

[Cite as *State v. Sneed*, 2009-Ohio-5241.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93194

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

MICHAEL SNEED

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-353104

BEFORE: Kilbane, P.J., Stewart, J., and Sweeney, J.

RELEASED: October 1, 2009

JOURNALIZED:

APPELLANT

Michael P. Sneed, pro se
Inmate No. 343-653
Grafton Correctional Institution
1800 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Diane Smilanick
Assistant Prosecuting Attorney
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant, Michael Sneed (“appellant”), appeals the trial court’s denial of his motion to correct his sentence. After a review of the record and pertinent law, we affirm.

{¶ 2} On July 17, 1997, appellant was charged with an eight-count indictment. In Counts 1 and 2, appellant was charged with aggravated vehicular homicide, in violation of R.C. 2903.06, felonies of the first degree, with driving under the influence specifications. In Counts 3 through 6 and Count 8, appellant was charged with aggravated vehicular assault, in violation of R.C. 2903.08, felonies of the second degree, and all contained driving under the influence specifications. In Count 7, appellant was charged with driving under the influence, in violation of R.C. 4511.19, a misdemeanor of the first degree. All counts contained a previous conviction specification, stemming from appellant’s 1996 conviction for driving under the influence.

{¶ 3} On September 25, 1997, appellant pled guilty to all counts. On October 24, 1997, the trial court sentenced appellant to a total of 15½ years of incarceration. On November 16, 1998, the trial court issued a nunc pro tunc entry correcting the October 24, 1997 sentencing entry to reflect the fact that pursuant to R.C. 4507.16, appellant’s driver’s license would be permanently revoked upon his release from prison. Appellant concedes that the statute mandates that the trial court permanently revoke his driver’s license.

{¶ 4} Appellant did not file a direct appeal following his sentencing hearing. However, on August 12, 1998, appellant requested leave from this court to file a delayed appeal, which was denied on September 9, 1998. See *State v. Sneed* (1998), Cuyahoga App. No. 75031, Motion No. 297768.

{¶ 5} On April 13, 1998, appellant filed a motion with the trial court for postconviction relief, asserting that he received ineffective assistance of counsel. On April 27, 1998, the trial court denied the motion and this court affirmed that decision. *State v. Sneed* (Sep. 30, 1999), Cuyahoga App. No. 76250.

{¶ 6} On June 9, 2000, Sneed filed a motion with the trial court to withdraw his guilty plea. Appellant's basis for the motion to withdraw his guilty plea was that he could not understand the ramifications of the plea at the time because he was on prescription medications. On June 14, 2000, the trial court denied the motion, and appellant did not appeal the decision.

{¶ 7} On August 17, 2001, appellant filed a motion with this court for leave to appeal his sentence. On September 10, 2001, this court denied the motion and dismissed the appeal. See *State v. Sneed* (2001), Cuyahoga App. No. 80113, Motion No. 330845.

{¶ 8} On January 22, 2002, appellant filed a motion with the trial court seeking to withdraw his guilty plea. This time appellant argued that he could not understand the consequences of pleading guilty because he was deprived

of one of his prescription medications. This was in direct contradiction to his previously filed motion to withdraw his guilty plea that argued he was taking prescription medicine at the time. On January 30, 2002, the trial court denied the motion, and this court later affirmed. *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502.

{¶ 9} On April 17, 2008, appellant filed a motion with the trial court to correct his sentence. He argued his sentence was void because the sentencing entry did not reflect that he was advised he would be subject to postrelease control. On April 23, 2008, the trial court denied the motion. Appellant appealed, and on October 9, 2008, this court remanded the matter to the trial court, ordering the trial court to correct its journal entry. On December 18, 2008, the trial court amended the sentencing entry to reflect that appellant would be subject to three years of postrelease control. *State v. Sneed*, Cuyahoga App. No. 91414, 2008-Ohio-5247.

{¶ 10} On March 5, 2009, appellant again filed a motion to correct his sentence with the trial court, this time pursuant to Civ.R. 60(B). On March 23, 2009, the State filed its response. On March 25, 2009, the trial court denied appellant's motion without opinion.

{¶ 11} Appellant filed the instant appeal, asserting one assignment of error for our review.

“The trial court exceeded its authority in denying appellant’s motion to correct sentence, pursuant to Civ.R.

60(B), as the trial court's judgment is void, pursuant to R.C. 2903.06, R.C. 2903.08, R.C. 4507.16, R.C. 4510.02, and R.C. 2929.19."

{¶ 12} Appellant argues that during his sentencing hearing the trial court failed to advise him that his license would be permanently revoked, therefore, rendering his sentence void. The State contends that the trial court properly amended its sentencing entry, and that this issue is untimely and barred by the doctrine of res judicata. For the following reasons, we agree with the State.

{¶ 13} Appellant specifically labeled and formatted this issue pursuant to the standard prescribed by Civ.R. 60(B), which governs relief from judgment. As an initial matter, we conclude that this motion must be construed as a motion for postconviction relief pursuant to Crim.R. 35 and R.C. 2953.12.

{¶ 14} Appellant attempted to invoke the provisions of the civil rules in his criminal case. In some limited instances the civil rules may be applicable to criminal actions. Crim.R. 57 provides, "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Thus, in this case, appellant may file a motion pursuant to Civ.R. 60(B) only where no similar basis for relief exists under the criminal rules.

{¶ 15} In *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, the Ohio Supreme Court held that when a criminal defendant files a motion pursuant to Civ.R. 60(B), arguing he is entitled to relief from judgment after his time for a direct appeal has elapsed, claims his constitutional rights have been violated, and requests relief from his sentence, the court should construe such motion as one for postconviction relief. Therefore, the standards applying to a motion for postconviction relief and not Civ.R. 60(B) will apply. *Id.* at ¶12.

{¶ 16} Motions for postconviction relief are governed by the provisions established in R.C. 2953.21. R.C. 2953.21(A) provides that if no direct appeal is taken, the motion for postconviction relief must be filed no later than 180 days after the expiration of the time to file an appeal had elapsed. Appellant was sentenced on October 24, 1997, and the trial court filed its nunc pro tunc entry reflecting the loss of appellant's driver's license on November 16, 1998. Clearly, appellant's motion, filed on March 5, 2009, is well beyond the 180 day deadline imposed by statute, and appellant had numerous opportunities to raise this issue earlier.

{¶ 17} However, in *State v. Wells*, Cuyahoga App. No. 90753, 2009-Ohio-223, this court concluded that the trial court is still required to consider an untimely or successive motion for postconviction relief where "(1) the petitioner was unavoidably prevented from discovering the facts on which

the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and that petition asserts a claim based on that new right.”

{¶ 18} Appellant has previously filed several motions for postconviction relief. Although the sentencing entry revoking appellant’s driver’s license was not amended until November of 1998, several months after appellant’s first motion for postconviction relief, appellant subsequently filed and appealed the denial of several motions to withdraw his plea. Motions to withdraw guilty pleas, if filed with the trial court after the expiration of the time to file a direct appeal, are construed as motions for postconviction relief. *State v. Beam*, Lorain App. No. 01CA007898, 2002-Ohio-160. A trial court has no jurisdiction to entertain successive petitions for postconviction relief, unless the defendant articulates an exception as outlined by this court in *Wells*, supra. *State v. Taylor*, Cuyahoga App. No. 80271, 2002-Ohio-2742, at ¶17.

{¶ 19} Appellant neither asserts an explanation for the delay in filing his motion, nor points to a new right recognized by the United States Supreme Court that would allow him to file a successive motion for postconviction relief.

{¶ 20} Further, appellant’s motion is barred by the doctrine of res judicata. A defendant may not file a motion for postconviction relief asserting errors that could have been brought to the court’s attention either in a direct

appeal or a previous motion for postconviction relief. *State v. Sawyer*, Cuyahoga App. No. 91946, 2009-Ohio-2391, at ¶19, citing *State v. Cole* (1992), 2 Ohio St.3d 112, 443 N.E.2d 169. In an appeal brought by appellant in 2005, this court stated, “Sneed has continued to file postconviction motions raising issues that could have been raised in a direct appeal or in his initial postconviction motion.” *State v. Sneed*, Cuyahoga App. No. 84964, 2005-Ohio-1865. At the very least, appellant could have raised this issue in his April 17, 2008 motion for correction of sentence, which addressed postrelease control.

{¶ 21} As appellant could have argued this issue in one of his previous motions for postconviction relief, the issue is now barred by res judicata. Therefore, appellant’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
JAMES J. SWEENEY, J., CONCUR