

[Cite as *State v. Flower*, 2015-Ohio-2335.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 14 MA 148
V.)	
)	OPINION
WICKHAM FRANKLIN FLOWER III,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 95CR391

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee Paul Gains
Prosecutor
Ralph M. Rivera
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For Defendant-Appellant Wickham F. Flower, III, Pro-se
#A311-820
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JUDGES:
Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Robb

Dated: June 9, 2015

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DONOFRIO, P.J.

{¶1} Defendant-appellant Wickham F. Flower III appeals a nunc pro tunc judgment entry filed by the Mahoning County Common Pleas Court sentencing him to life in prison with parole eligibility after 20 years for aggravated murder.

{¶2} In 1995, Flower pleaded guilty to two counts of aggravated burglary in violation of R.C. 2911.11(A)(3)(B), first-degree felonies, one count of aggravated robbery in violation of R.C. 2911.01(A)(2)(B), a first-degree felony, and one count of aggravated murder in violation of R.C. 2903.01(B)(C), a felony-life offense.

{¶3} At that time, as it pertained to Flower's aggravated robbery and aggravated burglary convictions, the Ohio Revised Code provided that a term of imprisonment for an aggravated felony of the first degree was to consist of a minimum term, which could be imposed as a term of actual incarceration of 5, 6, 7, 8, 9, or 10 years, and a maximum term of 25 years. R.C. 2929.11(B)(1)(a). Concerning Flower's aggravated murder conviction, the Ohio Revised Code provided that for an aggravated murder conviction that did contain a death-penalty specification, as was the case here, "the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender." R.C. 2929.03(A).

{¶4} In a judgment entry filed on August 23, 1995, the trial court sentenced Flower to 10 to 25 years with actual incarceration of 10 years for each of the aggravated burglary convictions and for the aggravated robbery conviction. The court sentenced Flower to life in prison for the aggravated murder conviction. The court then ordered that all of the sentences be served consecutively to each other.

{¶5} Flower did not file a timely appeal from that judgment. Over a year later, on September 25, 1996, Flower filed a notice of appeal which this Court construed as a motion for delayed appeal which was denied. See *State v. Flower*, 7th Dist. No. 96 CA 179 (Dec. 2, 1996).

{¶6} More than 18 years later, Flower filed a pro se "Motion for Corrective Sentence" on March 13, 2014, and the trial court overruled it as an untimely postconviction petition. Flower appealed that decision to this court in case no. 14 MA 42 but later voluntarily dismissed the appeal.

{¶7} On July 31, 2014, Flower filed a pro se “Motion to Correct Unlawful Sentence” in the trial court. In that motion, Flower argued that his sentence for aggravated murder was void ab initio because there was no provision in the Ohio Revised Code at that time for a sentence of “life in prison” for aggravated murder but only a sentence of “life in prison with parole eligibility after serving twenty years of imprisonment.” He argued that the omission of parole eligibility required a de novo sentencing hearing.

{¶8} On September 23, 2014, the trial court issued a nunc pro tunc judgment entry in which it added the parole eligibility language to Flower’s life in prison sentence for the aggravated murder conviction. This appeal followed.

{¶9} Flower’s sole assignment of error states:

THE TRIAL COURT LACKED JURISDICTION TO ISSUE A NUNC PRO TUNC ENTRY TO CORRECT A SENTENCE THAT WAS VOID AB INITIO AND VIOLATED DUE PROCESS IN DOING SO.

{¶10} As he did below in the trial court, Flower argues that his original life-sentence for the aggravated murder conviction was void ab initio because it did not contain the parole eligibility specification. He contends that the original judgment entry of sentence without the reference to parole eligibility reflected what occurred in open court at his sentencing hearing and, therefore, a new sentencing hearing is required for proper imposition of the life sentence and a nunc pro tunc entry will not suffice. In response, the state contends that Flower’s arguments are barred by the doctrine of res judicata and that the trial court properly corrected the original judgment entry of sentence with a nunc pro tunc entry pursuant to Crim.R. 36 as the omission of parole eligibility in the original entry was merely a clerical mistake.

{¶11} As initial matter, we address the nature of Flower’s motion. The Ohio Supreme Court has held that a motion seeking to correct and/or vacate a sentence constitutes a motion for postconviction relief where it is “(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.”

State v. Reynolds, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997); see also *State v. Schlee*, 117 Ohio St.3d 153, 882 N.E.2d 431, 2008-Ohio-545, at ¶ 12. Here, Flower's July 31, 2014 pro se "Motion to Correct Unlawful Sentence" plainly shares these four characteristics of a petition for postconviction relief.

{¶12} Next, this court must address the trial court's jurisdiction to entertain the merits of Flower's motion/petition. The requirement that a petition for postconviction relief be filed timely is jurisdictional. R.C. 2953.23(A) ("a court may not entertain a petition filed after the expiration of the period prescribed [in R.C. 2953.21]"). Unless the petition is filed timely, the court is not permitted to consider the substantive merits of the petition. *State v. Beaver*, 131 Ohio App.3d 458, 461, 722 N.E.2d 1046 (11th Dist.1998) (the trial court should have summarily dismissed appellant's untimely petition without addressing the merits).

{¶13} If a postconviction relief petition is filed beyond the 180-day time limitation or the petition is a second or successive petition for postconviction relief, R.C. 2953.23(A) precludes the court from entertaining the petition unless: (1) the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based, or (2) after the 180-day time period expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. R.C. 2953.23(A)(1)(a). The petitioner must then show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b).

{¶14} Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for postconviction relief. *State v. Carter*, 2d Dist. No. 03-CA-11, 2003-Ohio-4838, citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998).

{¶15} In this case, Flower's petition was unquestionably filed beyond the 180-day time limit set forth in R.C. 2953.21. The record on appeal was filed with this court on November 4, 1996. Therefore, Flower's petition would have been due by

Monday, May 5, 1997. Flower did not file the petition until July 31, 2014, well over 17 years after the statutory deadline.

{¶16} Flower did not offer any explanation as to how he was unavoidably prevented from discovering the facts upon which his claim for relief is based or that the United States Supreme Court has recognized a new federal or state right that applies retroactively to him and is the basis of his claim for relief. Consequently, Flower's petition was untimely and could have been dismissed on jurisdictional grounds accordingly.

{¶17} Notably, however, the trial court's September 23, 2014 nunc pro tunc judgment entry never directly or explicitly references the motion filed by Flower. This leads us next to the trial court's authority to correct the original judgment entry of sentence independent of Flower's July 31, 2014 pro se "Motion to Correct Unlawful Sentence." Crim.R. 36 clearly provides, "Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." For instance, in cases when the notification of postrelease control was properly given at the sentencing hearing, the Ohio Supreme Court has observed that "the essential purpose of notice has been fulfilled and there is no need for a new sentencing hearing to remedy the flaw." *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, 724, ¶ 24. Thus, the Court held that "[t]he original sentencing entry can be corrected to reflect what actually took place at the sentencing hearing, through a nunc pro tunc entry, as long as the correction is accomplished prior to the defendant's completion of his prison term." *Id.*

{¶18} Here, pursuant to Crim.R. 36 and *Qualls*, the trial court had the authority to correct Flower's judgment entry of sentence to reflect what actually took place at the sentencing hearing, through a nunc pro tunc entry, and add the parole eligibility language. Flower insists that the trial court did not include parole eligibility in its original pronouncement of sentence at his sentencing hearing. As indicated, the alleged omission would have occurred during the original sentencing hearing, but

Flower has not included a transcript of that sentencing hearing or a substitute for the record pursuant to App.R. 9.

{¶19} This court has repeatedly stressed that it is an appellant's responsibility to provide the court with a record of the facts, testimony, and evidence in support of their assignments of error. *State v. Funkhouser*, 7th Dist. No. 02-BA-4, 2003-Ohio-697, ¶ 13.

{¶20} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. * * * When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d. 197, 199, 400 N.E.2d 384 (1980).

{¶21} As Flower has not submitted a transcript of the sentencing proceeding, this court cannot determine whether or not the court acted properly within the context of appellant's assignment of error. Therefore, this court has nothing to pass upon and thus, as to this assigned error, the court has no choice but to presume the validity and regularity of the lower court's proceedings.

{¶22} Accordingly, Flower's sole assignment of error is without merit.

{¶23} The judgment of the trial court is hereby affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.