[Cite as *State v. Jones*, 2015-Ohio-1707.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 14 MA 46
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
AARON L. JONES,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 06CR95

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Aaron L. Jones
Inmate No. 511-342
Grafton Correctional Institution
2500 S. Avon-Belden Rd.
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JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: April 28, 2015

[Cite as *State v. Jones*, 2015-Ohio-1707.]
ROBB, J.

{¶1} Defendant-appellant Aaron L. Jones ("Appellant") appeals the decision of the Mahoning County Common Pleas Court denying his request for leave to file a delayed Crim.R. 33 motion for a new trial based on newly discovered evidence, his motion for resentencing, and his motion for trial and sentencing transcripts. The trial court did not abuse its discretion in denying the request for leave to file a delayed Crim.R. 33 motion for a new trial. The evidence Appellant contends is newly discovered does not warrant the granting of the request and the request was not made within a reasonable time of allegedly discovering the evidence. As for the resentencing motion, Appellant does not indicate why the motion is filed untimely. However, even if it was timely, it is barred by res judicata because the issue was previously raised in the direct appeal. Lastly, as to the motion for trial and sentencing transcripts, in a prior appeal we explained that an indigent's right to a transcript of proceedings is for use in a direct appeal after conviction, not for the circumstances presented here. For those reasons and the ones expressed below, the trial court's decision is hereby affirmed.

Statement of the Case

{¶2} On May 25, 2006, Appellant was convicted by a jury of aggravated burglary, in violation of R.C. 2911.11(A)(1)(B), a first-degree felony; and aggravated robbery, a violation of R.C. 2911.01(A)(1)(C), a first-degree felony. He received an aggregate sentence of twenty years; ten years for each crime. Those sentences were ordered to be served consecutively. 7/24/06 J.E.

{¶3} Appellant appealed his conviction and sentence to this court. He argued the evidence was insufficient to support the convictions, the convictions were against the manifest weight of the evidence, the trial court failed to render curative instructions after defense objections, his speedy trial rights were violated, sentencing issues, and fifteen allegations of ineffective assistance of counsel. We found no merit with his arguments and affirmed the convictions and sentences. *State v. Jones*, 7th Dist. No. 06MA109, 2008-Ohio-1541 (*Jones I*). Appellant did not timely appeal our decision to the Ohio Supreme Court. Instead, he filed a motion for leave to file a

delayed appeal, which was denied. *State v. Jones*, 120 Ohio St.3d 1414, 2008-Ohio-6166, 897 N.E.2d 650.

{¶4} Appellant has filed multiple postconviction pleadings. The first occurred while the direct appeal was pending. On January 5, 2007, he filed a motion titled Petition to Vacate or Set Aside Sentence asserting there was insufficient evidence to sustain the conviction and his speedy trial rights were violated. 1/5/07 Petition. On March 27, 2008, after this court affirmed his conviction in the direct appeal, Appellant filed a motion to have a new trial. 3/18/08 Motion. The trial court immediately overruled the motion. 3/31/08 J.E. The decision was not appealed to this court.

{¶5} Appellant then filed a postconviction petition to set aside or vacate judgment of conviction or sentence. 7/23/08 Petition. He claimed his speedy trial rights were violated and trial counsel was ineffective, which appears to be a claim that there was not sufficient evidence to support the conviction. 7/23/08 Petition. Approximately two weeks after filing that petition, he filed a second identical petition. 8/06/08 Petition.

{¶6} The same day the second identical petition was filed, the trial court overruled the July 23, 2008 petition (the first petition). 8/6/08 J.E. He did not appeal that decision.

{¶7} On February 25, 2009, Appellant filed a Motion for Acquittal. 2/25/09 Motion. This motion contended that there was insufficient evidence to support the conviction. On March 10, 2009, the trial court overruled the motion. He did not appeal that decision.

{¶8} On November 18, 2009 Appellant filed a Motion to Void Judgment. On December 28, 2009, he filed a Motion to Vacate Void Judgment and Sentence. This motion asserted that the indictment was defective. On January 7, 2010 he filed a successive postconviction petition to set aside or vacate judgment of conviction or sentence. 1/7/10 Petition. This postconviction petition reasserted the claim in a prior postconviction petition that trial counsel was ineffective. This petition, however, raised a new claim that the indictment was defective.

{¶9} On February 5, 2010, the trial court overruled all three filings. Appellant appealed those decisions. 3/16/10 Notice of Appeal. He argued trial counsel was ineffective and the trial court erred when it ordered him to serve maximum consecutive sentences. *State v. Jones*, 7th Dist. No. 10MA47, 2011-Ohio-1002, ¶ 7, 8 (*Jones II*). We found no merit with the assigned errors and affirmed the trial court's decision. *Id.* at ¶ 17. There were three bases for our decision. First, we explained that the issues raised were addressed in the direct appeal. *Id.* at ¶ 10. Second, we noted that most of the arguments made in the appeal were not made in the petition and therefore, could not be raised for the first time on appeal. *Id.* at ¶ 11. Lastly, we opined that Appellant's petition was untimely and successive. *Id*. at ¶ 12. We explained a trial court is without jurisdiction to entertain an untimely or successive petition unless R.C. 2953.23(A)(1) or (2) applies and since Appellant did not show either, the trial court was without jurisdiction to consider the petition. *Id*. at ¶ 12-16.

{¶10} He appealed that decision to the Ohio Supreme Court; however, it was not accepted for review. *State v. Jones*, 129 Ohio St.3d 1411, 2011-Ohio-3244, 949 N.E.2d 1005.

{¶11} On December 5, 2011, Appellant filed a motion to Correct Judgment and/or Vacate and Resentence Pursuant to Enacted H.B. 86. He asserted H.B. 86 reenacted all provisions that were rendered unconstitutional and severed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. This motion was overruled on April 9, 2013.

{¶12} Appellant timely appealed that decision. *State v. Jones*, 7th Dist. No. 13MA53, 2014-Ohio-2592 (*Jones III*). He raised three assignments of error. In the first assignment of error he attempted to resurrect his sufficiency claim and his ineffective assistance of counsel claim. We found no merit with this assignment based on the language in *Jones II*. *Id*. at ¶ 10. In his second and third assignments of error he argued that H.B. 86 reenacted the felony sentencing statute provisions that were rendered unconstitutional and severed pursuant to the Ohio Supreme Court's decision in *Foster*. We found no merit with this argument for two reasons. First, the petition is an untimely and successive petition and Appellant did not provide

a basis under R.C. 2953.21(A)(1) or (2) to invoke the trial court's jurisdiction to entertain an untimely and successive petition. *Id*. at ¶ 14-16. Secondly, we explained that even if his petition was timely, he would still not be entitled to resentencing because he was sentenced prior to the enactment of H.B. 86 and H.B. 86 does not apply retroactively. *Id*. at ¶ 19, citing *State v. Williams*, 7th Dist. No. 11MA131, 2012-Ohio-6277, ¶ 62. Therefore, we affirmed the trial court's decision to deny the postconviction petition.

{¶13} That decision was not appealed to the Ohio Supreme Court.

{¶14} This leads us to the three postconviction motions that are now before us. The first motion is Appellant's January 3, 2013 motion for resentencing. In this motion he argues that pursuant to *Foster* he could not be sentenced to a maximum consecutive sentence.

{¶15} The second motion is the March 4, 2013 request for trial and sentencing transcripts at state's expense. In this motion Appellant requests a copy of the transcripts from his 2006 trial and sentencing.

{¶16} The third motion is his request for leave to file a delayed motion for new trial pursuant to Crim.R. 33. 3/4/13 Motion. In this motion he asserts that there is newly discovered evidence and therefore, the trial court should consider his delayed motion for a new trial.

{¶17} All three motions were overruled on April 4, 2014.

{¶18} Appellant filed two notices of appeal. The first notice of appeal, filed April 16, 2014, was specifically from the denial of the request for trial and sentencing transcripts. *State v. Jones*, 7th Dist. No. 14MA44 (*Jones IV*). The second notice of appeal was filed on April 22, 2014. In that notice Appellant appealed all three April 4, 2014 judgments (which would include the denial of the request for transcripts). On May 16, 2014 we sua sponte dismissed *Jones IV*. We explained that the denial of the request for transcripts is part of a group of three judgment entries appealed in 14MA46, the instant appeal. We also indicated the order is not a final appealable order, Appellant did not have pending in the trial court any action to warrant review of

the trial transcripts, and an indigent's right to a transcript is for use in a direct appeal, not for the circumstances presented here. *Jones IV* 5/16/14 J.E.

Statement of the Facts

{¶19} In *Jones I* we set forth the facts of the case as follows. *Jones I*, 2008-Ohio-1541, at ¶ 2-12. On January 12, 2006, Felicia Rodriguez reported that Appellant, her former boyfriend, broke into her house with his cousin while she was sleeping and threatened her with a gun while she lay in bed. She stated that Appellant repeatedly punched her in the face as he held her by the hair and that his cousin stole money and kicked her. Ms. Rodriguez called 911 repeatedly and, when police were slow to respond, she requested an ambulance, which transported her to the emergency room. Her nose was bleeding, her eyes and lips were swollen and she had contusions on her face and back. She provided a statement to police at the hospital and again the next day.

{¶20} Appellant was arrested on January 19, 2006 for aggravated burglary. He remained in jail in lieu of bail. On January 30, 2006, a preliminary hearing was held, and Appellant was bound over to the grand jury. On February 23, 2006, the grand jury indicted him on four counts. The first two were alternative forms of aggravated burglary, one for physical harm and one for having a deadly weapon. See R.C. 2911.11(A). Count three was for aggravated robbery. See R.C. 2911.01(A)(1). The final count was for felonious assault, but this charge was not brought to trial. See R.C. 2903.11(A)(2).

{¶21} Although represented by appointed counsel since the beginning, Appellant filed various pro se motions. A pro se motion for new counsel was granted. However, a pro se motion to dismiss on speedy trial grounds was denied.

{¶22} Thereafter, the jury trial commenced on May 22, 2006. The victim testified for the state. She noted that she had locked the door before she went to bed at 7:00 p.m. but that she discovered the door unlocked after the incident. She explained that Appellant still had her key from when they dated and that he had ignored her requests to give it back since they stopped dating the prior summer. (Tr. 208, 231-232).

{¶23} The victim then described waking up with the lights on and feeling a gun pressed against her head. (Tr. 211). She said Appellant threatened that he would shoot her if she called the police or her fiancé. (Tr. 213). She then disclosed that Appellant began punching her in the face as he held her by the hair. (Tr. 214-216).

{¶24} In the meantime, Appellant's cousin knocked things down as he searched the room. He took $800 from a box by her bed and her prescription Vicodin pills. He then kicked the victim in the back as she was struggling with Appellant. (Tr. 217).

{¶25} The victim estimated the incident took place at 9:00 or 9:30 p.m. and lasted approximately twenty minutes. However, she had been asleep, and there were no clocks in her bedroom. (Tr. 221). She noted that she called 911 repeatedly, waiting over fifteen minutes between the first and second calls. (Tr. 220-221). She believed that she called her fiancé at work around 10:00 and that he arrived home at 10:30 p.m., just prior to the ambulance arriving. (Tr. 221).

{¶26} The state also called the first responding officer and the emergency room physician to the stand. They testified to the victim's injuries and opined that it appeared she had been beaten. Hospital records established that the victim checked-in just before 11:00 p.m. (Tr. 283).

{¶27} The defense called Takisha Watson, Appellant's girlfriend, as an alibi witness. It was pointed out that she had been dating Appellant for three years and that he had dated the victim for a year and a half of that time unbeknownst to Ms. Watson. Ms. Watson testified that on January 12, 2006, she picked Appellant up from work at 5:00 p.m. and went to Northside Hospital with him to see his grandmother. She said that they left when visiting hours were over at 8:30 or 9:00 p.m. (Tr. 301). She explained that her car would not start so they had to use the security guard's battery charger. (Tr. 302). Ms. Watson testified that they then went to her house on the south side of Youngstown. She stated that her brother called Appellant at 9:30 or 10:00 p.m.; he asked for a ride, but the car would not start. She concluded that she and Appellant went to bed between 11:00 and 11:30 p.m. (Tr. 303).

{¶28} This witness's brother was also called as an alibi witness since he stated that he called his sister's house at 9:30 or 10:00 p.m. and spoke to Appellant for about an hour. (Tr. 323). Appellant testified in his own defense and confirmed the testimony of the alibi witnesses, stating he left the hospital building at 8:45 p.m., got a jump start, went home, ate, and talked on the telephone to Ms. Watson from 9:30 p.m. until 10:15 or 10:30 p.m. (Tr. 349-351). He also claimed that he left the victim's house key on her table on the day they ended their relationship. (Tr. 367).

First Assignment of Error

"Trial Court abused its discretion and authority, April 3, 2014, in overruling the defendant, Aaron L. Jones' request for a new trial pursuant to Crim.R. 33, from March 3, 2013."

{¶29} Crim.R. 33(B) provides that motions for new trial based on newly discovered evidence shall be filed within 120 days after the day upon which the verdict was rendered. The rule, however, provides a mechanism for movants who discover the evidence outside the 120 day period; the movant is to file a motion requesting leave to file a motion for new trial. *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, 927 N.E.2d 1133, ¶ 23 (7th Dist.). In such a motion, the moving party must show by clear and convincing proof that the evidence he is relying on to support his motion for new trial could not have been discovered within the 120 day period; the moving party must prove unavoidable delay by clear and convincing evidence. *State v. Lordi,* 149 Ohio App.3d 627, 2002–Ohio–5517, 778 N.E.2d 605, ¶ 26 (7th Dist.); Crim.R. 33(B). Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence. *Id.* citing, *State v. Walden,* 19 Ohio App.3d 141, 146, 1483 N.E.2d 859 (1984). Crim.R. 33(B). If such motion for leave is granted, the motion for new trial must be filed within seven days of that order. Crim.R. 33(B).

{¶30} Here, Appellant did follow the proper mechanism and requested leave to file a delayed motion for new trial. Attached to the motion are two letters from Twana D. Johnson (who was Appellant's accomplice in these crimes). One was

allegedly received in December 2010 and the other, although dated December 2006, was allegedly received in December 2012. In both letters, Johnson claims the victim Felicia Rodriguez lied, she told him that she lied, and she was going to try to help Appellant by telling the truth. The trial court denied the motion.

{¶31} We review the trial court's denial of a Crim.R. 33(B) motion for leave to file a motion for new trial under an abuse of discretion standard of review. *State v. Wilson*, 7th Dist. No. 11 MA 92, 2012-Ohio-1505, ¶ 44, citing *State v. Pinkerman,* 88 Ohio App.3d 158, 160, 623 N.E.2d 643 (4th Dist.1993). Unless we find that the court's attitude was unreasonable, arbitrary or unconscionable, we must affirm the court's decision. *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶32} In determining whether the trial court abused its discretion, we must consider the evidence presented. These letters from Johnson appear to be a claim that Felicia Rodriguez, the victim, is recanting her testimony.

{¶33} As this Court observed in *Brown:*

> "Newly discovered evidence must do more than merely impeach or contradict evidence at trial, and there must be some compelling reason to accept a recantation over testimony given at trial." *State v. Fortson,* 8th Dist. No. 82545, 2003–Ohio–5387, 2003 WL 22312206, ¶ 13. "[N]ewly discovered evidence which purportedly recants testimony given at trial is 'looked upon with the utmost suspicion.'" *State v. Germany* (Sept. 30, 1993), 8th Dist. No. 63568, 1993 WL 389577, *6, quoting *United States v. Lewis* (C.A.6, 1964), 338 F.2d 137, 139. "Recanting affidavits and witnesses are viewed with extreme suspicion because the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both times." *State v. Gray,* 8th Dist. No. 92646, 2010–Ohio–11, 2010 WL 27872, ¶ 29, citing *State v. Jones,* 10th Dist. No. 06AP–62, 2006–Ohio–5953, 2006 WL 3240659, ¶ 25, and *United States v. Earles* (N.D.Iowa, 1997), 983 F.Supp. 1236, 1248.

Brown, 186 Ohio App.3d 309, 2010–Ohio–405 at ¶ 20 (7th Dist.).

{¶34} Likewise, we have also explained that merely because an important witness recants does not per se entitle a defendant to a new trial. *State v. Perdue,* 7th Dist. No. 04MA119, 2005–Ohio–2703, ¶ 19. Rather, where a witness recants and/or offers a post-trial confession, the trial court must determine which of the contradicting testimonies of that witness are credible. *Id. See also*, *State v. Pasco* (Sept. 10, 1987), 7th Dist. Nos. 82C40, 83C28 (trial court has discretion to determine whether later confession of another person is credible). Some relevant considerations in weighing the competing versions of testimony are: whether the judge reviewing the new trial motion also presided over the trial; whether the witness is a relative of the defendant or otherwise interested in his success; and whether the new testimony contradicts evidence proffered by the defense at trial. *State v. Shakoor,* 7th Dist. No. 10MA64, 2010–Ohio–6386, ¶ 27. It is only if the trial court determines that the recantation is believable must the court then consider whether the confession would materially affect the outcome of trial. *Perdue* at ¶ 18, 27.

{¶35} In this instance, the witness does not directly recant her testimony. Rather, it is a third person, Appellant's alleged accomplice, who claims the witness is recanting or will recant. Since there is no direct evidence from the witness that she is or will recant her testimony, the trial court did not abuse its discretion in denying the motion.

{¶36} Furthermore, there is a timeliness issue with this evidence. We have previously explained that although Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for a new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence. *Brown,* 186 Ohio App.3d 309, 2010–Ohio–405 at ¶ 24. The request for leave to file a delayed motion for new trial was filed March 4, 2013. Appellant claims to have received the undated letter on December 9, 2010, which is over two years prior to the request for leave. The other letter is dated December 11, 2006; however, it was allegedly not received by Appellant until December 23, 2012, which is about four months prior to the filing of the request for leave. While four months might be a reasonable amount of time, that

letter does not indicate that Rodriguez is recanting; rather that letter, at most, indicates Johnson is of the opinion that Rodriguez lied on the stand. It is the other letter, the one Appellant claims to have received in 2010, that asserts Rodriguez is recanting her testimony. Waiting two years to file the request for leave is unreasonable. Even if the letter offered a basis for a new trial, the trial court did not abuse its discretion in denying the request.

{¶37} For those reasons this assignment is meritless. The trial court's April 4, 2014 decision to deny the request for leave to file a delayed motion for a new trial is hereby affirmed.

Second and Third Assignments of Error

"Trial court judge abused her discretion and authority when overruling action that clears defendant of any infraction."

"Defendant, Aaron L. Jones has been incarcerated 8 ½ years on a void sentence, since July 20, 2006."

{¶38} The second and third assignments of error are addressed together because they both address sentencing and the trial court's decision to overrule the January 3, 2013 motion for resentencing.

{¶39} In the motion filed with the trial court, Appellant argued that he should not have received more than the minimum sentence. He argued that his sentence is void and that his sentence violated the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶40} We have previously explained that when a criminal defendant, after his direct appeal, files a motion to vacate or correct his sentence on the basis that his constitutional rights have been violated, such motion is construed as a petition for postconviction relief as defined in R.C. 2953.21. *State v. Kapsouris*, No. 08 MA 265, 2010-Ohio-754, ¶ 13, citing *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus.

{¶41} In *Jones II* and *III* we explained that under R.C. 2953.21(A)(2) a petition for postconviction relief must be filed within one hundred eighty days of the date in which the trial transcript is filed in the court of appeals on direct appeal, unless

certain exceptions enumerated in R.C. 2953.23 apply. *Jones II*, 2011-Ohio-102 at ¶ 12; *Jones III*, 2014-Ohio-2592 at ¶ 14. Pursuant to R.C. 2953.23, the trial court cannot entertain an untimely or successive petition unless division (A)(1) or (2) applies. *Jones II* at ¶ 12; *Jones III* at ¶ 14. This petition qualifies as untimely and successive. It is untimely because it was clearly filed outside the one hundred eighty day time limit. It is successive because the issues raised in the motion for resentencing were raised in prior petitions.

{¶42} Therefore, in order for the trial court to have jurisdiction to hear the petition either division (A)(1) or (2) had to be met. Division (A)(2) deals with DNA, which is inapplicable here because there is no claim concerning DNA. Division (A)(1) requires both of the following to apply:

> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

R.C. 2953.23(A)(1); *Jones II* at ¶ 13-14; *Jones III* at ¶ 14.

{¶43} Here (similar to his previous cases), Appellant did not tell the trial court how he was unavoidably prevented from discovering the fact on which his petition was based; nor did he claim a new retroactive right has been recognized by the United States Supreme Court. R.C. 2953.23(A)(1). In fact, all of the arguments made could have been raised in a timely filed petition for postconviction relief. As

such, the trial court had no jurisdiction to consider the petition. *State v. Bryant,* 7th Dist. No. 10 MA 11, 2010–Ohio–4401, ¶ 16.

{¶44} Also, Appellant did not show by clear and convincing evidence that, but for constitutional errors at trial, no reasonable fact-finder would have found him guilty. R.C. 2953. 23(A)(2). This is an alternative reason why the trial court had no jurisdiction to consider the petition. *Bryant* at ¶ 16.

{¶45} Regardless, even if the petition was timely, the issues raised in it are barred by res judicata. *Foster* and its implications were discussed in *Jones I*. *Jones I*, 2006-Ohio-1541 at ¶ 81-98. We found that the sentence issued by the trial court did not violate *Foster*. The Ohio Supreme Court has indicated that "[r]es judicata is applicable in all postconviction relief proceedings." *State v. Szefcyk,* 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.* at syllabus.

{¶46} It is also noted that in the appellate brief under the second assignment of error, Appellant argues there was insufficient evidence to support the conviction. This issue was raised in the direct appeal and we found no merit with it. *Jones I*, 7th Dist. No., 2008-Ohio-1541 at ¶ 41-46. It was also raised in his appeal from his first postconviction petition. In that decision we informed him that since the issue was already raised in the direct appeal it was barred by res judicata. *Jones II*, 7th Dist. No. 10MA47, 2011-Ohio-1002, ¶10. That rule equally applies here.

{¶47} In the motion for resentencing Appellant did not raise sufficiency of evidence. In *Jones II*, we advised Appellant that since the argument was not presented in the postconviction petition, it could not be considered for the first time on appeal. *Id.* at ¶ 11. That ruling provides additional reasoning for finding no merit with the insufficient evidence argument.

{¶48} In conclusion, the second and third assignments of error are meritless. The petition is untimely, successive and does not meet the requirements of R.C. 2953.23(A)(1) or (2). Therefore, the trial court lacked jurisdiction to entertain the

petition. Furthermore, even if it could be considered, the arguments raised are barred by res judicata.

Fourth Assignment of Error

"The trial court and the state of Ohio disregards United States General Assembly Mandates, in response to indigent pro se litigants receiving 'the record' for purposes of an appeal."

{¶49} On March 4, 2013, Appellant filed a request for trial and sentencing transcripts at state's expense. In that motion Appellant asked for copies of the trial and sentencing transcripts that were prepared for the direct appeal.

{¶50} The record does contain the official transcript. However, the trial court did not commit error in denying the request for a copy of the transcripts. As aforementioned, in *Jones IV* we explained that Appellant, an indigent, does not have a right to have a copy of the transcripts for purposes of preparing and filing a postconviction petition. *Jones IV*, 7th Dist. No. 14MA45 (May 16, 2014 J.E.). That conclusion is correct. Due process does not require that indigent civil litigants must be provided trial transcripts at state's expense. *Griffin v. Illinois,* 351 U.S. 12, 19-20, 76 S.Ct. 585 (1956). A postconviction proceeding is not an appeal of a criminal conviction, but rather, is a collateral civil attack on a criminal judgment. *State v. Calhoun,* 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Furthermore, the Tenth Appellate District has concluded that due process does not entitle indigent defendants to a transcript at state expense prior to the filing of a petition for postconviction relief. *State v. Bird*, 138 Ohio App. 3d 400, 406, 741 N.E.2d 560 (10th Dist.2000), citing *State ex rel. Murr v. Thierry*, 34 Ohio St.3d 45, 517 N.E.2d 226 (1987); *Burnside v. Mahoning Cty. Common Pleas Court*, 7th Dist. No. 97CA12, 1998 WL 811349 (Nov. 19, 1998); *State v. Jones*, 4th Dist. No. 96CA19, 1996 WL 732454 (Dec. 19, 1996).

{¶51} Consequently, this assignment of error is meritless.

Conclusion

{¶52} For all the above stated reasons, all assignments of error lack merit. The trial court's April 4, 2014 decisions to deny the request for leave to file a delay motion for new trial, the motion for resentencing, and the request for trial and sentencing transcripts are hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.