

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

STATE OF OHIO, : Case No. 15CA1008
Plaintiff-Appellee, :
v. : DECISION AND
NICHOLAS WOLKE, : JUDGMENT ENTRY
Defendant-Appellant. : RELEASED: 03/11/2016

APPEARANCES:

Nicholas Wolke, Chillicothe, Ohio, pro se appellant.

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

Hoover, J.

{¶1} Defendant-appellant, Nicholas Wolke (“Wolke”), appeals from an Adams County Common Pleas Court judgment that denied his motion for resentencing. On appeal, Wolke contends that the trial court erred in denying the motion because the court failed to notify him at sentencing that his failure to pay the costs of prosecution could result in an order that he perform community service. In addition, Wolke argues that his trial counsel provided ineffective assistance by failing to object to the trial court’s imposition of the costs of prosecution, and by failing to object to the trial court’s improper notification regarding possible community service. After reviewing the record, we conclude that Wolke’s arguments are barred by the doctrine of res judicata. Accordingly, we find that the trial court did not abuse its discretion in denying the motion; and we affirm the trial court’s judgment.

I. Facts and Procedural History

{¶2} In 2008, Wolke pleaded guilty to two counts of murder and was sentenced to 15 years to life in prison on each count to be served consecutively. Wolke was also ordered to pay the costs of prosecution. It appears from the record that Wolke did not file a direct appeal of right following his conviction and sentence.

{¶3} In 2015, Wolke commenced the case sub judice by filing a pro se motion seeking a resentencing on the grounds that his original sentence was void because the trial court did not inform him at sentencing that the failure to pay the costs of prosecution could result in court ordered community service pursuant to R.C. 2947.23(A)(1)(a). The State did not file a memorandum in opposition to Wolke's motion for resentencing. On May 18, 2015, the trial court overruled the motion but did not give any reasons in support of its denial. This appeal followed.

II. Assignments of Error

{¶4} Wolke assigns the following errors for our review:

First Assignment of Error:

The Trial Court Erred as a matter of law, and abused its discretion, when it failed to Re-sentence the Defendant-Appellant as statutory [sic] Required, when it failed to notify the Defendant-Appellant at the "Sentencing Hearing" on December 19th, 2008 and entered on December 19th, 2008 in Case # 20080023 that failure to pay Restitution, all costs of the Prosecution, or Court costs could result in the Trial Court Ordering the Defendant-Appellant to perform Community Service "until the Judgment is paid or until the Court is satisfied that the Defendant-Appellant is in compliance with the approved Schedule." See Revised Code 2947.23(A)(1)(a).

Second Assignment of Error:

Trial Counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to "Object" at Sentencing", to the Trial Court's imposition of Restitution, Court costs, and all costs of the Prosecution that could have resulted in the Trial Court Ordering the Defendant-Appellant to perform Community Service "until the Judgment is paid or until the Court is

satisfied that the Defendant-Appellant is in compliance with the approved Schedule.” See Revised Code 2947.23(A)(1)(a).

III. Law and Analysis

{¶5} In his first assignment of error, Wolke contends that the trial court erred by denying his motion for resentencing because at his sentencing in 2008 the court failed to notify him of the possible penalty for failing to pay the costs of prosecution – specifically, that he could be required to perform community service if he failed to pay those costs.

{¶6} Recently, this Court has been taxed with resolving the exact issues as raised in the case sub judice. *See State v. Bennett*, 4th Dist. Scioto No. 15CA3682, 2015-Ohio-3832 (addressing whether the trial court erred in denying a motion for resentencing where the trial court’s 2005 sentencing failed to alert defendant-appellant that his failure to pay court costs could require him to perform community service); *State v. McCreery*, 4th Dist. Lawrence No. 15CA10, 2015-Ohio-5453 (addressing whether the trial court erred in denying a motion for resentencing where the trial court’s 2010 sentencing failed to alert defendant-appellant that his failure to pay court costs could require him to perform community service; and whether trial counsel was ineffective for failing to object to the trial court’s failure to give the community service notification). In those cases, despite some reservation, we decided to treat the motions for resentencing as untimely¹ petitions for post-conviction relief. *Bennett* at ¶¶ 5-8; *McCreery* at ¶¶ 12-13, 19.² A trial court’s decision to grant or deny a R.C. 2953.21 petition for post-conviction

¹ “If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.” R.C. 2953.21(A)(2).

² We note that concurring opinions were filed in *Bennett* and *McCreery* which determined that because the defendant-appellant had failed to raise a constitutional error, post-conviction relief was not available. *Bennett* at ¶ 21 (Harsha, J., concurring in judgment only); *McCreery* at ¶ 22 (Harsha, J., concurring in judgment only). Nonetheless, each of those cases determined that the motions for resentencing should be treated as untimely petitions for post-conviction relief.

relief should be upheld absent an abuse of discretion. *Bennett* at ¶ 9; *McCreery* at ¶ 7. An “abuse of discretion” is more than an error of law or judgment; it implies that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Id.* In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *Id.*

{¶7} In *Bennett* and *McCreery*, we also recognized that the doctrine of res judicata applies when determining whether post-conviction relief is warranted under R.C. 2953.21. *Bennett* at ¶ 10, and cases cited therein; *McCreery* at ¶¶ 8, 14, 21, and cases cited therein. “In other words, a petitioner may not raise, for purposes of post-conviction relief, any error that could have been raised on direct appeal.” *Bennett* at ¶ 10; *McCreery* at ¶ 14. However, we also observed that the doctrine of res judicata does not apply to void judgments; and that the existence of a void judgment creates an exception to the time limitations for filing a post-conviction relief petition. In reaching these conclusions we cited *State v. Lowe*, 9th Dist. Summit No. 27199, 2014-Ohio-1817, ¶ 7, which held that a void judgment may be challenged at any time. *Bennett* at ¶ 11; *McCreery* at ¶ 15. Thus, in the case sub judice where the alleged errors could have been raised on direct appeal, just as in *Bennett* and *McCreery*, the determination of Wolke’s first assignment of error depends on whether the trial court’s failure to alert Wolke of the possibility of community service rendered the sentencing judgment void or voidable. *See Bennett* at ¶ 12 (“In short, the only questions before us are whether the alleged errors are ones that had the effect of rendering the 2005 sentencing judgment void or voidable. * * * [I]f the alleged errors were such that they rendered the judgment of conviction and sentence void, they may be raised at any time * * *.”); *McCreery* at ¶ 15, quoting *Bennett* at ¶ 12.

{¶8} In *Bennett* and *McCreery*, we concluded generally that any error regarding the imposition of court costs renders the judgment voidable, rather than void; and specifically, that

any failure to alert a defendant that the failure to pay court costs may require the performance of community service in lieu thereof, does not render the sentencing entry void. *Bennett* at ¶¶ 17-18; *McCreery* at ¶¶ 16-19. We also noted that other appellate districts have similarly held that a trial court's failure to alert a defendant that the failure to pay court costs may require the performance of community service does not render the sentencing entry void. *See Bennett* at ¶ 18, and cases cited therein; *McCreery* at ¶ 18. Based on this conclusion, we reasoned in both cases that because the alleged errors did not render the sentencing entry void, and because they could and should have been raised on direct appeal, they were now barred from being raised by the doctrine of res judicata. *Bennett* at ¶ 19; *McCreery* at ¶¶ 18-21.

{¶9} Here, based on the analysis set forth in *Bennett*, 2015-Ohio-3832, and *McCreery*, 2015-Ohio-5453, we construe Wolke's motion for resentencing as an untimely petition for post-conviction relief. Furthermore, based on the foregoing, we conclude that the trial court's failure to alert Wolke of the possibility of community service did not render the sentencing judgment void. Because Wolke failed to raise this issue in a direct appeal, it is now barred by the doctrine of res judicata. Accordingly, Wolke's first assignment of error is overruled.

{¶10} In his second assignment of error, Wolke contends that he received ineffective assistance because his trial counsel failed to object to the imposition of costs and to the trial court's failure to give the necessary community service notification.

{¶11} Wolke could have also raised the issue of his trial counsel's alleged ineffectiveness in a direct appeal. *See McCreery* at ¶ 20 ("Appellant's direct appeal raised the issue of ineffective assistance without including the argument he now makes, that his trial counsel failed to object to the necessary community service notification. Appellant could have included this argument in the direct appeal but did not."). Because Wolke failed to do so, he is

barred by the doctrine of res judicata from doing so now. *McCreery* at ¶ 21. Accordingly, Wolke's second assignment of error is overruled.

IV. Conclusion

{¶12} In sum, all of the arguments that Wolke raises in the motion for resentencing and in this current appeal could have been raised in a direct appeal of his 2008 conviction and sentence. Because he failed to do so, and because the alleged errors do not render the sentencing judgment void, he is now precluded from raising them under the application of the doctrine of res judicata. Thus, the trial court did not abuse its discretion when it denied Wolke's motion for resentencing, aka, petition for post-conviction relief. For all these reasons, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring in judgment only:

{¶13} I do not agree that a motion that raises a violation of a state statute on non-constitutional grounds constitutes a petition for post-conviction relief. But I do agree that *res judicata* precludes Wolke from raising his first assignment of error now. However, I agree that the ineffective assistance of counsel assignment of error can be raised by post-conviction relief. See my concurring opinion in *McCreery, supra*. And like my colleagues, I agree that *res judicata* also precludes a review on the merits of that issue.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J.: Concurrency in Judgment Only with Opinion.

McFarland, J.: Concurrency in Judgment Only.

For the Court

BY: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.