[Cite as *State v. Walker*, 2013-Ohio-2131.]

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

State of Ohio — Court of Appeals No. L-12-1204

Appellee — Trial Court No. CR0200603016

v.

Allen Reginald Walker — **DECISION AND JUDGMENT**

Appellant — Decided: May 24, 2013

* * * * *

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

Allen Reginald Walker, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Allen Reginald Walker, appeals the July 11, 2012 judgment of the Lucas County Court of Common Pleas which denied his postconviction motion to correct an illegal sentence. For the reasons set forth below, we affirm.

{¶ 2} In 2007, following a jury trial, appellant was convicted of aggravated robbery, kidnapping, and aggravated burglary. Appellant was sentenced to nine years of imprisonment on each count; the counts were ordered to be served consecutively for a total of 27 years of imprisonment.

{¶ 3} On direct appeal, this court rejected appellant's arguments that the kidnapping and aggravated robbery charges were allied offenses of similar import. We also found that appellant's convictions were supported by sufficient evidence and were not against the weight of the evidence. *See State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614.

{¶ 4} Appellant's case was again before the court following his resentencing pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. Filing an *Anders* brief, appellant's counsel argued that appellant's resentencing hearing was unconstitutional because it was held via teleconference rather than appellant appearing in person. We rejected this argument and found the appeal to be frivolous. *See State v. Walker*, 6th Dist. No. L-11-1174, 2012-Ohio-2812.

{¶ 5} On April 11, 2012, appellant filed a motion to correct an illegal sentence. Appellant argued that aggravated robbery and aggravated burglary were allied offenses and he could only have been sentenced on one. Appellant also argued that the offenses of kidnapping and aggravated robbery were allied. In support, appellant relied on the Supreme Court of Ohio's recent test for determining whether offenses are allied. *State v.*

Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. In *Johnson*, the court held that in determining whether two offenses are allied and subject to merger, the conduct of the accused must be considered. *Id.* at syllabus.

{¶ 6} On July 11, 2012, the trial court denied appellant's motion. First, the court found that the motion was properly categorized as a petition for postconviction relief which, under R.C. 2953.21(A)(2), must be filed no later than 180 after the filing of the transcript in the direct appeal. The court concluded that the petition was 23 days late. The court then looked to R.C. 2953.23(A)(1) which permits late petitions for postconviction relief if the petitioner can demonstrate that he was unavoidably prevented from discovering the facts forming the basis of the petition or the petitioner's claim is based on a new state or federal right which applies retroactively and, but for the error, no reasonable factfinder would have found the petitioner guilty of the offense for which he was convicted. Analyzing the factors, the court concluded that the untimely petition was barred by res judicata and that the *Johnson* ruling was prospective in its application. This appeal followed.

{¶ 7} Appellant, pro se, raises one assignment of error for our review:

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

{¶ 8} In his sole assignment of error, appellant contends that because the judgment was not final, the trial court's finding that the petition was untimely was improper and, in

fact, the postconviction petition was "premature." Appellant argues that the June 7, 2011 nunc pro tunc judgment entry was void because the court failed to note that no restitution was owed.

{¶ 9} "A judgment entry ordering restitution is not final and appealable if the entry fails to provide either the amount of restitution or the method of payment." *City of Toledo v. Kakissis*, 6th Dist. No. L-07-1215, 2008-Ohio-1299, ¶ 3, citing *In re Holmes*, 70 Ohio App.2d 75, 77, 434 N.E.2d 747 (1st Dist.1980). It is nonsensical to suggest, however, that where no restitution is ordered this fact must be set forth in the sentencing judgment entry.

{¶ 10} Reviewing the trial court's judgment, we agree that the Supreme Court of Ohio's decision in *Johnson*, *supra*, does not apply retroactively. *See State v. Porter*, 6th Dist. No. L-12-1243, 2013-Ohio-1360, ¶ 13. Thus, the arguments are barred by res judicata and are not well-taken. Appellant's assignment of error is not well-taken.

{¶ 11} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J _____
CONCUR.
JUDGE