[Cite as *State v. McKinney*, 2013-Ohio-1149.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-424 (C.P.C. No. 05CR-10-7130)
Anthony L. McKinney,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Anthony L. McKinney, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Anthony L. McKinney is appealing from the results of a sentencing hearing at which post-release control was added to his lengthy prison sentence. He was originally convicted of numerous charges in 2007 and pursued a direct appeal at that time. The issue to be considered at his most recent sentencing hearing was limited to whether post-release control should be part of his sentence and if so, how long the post-release control should last. McKinney attempts in his appellate brief to raise several other issues which he calls "claims" as opposed to assignments of error. They are:

> CLAIM I
>
> The Appellant was ultimately denied his guaranteed right to the Sixth, Fifth, Fourteenth Admendment to the U.S. and Feferal Constitution, the right to confront and be protected against unseen and unknown witnesses and Due Process.

The petitioner Mr. McKinney's rights were violated due to an unknown officer or Sgt. and unknown unseen witness. The officer or Sgt. who actually conducted the identification procedure at the scene of the crime has never produced, he's unknown and unseen. No one can identify this officer/Sgt. This officer/Sgt. who conducted this identification procedure, also unknown would be the only person to know who his witness was, only if there was a positive identification. Logically if the state doesn't know who the officer/Sgt. is who conducted the identification procedure, you wouldn't know if there was a witness, or who this officers witness was. Officer Brian Jackson who testified at trial, say he only observed the unknown officer/Sgt. conduct the identification procedure, with an unknown person from a distance. Officer Jackson testified that he didn't hear a positive identification. Crawford v washington 541 U.S. 36,68(2004)and that he could not identify the witness, even if he walked in the court room. The phantom witness Terrell Craig. The trial court also violated confrontation by allowing a witness that could not be identified by officials to identify petitioner at trial. Taylor v Cain, 545 F.3d 327 (5th cir.2008). No officer could or have identified this mystery witness as a person who identified petitioner at the scent. Due to the officer/Sgt who conducted the identification procedure, being unknown, unseen and has not been identified. It is impossible to have a witness under the protection of due process, and confrontation, when the identification officer/Sgt is unknown. Not only was the identification officer unknown, but officer Brian Jackson says there was no positive identification, and he can't identify this unknown unseen witness terrell craig, even if he walked in the court room. Also this claim is not likeany other argument petitioner previously argued. Just the same facts, this is a confrontation claim not identification. Haynes v Quarterman, 561 F. 3d 535, 538-39 (5th circuit 2009) Petitioner is showing that a officer/Sgt. and a witness is unknown and unseen. This claim is properly reserved for Appellete review. See March 23, 2012 Sentencing tracscipts and the courts decision July 5, 2012. This court should reverse and remand for a new trial or, rather an acquittal is the proper remedy.

CLAIM II

The appellant was denied the right to be free from double jeopardy 5th admendment to the united states constitution, allied offenses. On March 23, 2012 defendant sucessfully

challenged P.R.C. and allied offences at sentencing hearing. Petitioner received a copy of the transcipts from Alicia Lash, these transcipts did not contain petitioners full argument. Petitioners allied offenses claim and other federal constitutional claims were omitted from my transcripts. On Sept. 11, Petitioner filed a motion for correction in this court. Sept. 18, 2012 the judges journal entry recommend appellant file his motion to correct with the trial court. Petitioner did as this court recommended, petitioner still has not received a decision or a timed stamped copy. Petitioner successfully challenged P.R.C. and merger of sentences. See state v Fischer 128 ohio st.3d 92,2010-ohio6238 State v. millette 2011 ohio 6357. State v Johnson 128 ohio st 3d 153 942. State v fairman 2011 ohio 6489 State v Griffis 2011 ohio 2955. State v. Hruby 2010 ohio 3530. This trial court failed to consider these claims together. The only portion of petitioner claim that is void is the allied offenses. As long as I give the state courts a fair opportunity to fix the federal violation, petitioner is in good standings. The conduct of the accused must be considered as established by the evidience, offenses arising from the same occurance sentence that are allied should be merged, to prevent shotgun convictions. Geigerm 45 ohio st. 2d at 242.. 74. No need to perform hypothetical or abstract comparison of offenses at issue to conclude that the offenses are subject to merge. Under R.c. 2941.25(a) the question is whether it is possible to commit one offense and commit the other with the same conduct. If commission of one offense constitutes the commission of the other then the offenses are of similar importance. A single act committed with a single state of mind. The state must only choose one, must also merge weapons under disability, felinous assult, gun spec., felonious and murder together. State v fairman 2011 ohio 6489. johnson. This issue was properly preserved for appellate review. This court should reverse and remand, specificially for allied offenses not P.R.C. P.R.C. was properly imposed.

CLAIM III

The Pititioners rebuttal to the presumption of correctness, a violation of petitioners U.S. and Federal constitutional rights Jefferson v Upton, 130 S.ct 2217. 28 U.S.C. 2254 (e) (i).

In miller-Ei v Cockrell, 537 u.s.322,340 (2003) the supreme court held; A Federal court can disagree with the state courts credibility determinitation and when guided by AEDPA,conclude the decision was unreasonable or that the factual, Premise was incorrect by clear and convincing evidence. See 28 U.S.C. 2254 (e) (1). A petitioner may also rebut the presumption of correctness of the state fact findings by establishing that any one of the eight enumerated exceptions under form 28 U.S.C. 2254 (d)(1)-(8) applies. See Jefferson v Upton, 130 s.ct 2217. It is evident that the state trial court lost its way in pursuit of its findings. The state used a set of different facts that where found differently in the trial court records/transcipts, an unreasonable determination of the facts in light of the evidence presented in the state court. The states facts are not fairly supported by the record. At this point Petitioner must make this court aware of Sumner v Mata 11, 455 U.S. 591, 593 "statement of reason" requirement.

CLAIM IV

Inneffective assistance of appellate counsel, on three different appellate counsels on the same issue, coming from sentencing. Counsels failed to raise petitioners claims and issues arising at the resentencing hearing. A violation of the 6th 5th and 14th of the Federal and U.S. Constitution. innEffective council and due process.

The trial court abused its descreation by allowing John Keeling to withdraw, by agreeing with counsel that there was no issues to raise, when it was obvious that there were issues. State v Millette 2011 ohio 6357 State v Fischer 128 ohio st. 3d 92, 942. State v Hruby 2010 ohio 3530. State v Griffis 2011 ohio 29ss. United States v France 318 Fed Appx.411. This councel never even reviewed the transcripts of the sentencing hearing. See appellate court July 5, 2012 memorandum decision. See March 23, 2012 sentencing transcipts. Post release control was properly imposed,Kelling failed to raise petitioners issues arising at resentencing hearing. As a result Keeling was allowed to withdraw, made appellant miss his deadline to file a notice, which could have ultimately had

> petitioner barred for failure to appeal. Pititioner is not an attorney, petitioner was forced to file a late delayed appeal due to ineffective assistance of counsel. The trial court abused its descreation when there was obvious issues to be raised.
>
> Appellant was appointed David L. Strait, by this honorable court, there was a conflict of interest because counsel failed to raise appellant previous identification claim in this court, and failed to raise petitioners confrontation claim, and Jefferson v Upton 130 s.ct 2217 about the fact that petitioner was not identified. Presumption of correctness rebuttal and allied offenses. This is why appellant is fighting for his life now, why should counsel get to raise issues he should have raised on direct appeal. Now that appellant has brought them forth why should he get to argue what he should of did in the first place. And he probably wouldn't have raised my issues anyways, he was talking the same way John Keeling and David Thomas was talking. All he could do is raise post Release control issues. David L. Strait was ineffective and also he withdrew due to a conflict.

(Sic. passim.)

{¶ 2} The first three "claims" are legal issues which were or could have been addressed in McKinney's prior appeals. As such, they are barred by the doctrine of res judicata. Treated as assignments of error, they are overruled.

{¶ 3} The fourth claim attacks the performance of McKinney's appellate counsel who all apparently informed McKinney he had nothing of any merit for the court to consider on the appeal. This is not a legitimate issue for an assignment of error. McKinney's fourth claim, treated as an assignment of error, is also overruled.

{¶ 4} All four claims, treated as assignments of error, having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.