

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-T-0101
FELIX O. BROWN, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 95 CR 127.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Felix O. Brown, Jr., pro se, PID: A312676, Lorain Correctional Institution, 2075 South Avon-Beldon Road, Grafton, OH 44044 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Felix O. Brown, Jr., appeals the judgment of the Trumbull County Court of Common Pleas denying his “Civil Rules of Procedure Rule 60(B) motion for relief from judgment, or in the alternative, Crim.R. 47 motion to vacate judgment” and his “motion for leave to amend Civil Rule 60(B)/Criminal Rule 47 motion pursuant to Civil Rule 15(A).” For the following reasons, we affirm the trial court’s judgments to deny such motions.

{¶2} A jury found appellant guilty of murder, in violation of R.C. 2903.02, with a firearm specification under R.C. 2941.145, and having weapons while under disability, in violation of R.C. 2923.13. Appellant was sentenced to an aggregate sentence of 18 years to life. Appellant appealed from his conviction which was upheld by this court in *State v. Brown*, 11th Dist. Nos. 95-T-5349 and 98-T-0061, 2000 Ohio App. LEXIS 1430 (Mar. 31, 2000).

{¶3} On September 20, 2011, appellant filed a motion for leave to amend his hybrid Civ.R. 60(B)/Crim.R. 47 motion. On the same date, the lower court issued a judgment entry denying his Civ.R. 60(B)/Crim.R. 47 motion. The judgment entry, however, did not address the additional points raised by appellant in his motion to amend. Before the lower court issued a ruling on appellant's motion to amend, he filed the instant appeal. Thus, appellant divested the trial court of jurisdiction to rule on his motion to amend. In the interest of judicial economy, this court remanded the matter to the trial court to issue a ruling on appellant's motion to amend. The trial court overruled the motion to amend.¹

{¶4} Appellant now appeals, and as his assignments of error, he alleges the following:

{¶5} [1.] The trial court abused its discretion, to the prejudice of appellant, thereby committing reversible error when it failed to hold an evidentiary hearing on appellant's motion for relief from

1. Although the trial court did rule upon appellant's motion to amend, it suggested the pending motion was a nullity. A motion is a nullity only if it has no legal significance and, in effect, such a document does not require a ruling. The docket reflects, however, the motion to amend was filed *prior* to the court's denial of appellant's Civ.R. 60(B)/Crim.R. 47 motion. Thus, the motion was not devoid of legal import; i.e., it was not a nullity, but was properly filed while the Civ.R. 60(B)/Crim.R. 47 motion was still pending and technically subject to amendment.

judgment/motion to vacate judgment thus mandating a reversal and remand for purpose of holding such hearing in direct regard to the first of the two combined misnomers. The misnomer of Appellant's father's name Felix (Oliver) Brown being assigned to appellant, Felix (Oliver) Brown, Jr. [sporadically] during the criminal trial.

{¶6} [2.] The trial court abused its discretion to the prejudice of appellant, thereby committed reversible error when it refused to hold an evidentiary hearing on appellant's motion for relief from judgment/motion to vacate judgment, thus mandating a reversal and remand for the purpose of holding said hearing in direct regard to the second of the two combined misnomers. The misnomers of Appellant's father's address, 1229 North Road, Apartment #238 being negligently assigned as Appellant's address where Appellant's actual address was 1231 North Road, Apartment #278.

{¶7} [3.] The trial court abused its discretion and prejudiced appellant thereby committed reversible error, when it denied or merely refused to consider appellant's motion for leave to amend his civil rule 60(B)/criminal rule 47 motion – which contained two additional claims for relief. Thus mandating a reversal and remand for purpose of determining and granting 'motion for leave to amend.'

{¶8} [4.] The trial court abused its discretion and prejudiced appellant, thereby committed reversible error, when it denied or merely refused to consider appellant's motion for leave to amend his civil

rule 60(B)/criminal rule 47 motion – which contained two additional claims for relief. Thus mandating a reversal and remand for the purpose of determining and granting ‘motion for leave to amend...’

{¶9} Sixteen years into his sentence, appellant is now attempting to vacate his conviction by alleging misnomer—arguing both his name and his address were improper on the indictment. Appellant sought relief from his convictions pursuant to Civ.R. 60(B) or, in the alternative, Crim.R. 47. Additionally, appellant sought an evidentiary hearing. In his first and second assignments of error, appellant alleges the trial court abused its discretion in overruling his motion without holding an evidentiary hearing.

{¶10} Crim.R. 57(B) permits trial courts to apply the Rules of Civil Procedure when no applicable Rule of Criminal Procedure exists. In *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶12, the Ohio Supreme Court stated:

{¶11} Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, citing *State v. Reynolds* (1999), 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131. In *Reynolds*, we concluded that a motion styled ‘Motion to Correct or Vacate Sentence’ met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1), because it was ‘(1) filed subsequent to [the defendant’s] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and

(4) asked for vacation of the judgment and sentence.’ *Id.* at 160.

The Civ.R. 60(B) motion filed by [the defendant] was filed subsequent to his direct appeal, claimed a denial of constitutional rights, and sought reversal of the judgment rendered against him. We conclude, therefore, that the Civ.R. 60(B) motion filed by [the defendant] could have been filed as a petition for postconviction relief. Thus, it is not necessary to look to the Civil Rules or other applicable law for guidance in the way Crim.R. 57(B) intends, because a procedure ‘specifically prescribed by rule’ exists, i.e., Crim.R. 35.

{¶12} In overruling appellant’s motion, the trial court noted it was appellant’s duty, not the trial court’s, to correct any errors in his own name which appeared in the indictment. Appellant failed to do so. In its entry, the trial court recognized that it is not the duty of the trial court “to undo what amounts to an invited error sixteen years post trial.” The trial court also acknowledged that appellant did not suffer prejudice at trial; it noted that appellant “presented no authority to show any nexus between this alleged Misnomer and a void conviction.”

{¶13} In disposing of appellant’s motion, however, the lower court failed to address how it treated appellant’s motion—as a Civ.R. 60(B) motion or as a petition for postconviction relief. Here, appellant’s motion, which was filed subsequent to his direct appeal, sought to render the judgment void and requested vacation of the judgment and conviction—appellant did not allege a denial of his constitutional rights. Accordingly, as

appellant's motion did not meet the four characteristics of a petition for postconviction relief, we address his motion under Civ.R. 60(B).

{¶14} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987).

{¶15} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶16} On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

{¶17} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Ohio Supreme Court has held:

{¶18} To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or

claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶19} Appellant has failed to demonstrate that he is entitled to relief under Civ.R. 60(B). Appellant waited nearly 16 years to file the instant motion alleging that he was improperly indicted under his father's name and address. Furthermore, in his direct appeal, appellant alleged the trial court erred in failing to answer the jury's question regarding the discrepancy in apartment numbers. In his direct appeal, appellant could have raised misnomer, and consequently, these claims are further barred by the doctrine of res judicata.

{¶20} Appellant's first and second assignments of error are without merit.

{¶21} In his third and fourth assignments of error, appellant alleges the trial court erred in failing to allow him to amend his Civ.R. 60(B) motion. We disagree.

{¶22} Upon a review of appellant's motion to amend, we do not find the trial court abused its discretion in its denial. In his motion to amend, appellant argued the trial court erred in instructing the jury. As appellant could have raised this argument in his direct appeal, it is barred by the doctrine of res judicata.

{¶23} Appellant's third and fourth assignments of error are without merit.

{¶24} Based on the foregoing, appellant's Civ.R. 60(B) motion for relief from judgment did not allege operative facts to warrant relief from judgment, and the trial court did not abuse its broad discretion in denying his motion without holding an evidentiary hearing. Further, the trial court did not err in denying appellant's motion to amend. Accordingly, we affirm the judgment of the Trumbull County Court of Common Pleas.

MARY JANE TRAPP, J.,
THOMAS R. WRIGHT, J.,
concur.