[Cite as *State v. Timmons*, 2019-Ohio-3506.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 105940,105941, and 105942
TERRANCE TIMMONS, JR.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 27, 2019

Cuyahoga County Court of Common Pleas
Case Nos. CR-16-611131-A, CR-16-611383-A, and CR-16-611004-A
Application for Reopening
Motion No. 528763

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory J. Ochocki, Assistant Prosecuting Attorney, *for appellee*.

Terrance Timmons, Jr., *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Terrance Timmons, Jr., has filed a second App.R. 26(B) application for reopening of the appellate judgment that was rendered by this court in *State v.*

Timmons, 8th Dist. Cuyahoga Nos. 105940, 105941, and 105942, 2018-Ohio-2837. For the following reasons, we decline to reopen Timmons's direct appeal.

I. FACTS

{¶ 2} On July 19, 2018, this court rendered an opinion that affirmed Timmons's convictions and sentences imposed in three underlying criminal cases, *State v. Timmons,* Cuyahoga C.P. Nos. CR-16-611004-A, CR-16-611131-A, and CR-16-611383-A. This court's judgment found that Timmons's two assignments of error, which involved the claims of defective pleas of guilty pursuant to Crim.R. 11 and the imposition of maximum, consecutive sentences, were not well taken.

{¶ 3} On October 18, 2018, Timmons filed an App.R. 26(B) application for reopening. On November 7, 2018, Timmons filed a motion to withdraw the App.R. 26(B) application for reopening. On November 19, 2018, Timmons's motion to withdraw his App.R. 26(B) was granted and the application was denied as moot. On February 1, 2019, Timmons filed a motion to vacate the motion to withdraw, captioned "motion to vacate fraudulent motion," on the basis that it was filed by an "unknown" individual and did not represent his desire to withdraw the application.

{¶ 4} On April 9, 2019, the "motion to vacate fraudulent motion" was denied and it was further held that a substantive review of the proposed assignments of error in support of his claim of ineffective assistance of appellate counsel failed to establish any claim of ineffective assistance of appellate counsel. On May 28, 2019, Timmons filed a second App.R. 26(B) application for reopening.

II. UNTIMELY FILING OF APP.R. 26(B) APPLICATIONS FOR REOPENING

{¶ 5} Timmons's first App.R. 26(B) application for reopening was filed on October 18, 2018, and the second application for reopening was filed on May 28, 2019. Both applications for reopening were filed beyond the 90- day period for the filing of a timely application for reopening.

{¶ 6} App.R. 26(B)(2)(b) requires that Timmons establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment" that is subject to reopening. The Supreme Court of Ohio, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has established that:

> [W]e now reject [the applicant=s] claims that those excuses gave good cause to miss the 90-day deadline in App.R. 26(B). * * * Consistent enforcement of the rule=s deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved. Ohio and other states "may erect reasonable procedural requirements for triggering the right to an adjudication," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. * * * The 90-day requirement in the rule is applicable to all appellants, *State v. Winstead*, 74 Ohio St.3d 277, 278, 658 N.E.2d 722 (1996), and [the applicant] offers no sound reason why he, unlike so many other Ohio criminal defendants, could not comply with that fundamental aspect of the rule. *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, ¶ 7. *See also State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970.

{¶ 7} Timmons has failed to establish a showing of good cause for the untimely filing of either of his applications for reopening, which were both filed more than 90 days after journalization of the appellate judgment of July 19, 2018. Thus, we are required to deny the second untimely filed application for reopening. *Gumm, supra*; *State v. Cooey*, 73 Ohio St.3d 411, 653 N.E.2d 252 (1995); *State v. Reddick*, 72 Ohio St.3d 88, 647 N.E.2d 784 (1995).

{¶ 8} Of greater significance is the fact that Timmons is not permitted to file a second application for reopening. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289. There exists no right to file successive applications for reopening under App.R. 26(B). *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 299. *State v. Richardson*, 74 Ohio St.3d 235, 658 N.E.2d 273 (1996); *State v. Cheren*, 73 Ohio St.3d 137, 138, 652 N.E.2d 707 (1995).

III. SUBSTANTIVE REVIEW OF PROPOSED ASSIGNMENTS OF ERROR

{¶ 9} Finally, a substantive review of Timmons's two proposed assignments of error fails to reveal the existence of any prejudice that would have resulted in a different result on appeal.

A. FIRST PROPOSED ASSIGNMENT OF ERROR

{¶ 10} Timmons's initial proposed assignment of error is that:

> Appellate counsel was ineffective for failing to raise that the trial court erred by failing to inform the Appellant as to the possibility of extensions to his prison term before accepting his guilty plea(s) thus rendering his pleas involuntary and unknowingly pursuant to Crim.11(C)(2)(a) and R.C.2943.032 thus violating U.S. Constitution of the IV Amendment.

{¶ 11} Timmons, through his initial assignment of error, argues that his guilty plea was involuntary and not in compliance with Crim.R. 11, because the trial court failed to properly advise him of the consequences of postrelease control.

{¶ 12} We previously found on appeal, that "the trial court complied with Crim.R. 11 and that [Timmons's] plea was knowing, intelligent, and voluntary." *Timmons*, 8th Dist. Cuyahoga Nos. 105940, 105941, and 105942, 2018-Ohio-2837, at ¶ 13. Thus, the doctrine of res judicata bars any further review of the issue of an involuntary plea of guilty. *State v. Slagle*, 97 Ohio St.3d 332, 2002-Ohio-6612, 779 N.E.2d 1041; *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶ 13} In addition, the transcript of the sentencing hearing and the trial court's sentencing journal entry clearly demonstrate that the trial court properly imposed postrelease control and that Timmons was aware of the imposition of postrelease control. The transcript provides that:

> THE COURT: You will also have a period of post release control which is mandatory on the felonies of the third degree and optional on all other counts. And while on post release control, which will be three years, if you violate any of the conditions that the Parole Authority tells you they can violate you and send you back to prison for up to one half of this sentence in periods of nine months for each violation. If you commit a new felony while on post release control then the new felony sentencing judge or the Adult Parole Authority may — excuse me, I've been distracted.
>
> THE DEFENDANT: Your Honor —
>
> THE COURT: — may add onto your new felony sentence the greater of one year or the time remaining on post release control. And by law this

must be done in a consecutive fashion, meaning one sentence to follow the other.

(Tr. 78 – 79.)

{¶ 14} The trial court's sentencing journal entry in CR-16-611004-A, provided in pertinent part, that:

> DEFENDANT ADVISED THAT: POST RELEASE CONTROL (PRC) IS PART OF THIS SENTENCE FOR 3 YEARS OPTIONAL FOR THE ABOVE REFERENCED FELONY(S) UNDER R.C. 2967.28. DEFENDANT ADVISED THAT WHILE ON PRC, FAILURE TO COMPLY WITH THE RULES OF SUPERVISION OR ANY REQUIREMENT OF PRC UNDER 2967.131(B), THE PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE DEFENDANT. FURTHER, IF THE DEFENDANT COMMITS A NEW FELONY WHILE ON PRC, AN ADDITIONAL SENTENCE OF THE GREATER ONE YEAR OR THE TIME REMAINING ON PRC MAY BE IMPOSED AND SUCH SENTENCE MUST BE CONSECUTIVE TO DEFENDANT'S NEW FELONY SENTENCE.

{¶ 15} The trial court's sentencing journal entry in CR-16-611131-A, provided in pertinent part that:

> DEFENDANT ADVISED THAT: POST RELEASECONTROL (PRC) IS PART OF THIS SENTENCE FOR 3 YEARS OPTIONAL FOR THE ABOVE REFERENCED FELONY(S) UNDER R.C. 2967.28. DEFENDANT ADVISED THAT WHILE ON PRC, FAILURE TO COMPLY WITH THE RULES OF SUPERVISION OR ANY REQUIREMENT OF PRC UNDER 2967.131(B), THE PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE DEFENDANT. FURTHER, IF THE DEFENDANT COMMITS A NEW FELONY WHILE ON PRC, AN ADDITIONAL SENTENCE OF THE GREATER ONE YEAR OR THE TIME REMAINING ON PRC MAY BE IMPOSED AND SUCH SENTENCE MUST BE CONSECUTIVE TO DEFENDANT'S NEW FELONY SENTENCE.

{¶ 16} The trial court's sentencing journal entry in CR-16-611383-A provided in pertinent part that:

> DEFENDANT ADVISED THAT: POST RELEASE CONTROL(PRC) IS PART OF THIS SENTENCE FOR 3 YEARS MANDATORY ON COUNT 3 AND 7, AND 3 YEARS OPTIONAL ON COUNTS 1 AND 5 FOR THE ABOVE REFERENCED FELONY(S) UNDER R.C. 2967.28. DEFENDANT ADVISED THAT WHILE ON PRC, FAILURE TO COMPLY WITH THE RULES OF SUPERVISION OR ANY REQUIREMENT OF PRC UNDER 2967.131(B), THE PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE DEFENDANT. FURTHER, IF THE DEFENDANT COMMITS A NEW FELONY WHILE ON PRC, AN ADDITIONAL SENTENCE OF THE GREATER ONE YEAR OR THE TIME REMAINING ON PRC MAY BE IMPOSED AND SUCH SENTENCE MUST BE CONSECUTIVE TO DEFENDANT'S NEW FELONY SENTENCE.

{¶ 17} The imposition of postrelease control by the trial court was proper and did not result in any prejudice to Timmons. *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700; *State v. Masterson*, 8th Dist. Cuyahoga No. 107622, 2019-Ohio-711; *State v. Tolbert*, 8th Dist. Cuyahoga No. 105326, 2017-Ohio-9159. The first proposed assignment of error fails to establish ineffective assistance of appellate counsel.

B. SECOND PROPOSED ASSIGNMENT OF ERROR

{¶ 18} Timmons's second proposed assignment of error is that:

> Appellate counsel failed to provide effective assistance for failing to raise the trial court erred when modify of the sentence outside the presents [sic] of the Appellant violating Crim.R. 43(A)(1) and the V amendment of the U.S. Constitution.

{¶ 19} Timmons, through his second proposed assignment of error, argues that he was prejudiced by the trial court's amendment of the sentence originally imposed at the sentencing hearing outside the presence of Timmons. Timmons argues that he was prejudiced because at the sentencing hearing, the trial court imposed an aggregate sentence of 16 years, but imposed an aggregate sentence of 14.5 years in the sentencing journal entry. Specifically, Timmons argues that he was not present when the trial court modified the aggregate sentence originally imposed at the sentencing hearing from 16 years to 14.5 years. (*See* tr. 78.)

{¶ 20} On appeal, the issue of the modification of the original sentence by the trial court and the nonpresence of Timmons was addressed. We held that:

> The transcript reflects that in Cuyahoga C.P. No. CR-16-611004-A, the sentence pronounced at the sentencing hearing included a longer sentence of 36 months on Count 6, resulting in a total sentence in that case of 7 years, and a total sentence in all three cases of 16 years. We note that although the state mentioned the discrepancy at oral argument, no appeal was taken by the state to challenge the modified sentence imposed in the journal entry. Further, although Crim.R. 43(A)(1) provides a criminal defendant the right to be present at every stage of the criminal proceedings, including the imposition of sentence and any modification of a sentence, appellant does not seek to invoke his due process rights on appeal as to the reduction of his sentence. Accordingly, because a court speaks only through its written journal entries, we shall review the sentence imposed in the trial court's sentencing entry.

Timmons, 2018-Ohio-2837, ¶ 13, fn. 1.

{¶ 21} The issue raised through Timmons's second proposed assignment of error has already been addressed on appeal and is thus barred from further review by the doctrine of res judicata. *Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104.

Murnahan, 63 Ohio St.3d 60, 584 N.E.2d 1204; *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934.

{¶ 22} Finally, we find that Timmons has failed to establish that he was prejudiced by the trial court's amendment of his sentence from 16 years to 14.5 years. *State v. Lester*, 8th Dist. Cuyahoga No. 105992, 2018-Ohio-5154; *State v. Burnett*, 8th Dist. Cuyahoga No. 87506, 2007-Ohio-4434. The second proposed assignment of error fails to establish ineffective assistance of appellate counsel.

{¶ 23} Accordingly, the application for reopening is denied.

SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR