

[Cite as *State v. Perry*, 2017-Ohio-8324.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105807

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVEION PERRY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610816-A

BEFORE: Jones, J., E.T. Gallagher, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 26, 2017

FOR APPELLANT

Daveion Perry, pro se
Inmate No. 691391
Trumbull Correctional Institution
Leavittsburg, Ohio 44430

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Mary M. Dyczek
Assistant County Prosecutor
The Justice Center, 9th Floor
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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Daveion Perry, appeals the trial court's decision to deny his postconviction petition. The state concedes the error. We reverse and remand.

{¶2} In October 2016, Perry pleaded guilty to aggravated murder, five counts of aggravated robbery, four counts of kidnapping, two counts of felonious assault, breaking and entering, obstructing official business, tampering with evidence, and accompanying three-year firearm specifications. The trial court sentenced Perry to an aggregate sentence of life in prison without parole to be served consecutive to six years in prison on the firearm specifications.

{¶3} In December 2016, Perry, pro se, sought leave to file a delayed appeal and appointment of appellate counsel. This court granted both motions and appointed Perry counsel.

{¶4} In April 2017, Perry, pro se, filed a motion for postconviction relief and a motion for appointment of counsel in the trial court. In May 2017, the trial court denied both motions, stating that it did not have jurisdiction to rule on Perry's motions because he had appealed his underlying conviction.

{¶5} In his appeal, Perry's counsel filed a motion to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct.1396, 18 L.Ed.2d 493 (1967), based on the belief that no prejudicial error occurred below and that any grounds for appeal would be frivolous. This court agreed and in August 2017, this court dismissed his appeal and granted appellate counsel's request to withdraw, finding that no meritorious argument existed and

that an appeal would be wholly frivolous. *State v. Perry*, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324, ¶ 13.

{¶6} Perry now appeals the trial court's May 2017 denial of his postconviction petition. He raises one assignment of error in which he argues that the trial court erred in finding that it did not have jurisdiction to rule on his motion for postconviction relief. In response, the state filed a notice of conceded error pursuant to Loc.App.R. 16(B).

{¶7} R.C. 2953.21(D) states that "[t]he court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending." R.C. 2953.21(A)(2) provides that a petition is timely filed if it is filed within 365 days after the date on which the transcript is filed in the court of appeals in the direct appeal. Here, Perry filed his petition for postconviction relief approximately 45 days after the filing of the transcript with this court for his direct appeal. Therefore, his petition was timely filed and, as the state concedes, the trial court erred when it ruled that it did not have jurisdiction to consider the petition.

{¶8} The sole assignment of error is sustained.

{¶9} Judgment reversed and case remanded.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common

pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

EILEEN T. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR