

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA3637
v.	:	
	:	
Breon A. Kelly,	:	
	:	<u>ENTRY</u>
Defendant-Appellant.	:	
	:	RELEASED 08/18/2014

HOOVER, A.J.

{¶1} Appellant Breon A. Kelly filed an appeal from the Scioto County Court of Common Pleas' judgment entry denying his post-conviction relief petition made pursuant to R.C. 2953.21. Kelly has filed his appellate brief. In response, the state filed a motion to dismiss the appeal on the grounds that this Court does not have jurisdiction over the appeal. The state argues that Kelly agreed to his sentence and therefore it is not subject to review pursuant to R.C. 2953.08(D). R.C. 2953.08(D) states:

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

{¶2} Here, however, Kelly did not appeal his sentencing entry, but instead pursued a post-conviction relief petition. Post-conviction relief petitions are used to assert claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio or United States Constitution such

that the conviction should be vacated or set aside. R.C. 2953.21(A)(1). The trial court's entry denying post-conviction relief is a final appealable order.

{¶3} The case law the state cites in support of its argument that we do not have jurisdiction over the appeal does not support its argument. *State v. Knisely*, 3rd Dist. App. No. 5-07-37, 2008-Ohio-2255 involved a direct appeal from a sentencing entry, not an appeal from a post-conviction relief petition. *State v. Turrentine*, 3rd Dist. App. No. 1-08-18, 2008-Ohio-3231 involved a post-conviction relief petition captioned "Motion to Modify Sentence as a Matter of Law" in which Turrentine argued that his sentence violated his federal and state constitutional rights. The appellate court did not dismiss his appeal for lack of jurisdiction, but instead reviewed his four assignments of error on the merits. The appellate court overruled three of the four assignments of error, which concerned Turrentine's sentence, on the ground that review of the sentence was barred under R.C. 2953.08(D) – not on the grounds that the court lacked jurisdiction over Turrentine's appeal. *Id.* at ¶13. The court overruled the remaining assignment of error, which concerned the trial court's failure to order a pre-sentence investigation, on the grounds that a pre-sentence investigation was not required in Turrentine's case under Crim. R. 32.2 and that the agreed sentence specifically provided that a pre-sentence investigation would not be ordered. *Id.* at ¶¶ 14-15.

{¶4} Because this case involves an appeal of an entry denying a post-conviction petition, we find that we have jurisdiction over it. Whether or not any of Kelly's assignments of error are barred by R.C. 2953.08(D) is an issue for consideration when we review the merits of his appeal. The state's motion to dismiss is **DENIED**.

{15} The clerk shall serve a copy of this order on all counsel of record at their last known addresses by ordinary mail. The clerk shall serve appellant by certified mail, return receipt requested. If returned unserved, the clerk shall serve appellant by ordinary mail. **MOTION DENIED. IT IS SO ORDERED.**

Harsha, J. & McFarland, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge