**[Cite as *State v. Porter*, 2013-Ohio-1360.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1243

Appellee — Trial Court No. CR0200401293

v.

Lamar Porter — **DECISION AND JUDGMENT**

Appellant — Decided: April 5, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Lamar Porter, pro se.

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**YARBROUGH, J.**

## I. Introduction

**{¶ 1}** Appellant, Lamar Porter, appeals from the judgment of the Lucas County Court of Common Pleas, denying his "Motion to Correct Illegal Sentence," in which

appellant argued that his sentences for felony murder and aggravated robbery should have merged as allied offenses of similar import. We affirm.

### A. Facts and Procedural Background

**{¶ 2}** In 2004, following a jury trial, appellant was convicted of the lesser-included offense of felony murder, with a firearm specification, and of aggravated robbery, with a firearm specification. The trial court sentenced appellant to life in prison with the possibility of parole in 15 years on the conviction for felony murder, three years in prison on the conviction for aggravated robbery, to be served consecutively, and three years in prison on the merged firearm specifications, also to be served consecutively.

**{¶ 3}** Appellant filed a direct appeal from his conviction, but did not raise the issue of allied offenses of similar import. On February 10, 2006, we affirmed his conviction and sentence in *State v. Porter*, 6th Dist. No. L-04-1278, 2006-Ohio-589, *appeal not accepted*, 110 Ohio St.3d 1410, 2006-Ohio-3306, 850 N.E.2d 72.

**{¶ 4}** Thereafter, appellant filed his first petition for postconviction relief on May 30, 2008, arguing that his aggravated robbery indictment was defective pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. The trial court dismissed this petition on October 9, 2008.

**{¶ 5}** Appellant next filed a "Motion for Issuance of Nunc Pro Tunc Judgment Entry" on December 21, 2011, because his original sentencing entry did not reflect that he was found guilty by a jury. The trial court, complying with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, entered the nunc pro tunc judgment on

December 29, 2011. Appellant attempted to appeal anew from the nunc pro tunc judgment, but we dismissed his appeal on March 9, 2012, on the authority of *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142.

**{¶ 6}** The genesis of the present matter occurred on July 16, 2012, when appellant filed his "Motion to Correct Illegal Sentence," arguing that his convictions for felony murder and aggravated robbery should have merged as allied offenses of similar import. On August 6, 2012, the trial court denied this motion as an untimely petition for postconviction relief, and because it failed on the merits.

### B. Assignment of Error

**{¶ 7}** Appellant now appeals raising a single assignment of error:

> The trial court erred to the prejudice [sic] when it did not grant Mr. Porter's "Motion to Correct Illegal Sentence.

## II. Analysis

**{¶ 8}** We initially note that appellant's "Motion to Correct Illegal Sentence" is properly construed as a petition for postconviction relief. *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus ("Where 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, such a motion is a petition for postconviction relief as defined in R.C. 2953.21"). We review a trial court's decision granting or denying a postconviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

An abuse of discretion connotes that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 9}** A petition for postconviction relief "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction." R.C. 2953.21(A)(2). Here, the trial transcript was filed on December 3, 2004. Thus, appellant's petition is untimely by approximately seven years.

**{¶ 10}** "A trial court has no jurisdiction to consider an untimely petition for postconviction relief unless the untimeliness is excused under R.C. 2953.23(A)(1)." *State v. Guevara*, 6th Dist. No. L-12-1218, 2013-Ohio-728, ¶ 8. Under R.C. 2953.23(A)(1), the time limit is excused if both (1) it can be shown that either the petitioner was unavoidably prevented from discovering the facts relied on in the claim for relief, or that the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation and the petition asserts a claim based on that right; and (2) the petitioner presents clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty.

**{¶ 11}** Here, appellant does not argue that this exception applies. Instead, he argues that his prior appeals are a nullity because there has never been a final judgment of conviction in this case, and therefore his postconviction petition was actually filed

*prematurely*. Appellant contends that the December 9, 2011, nunc pro tunc judgment entry—and presumably the original sentencing entry—was not a final and appealable order because it did not resolve the amount of restitution to be awarded. In fact, the trial court did not impose any restitution. Nevertheless, appellant argues that the issue remains unresolved because the judgment entry does not state "no restitution owed." We disagree. Restitution is a discretionary sanction, not a mandatory one. *See* R.C. 2929.18(A) and (A)(1) (restitution *may* be imposed). Thus, the amount of restitution is not an issue unless the court first imposes restitution. Here, it did not. Therefore, appellant's argument that no final and appealable order exists is without merit.

**{¶ 12}** Alternatively, appellant argues that the failure to merge allied offenses of similar import results in a void sentence, which may be challenged even by an untimely petition for postconviction relief. However, appellant is incorrect; "the failure to merge allied offenses at sentencing does not render a sentence void." *Guevara*, 6th Dist. No. L-12-1218, 2013-Ohio-728, at ¶ 8. Thus, his second argument is without merit.

**{¶ 13}** Moreover, appellant's allied offenses claim fails on its merits. Appellant bases his argument on the standard set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. *Johnson*, though, does not apply retroactively. "A new judicial ruling may be applied only to cases that are pending on the announcement date. * * * The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6. Here, appellant

exhausted all of his appellate remedies in 2006. Thus, his conviction was final well before *Johnson* was decided. Consequently, *Johnson* does not apply. Instead, we apply the test set forth in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), which requires us to examine the statutorily defined elements of claimed allied offenses in the abstract. Under the *Rance* test, felony murder and aggravated robbery are not allied offenses of similar import because, comparing the elements in the abstract, "commission of neither offense necessarily results in commission of the other." *State v. Russell*, 2d Dist. No. 23454, 2010-Ohio-4765, ¶ 40.

**{¶ 14}** Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's petition for postconviction relief. Appellant's assignment of error is not well-taken.

## III. Conclusion

**{¶ 15}** For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE