and res judicata, however, this Court is constrained by the issues and arguments presently before it. Only the Supreme Court of Ohio would have the authority to accept and determine those issues should Mr. McIntyre appeal from this Court's decision.

{¶14} Regarding the law-of-the-case doctrine, in *Nolan v. Nolan*, 11 Ohio St.3d 1, 3-4 (1984), the Supreme Court of Ohio stated:

> Briefly, the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.
>
> The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. However, the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.
>
> * * *
>
> [T]he law of the case is applicable to subsequent proceedings in the reviewing court as well as the trial court. *Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court.*

(Emphasis added.) Further, "[u]nder the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by [the Supreme Court of Ohio] *settles the issue of law appealed*." (Emphasis added.) *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, ¶ 16.

{¶15} Importantly, Mr. McIntyre's 2018 appeal and corresponding decision are not before this Court for review and consideration. Mr. McIntyre unsuccessfully sought reconsideration of

this Court's 2018 decision, unsuccessfully sought en banc consideration of this Court's 2018 decision, and unsuccessfully appealed this Court's 2018 decision to the Supreme Court of Ohio. As such, this Court's 2018 decision, as issued, has become the law of the case and Mr. McIntyre cannot attack its reasoning through a post-conviction relief motion. Moreover, Mr. McIntyre has not provided us with any caselaw or argument demonstrating how, based upon this record, this Court could overturn the 2018 *McIntyre* decision which became law of the case due to the Supreme Court of Ohio's decision to decline jurisdiction.

{¶16} Accordingly, Mr. McIntyre's third assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY DEEMING [MR. MCINTYRE'S] POST-CONVICTION RELIEF PETITION AS UNTIMELY AND SUCCESSIVE.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY MISSTATING THE FACTS REGARDING TRIAL COUNSEL'S KNOWLEDGE OF [T.H.] AS A SUSPECT.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED BY DENYING [MR. MCINTYRE'S] POST-CONVICTION RELIEF PETITION WITHOUT HOLDING AN EVIDENTIARY HEARING.

{¶17} In his second assignment of error, Mr. McIntyre contends the trial court improperly denied his petition for post-conviction relief as being untimely and successive. Additionally, in his fourth and fifth assignments of error, Mr. McIntyre argues the trial court erred by: (1) misstating facts regarding Mr. McIntyre's former trial counsel's knowledge of an alleged "suspect co-defendant," and (2) denying Mr. McIntyre's petition for post-conviction relief without holding an evidentiary hearing.

{¶18} Pursuant to R.C. 2953.23:

> (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[.]

(Emphasis added.)

{¶19} Based upon our resolution of Mr. McIntyre's third assignment of error, and being bound by the 2018 *McIntyre* decision as law of the case, we must determine whether Mr. McIntyre's current petition for post-conviction relief is successive, as Mr. McIntyre has filed several other petitions of this very nature. It is, therefore, Mr. McIntyre's burden to show that: (1) he was unavoidably prevented from discovery of the facts upon which he 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; and (2) by clear and convincing evidence, that, but for constitutional error at trial, no reasonable factfinder would have found Mr. McIntyre guilty of the offense of which he was convicted.

{¶20} Mr. McIntyre, in his brief, only focuses on the timeliness of the petition for post-conviction relief, and ignores the successive nature of his petitions. In so doing, Mr. McIntyre

fails to address the trial court's reasoning that it lacked jurisdiction, pursuant to R.C. 2953.23(A)(1), to adjudicate the merits of his successive petition for post-conviction relief.

{¶21} Accordingly, Mr. McIntyre's second, fourth, and fifth assignments of error are overruled.

III.

{¶22} For the reasons stated above, Mr. McIntyre's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETTY SUTTON
FOR THE COURT

HENSAL, P. J.
CONCURS.

CARR, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

STEPHEN P. HANUDEL, Attorney at Law, for Appellant.

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