

[Cite as *State v. Sanders*, 2016-Ohio-5508.]

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

STATE OF OHIO, :  
 :  
Plaintiff-Appellee, : Case No. 15CA21  
 :  
vs. :  
 :  
BILL ADAM SANDERS, : DECISION AND JUDGMENT ENTRY  
 :  
 :  
Defendant-Appellant. :

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APPEARANCES:

Bill Adam Sanders, #A308-019, Chillicothe, Ohio appellant pro se.

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Heather MJ Armstrong, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio for Appellee.

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CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 8-15-16

ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment that denied a motion for “Re-Sentencing Based On Void Judgment” filed by Bill Adam Sanders, defendant below and appellant herein. Appellant assigns the following errors for review<sup>1</sup>:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AS A MATTER OF LAW, AND ABUSED IT’S DISCRETION[,] WHEN IT REFUSED TO RE-SENTENCE THE APPELLANT IN COMPLIANCE WITH STATUTORY REQUIREMENTS PURSUANT TO R.C.

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<sup>1</sup> Appellant’s brief does not contain a separate statement of the assignments of error. See App.R. 16(A)(3). We take these assignments of error from the “table of contents.”

2947.23(A)(1)(a), WHEN THE TRIAL COURT FAILED TO NOTIFY THE APPELLANT[, ] MR. SANDERS, IN ITS MARCH 17<sup>TH</sup> 1995 JUDGMENT ENTRY ENTERED ON THAT DATE AND WHERE THE TRIAL COURT'S "SENTENCING" TRANSCRIPTS FOR MARCH 8<sup>TH</sup> 1995 SHOWS WHERE THE TRIAL COURT'S FAILURE TO NOTIFY THE APPELLANT OF THE STATUTORILY MANDATED TERMS OF R.C. 2947.23(A)(1)(a), THAT IF APPELLANT'S [FAILURE] TO PAY COURT COSTS, PAY THE COSTS OF THE PROSECUTION COULD RESULT IN THE TRIAL COURT 'ORDERING' THE APPELLANT TO PERFORM COMMUNITY SERVICE UNTIL THE JUDGMENT IS PAID OR UNTIL THE COURT IS SATISFIED THAT THE APPELLANT IS IN COMPLIANCE WITH THE APPROVED SCHEDULE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, FOR FAILING TO 'OBJECT' TO THE TRIAL COURT'S IMPOSITION COURT COST'S [sic], AND THE COST [sic] OF PROSECUTION. THE TRIAL COURT INDICATED AT 'SENTENCING' ON TRANSCRIPT PAGE 573 THAT APPELLANT [WAS] INDIGENT, AS THE TRIAL COURT (DID NOT NOTIFY) MR. SANDERS THAT HIS FAILURE TO PAY COURT COSTS, PROSECUTION COSTS, OR ANY FINANCIAL SANCTIONS COULD RESULT IN THE COURT 'ORDERING' APPELLANT TO PERFORM COMMUNITY SERVICE."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR AND DENIED THE APPELLANT[, ] MR. SANDERS[, ] DUE PROCESS OF LAW WHEN IT IMPOSED COURT COSTS, PROSECUTION COSTS[, ] WITHOUT THE PROPER NOTIFICATION OF R.C. 2947.23(A)(1)(a), THAT APPELLANT'S FAILURE TO PAY COURT COSTS, PROSECUTION COSTS[, ] COULD RESULT IN THE TRIAL COURT 'ORDERING' APPELLANT TO PERFORM COMMUNITY SERVICE."

{¶ 2} In March 1995, appellant was convicted of three counts of attempted murder, all with firearm specifications. The trial court sentenced appellant to serve three years on each firearm specification and, once those sentences were completed, consecutive sentences for each count of attempted murder with an aggregate minimum term of twenty-four years (24) incarceration up to an aggregate maximum term of seventy-five (75) years. We affirmed appellant's conviction and sentence. See *State v. Sanders*, 4<sup>th</sup> Dist. Pickaway No. 95CA6, 1996 WL 734666 (Dec. 10, 1996)(*Sanders I*).

{¶ 3} On January 25, 2012, appellant filed a motion to correct his sentence. Appellant argued that at the sentencing hearing, the trial court ordered the sentences on counts two and three be served concurrently, but the actual sentencing entry ordered them to be served consecutively. The State of Ohio did not respond. On March 8, 2012, the trial court denied the motion. We affirmed that judgment. See *State v. Sanders*, 4<sup>th</sup> Dist. Pickaway No. 12CA4, 2013-Ohio-1326 (*Sanders II*). The Ohio Supreme Court denied any further appeal from that judgment. See *State v. Sanders*, 135 Ohio St.3d 1460, 988 N.E.2d 579, 2013-Ohio-2285 (*Sanders IIA*).<sup>2</sup>

{¶ 4} On November 27, 2013, appellant filed a motion to “correct unlawful sentence” and argued that his 1995 sentence violated R.C. 2941.25(A)(2) such that the convictions should

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<sup>2</sup> Appellant has also sought habeas corpus relief in federal court from his 1995 original conviction arguing that venue in Pickaway County was improper, he was denied a speedy trial and the state failed to disclose evidence favorable to his defense. A magistrate for the United States District Court recommended that the petition be dismissed as untimely. See *Sanders v. Warden*, Civil Action No. 2:12-cv-0423, 2012 WL 2070863 (S.D. Ohio) (May 12, 2012). The court adopted her recommendation and ordered the case dismissed. *Id.* at 2012 WL 2130987 (June 8, 2012).

have merged “into one sentence of a 8 to 25 years with one firearm specification.” On December 2, 2013, the trial court denied the motion on grounds of res judicata. We affirmed that decision. See *State v. Sanders*, 4<sup>th</sup> Dist. Pickaway No. 13CA29, 2014-Ohio-2521 (*Sanders III*).

{¶ 5} On May 13, 2015, appellant commenced the instant action and filed another motion for “re-sentencing based on void judgment.” This time, however, appellant challenged the trial court’s 1995 determination that he must “pay the costs of this matter, for which execution is hereby awarded.” Appellant claims that the trial court failed to “determine” his ability to pay sanctions and also failed to consider the R.C. 2947.23(A)(1)(a) requirements. The State filed a memorandum contra and, on June 9, 2015, the trial court overruled appellant’s motion. This appeal followed.

## I

{¶ 6} Before we address the assignments of error on their merits, we pause to address our “standard of review.” Although titled as a “Motion For Re-Sentencing,” appellant couched his motion in terms of a petition for postconviction relief, and the trial court treated it as such in its June 9, 2015 decision and judgment. We do the same here, although we have some doubts that the motion should be construed in that manner.<sup>3</sup>

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<sup>3</sup> The Ohio Supreme Court held that if “a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, then such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” (Emphasis added.) *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131, at the syllabus (1997). We emphasize that the precise language of *Reynolds* applies only to motions that raise constitutional violations. Since *Reynolds*, however, appellate courts have treated virtually every motion asking for re-sentencing as a petition for postconviction relief, whether there is an alleged constitutional violation or not. See e.g. *State v. Turner-Frantz*, 7<sup>th</sup> Dist. Jefferson NO . 14 JE 33, 2015-Ohio-2111, at ¶17 (motion for re-sentencing treated as though alleged violations were of statute and criminal rule); *State v. Gumm*, 8<sup>th</sup> Dist. Cuyahoga App. No. 101496, 2015-Ohio-1539, at ¶3 (referring to an earlier case where a motion for re-sentencing was treated as such a petition when the claim was for violation of a criminal rule). Appellant’s motion raised no constitutional issue. On appeal, appellant does claim ineffective assistance of counsel and denial of due process in his second and third assignment of error. Still, our decision would have the been same whether we strictly applied *Reynolds*, or, like its progeny, expanded that ruling to include every

{¶ 7} Generally, a trial court decision to grant or to deny a R.C. 2953.21 petition for postconviction should be upheld absent an abuse of discretion. See *State v. White*, 118 Ohio St.3d 12, 885 N.E.2d 905, 2008-Ohio-1623 at ¶45; *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶58. An “abuse of discretion” implies that a court's attitude was unreasonable, arbitrary or unconscionable. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Adams*, 60 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe I*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 8} At the outset we note that Ohio law required appellant to file his petition for postconviction relief within one hundred eighty days after transcripts were filed with the court of appeals. See R.C. 2953.21(A)(2). Here, the record shows that transcripts of appellant’s trial were filed many years ago. Thus, his May 2015 petition is out of rule. A trial court may only consider untimely petitions if a petitioner demonstrates the specific reasons outlined in R.C. 2953.23, none of which appellant attempted to establish in his motion. Thus, unless appellant can show an exception from this time constraint, his petition should not be considered in the first place.

{¶ 9} Finally, the Ohio Supreme Court has held that the doctrine of res judicata applies when determining whether R.C. 2953.21 postconviction relief is warranted. *State v. Szeftcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, at the syllabus (1996); *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375 (1984). In other words, a petitioner may not raise, for purposes of

postconviction relief, any error that was raised, or could have been raised but was not, on direct appeal. See *State v. Franklin*, 4<sup>th</sup> Dist. Meigs No. 05CA9, 2006–Ohio–1198, at ¶10; *State v. Peebles*, 4<sup>th</sup> Dist. Pickaway No. 05CA25, 2006–Ohio– 218, at ¶11

{¶ 10} In the case sub judice, we believe that all of the alleged errors that appellant raises were raised or could have been raised in his first appeal of right. Thus, unless appellant can point to an exception from the doctrine of res judicata, his claims may not be considered. The exception that appellant cites, however, is that his 1995 judgment of conviction and sentence is void for the failure to follow the R.C. 2947.23(A)(1)(a) guidelines. We acknowledge that the doctrine of res judicata does not apply to void judgments, see *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, 931 N.E.2d 1157, at ¶22, fn. 1, and a void judgment may be challenged at any time. *State v. Lowe*, 9<sup>th</sup> Dist. Summit No. 27199, 2014-Ohio-1817. at ¶7. Thus, the question is whether the alleged errors that appellant advances are ones that rendered the 2005 sentencing judgment void or voidable. With these principles in mind, we turn our attention to the merits of appellant's assignments of error.

## II

{¶ 11} We jointly consider appellant's first and third assignments of error because they both involve the issue of whether the 1995 judgment is void for the failure to comply with R.C. 2947.23(A)(1)(a).

{¶ 12} First, as we noted in *State v. Spencer*, 4<sup>th</sup> Dist. Scioto No. 15CA3681, 2015-Ohio-1445 at ¶9, R.C. 2947.23(A)(1)(a) did not exist until March 24, 2003. Appellant's conviction occurred many years before that. A conviction could not be void for failure to follow a statute that did not exist at the time of appellant's sentence.

{¶ 13} Second, the Ohio Supreme Court has held that the failure of a trial court to notify a defendant of court cost issues does not render a sentence void, but rather merely constitutes reversible error. *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, ¶11; *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio- 954, 926 N.E.2d 278. As the *Joseph* court stated, “while the failure of the court to orally notify [appellant] that it was imposing court costs on him does not void [appellant's] sentence, it was error.” 2010-Ohio-954, at ¶22. Other courts have similarly interpreted these cases that a sentence is not void because of the failure to notify a defendant of mandatory court cost issues. See, e.g., *State v. Liuzzo*, 8th Dist., 2014-Ohio-3030, 15 N.E.3d 424, ¶16 (finding the failure to provide a statutory notification under the former version of the law does not render the sentence void); *State v. Ramirez*, 3<sup>rd</sup> Dist. Defiance No. 4–12–01, 2012-Ohio-3752, at ¶10 (“no abuse of discretion in the Defiance County Court's decision to overrule Ramirez's motion to correct his sentence”)

{¶ 14} For that reason, Ohio appellate courts have held that res judicata bars a defendant from arguing that he is entitled to re-sentencing because he was not informed of the possibility of community service if he did not raise the issue on direct appeal. See e.g. *State v. McCord*, 12<sup>th</sup> Dist. Clermont No. CA2013– 12–096, 2014-Ohio-3187, at ¶¶14-15; *State v. Strickland*, 11<sup>th</sup> Dist. Trumbull No. 2014–T– 0049, 2014-Ohio-5622, at ¶12; *State v. Haynie*, 3<sup>rd</sup> Dist. Marion No. 9–13–18, 2013-Ohio-3777, at ¶9.

{¶ 15} Accordingly, for all of these reasons, we cannot conclude that the trial court erred by denying appellant's motion for postconviction relief and we overrule his first and third assignments of error.

{¶ 16} We now turn to appellant's second assignment of error wherein appellant argues that he received constitutionally ineffective assistance from trial counsel in 1995. As mentioned at the outset, courts have held that res judicata applies in determining if R.C. 2953.21 postconviction relief is warranted. See, supra, *Szefcyk*, 77 Ohio St.3d 93, at the syllabus; *Nichols*, 11 Ohio St.3d 40, 42. Not only is this alleged error one that could have been raised in appellant's first appeal of right, it was, in fact, actually raised. See *Sanders I*, 1996 WL 734666. Thus, it is barred from being re-considered, once again, at this stage of the proceedings.

{¶ 17} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.



JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway 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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_  
Peter B. Abele, 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.