

[Cite as *State v. Bandy*, 2015-Ohio-1033.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101785 and 101786

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIE BANDY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-01-417888-A

BEFORE: Jones, P.J., E.A. Gallagher, J., and Stewart, J.

RELEASED AND JOURNALIZED: March 19, 2015

FOR APPELLANT

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant Willie Bandy appeals the trial court's denial of his postconviction motions. We affirm.

{¶2} In 2001, Bandy was charged with aggravated murder. In May 2002, he pleaded guilty to murder and was sentenced to 15 years to life in prison in June 2002. Bandy did not file a direct appeal.

{¶3} In 2008, Bandy filed a motion for a delayed appeal, which this court denied. *State v. Bandy*, 8th Dist. Cuyahoga No. 91322. In August 2010, Bandy filed a motion to withdraw his guilty plea, which the trial court denied.

{¶4} Bandy filed numerous other motions in 2010 and 2011, at least six of which involved requests to withdraw his guilty plea or amend/vacate his sentence. The trial court denied these motions in a single judgment entry filed in February 2012. In August and November 2012, Bandy filed motions with this court requesting a delayed appeal, so he could challenge the trial court's February 2012 judgment entry. This court denied the motions and dismissed the appeals. *State v. Bandy*, 8th Dist. Cuyahoga Nos. 98807 and 99169.

{¶5} In January 2014, Bandy filed another notice of appeal, which this court dismissed for his failure to file a timely appeal under App.R. 4(A). *State v. Bandy*, 8th Dist. Cuyahoga No. 100863.

{¶6} On March 10, 2014, Bandy filed a motion asking the trial court to amend its June 2002 sentencing journal entry because, he argued, it was not a final, appealable order. On March 21, 2014, Bandy moved to vacate and void his sentence alleging the trial court failed to impose a mandatory fine. The trial court denied these motions on July 21, 2014.

{¶7} On August 7, 2014, Bandy filed two notices of appeal appealing the trial court's July

21, 2014 judgment entries denying his March 10 and March 21, 2014 motions. This court consolidated the two appeals.

{¶8} On appeal, Bandy raises 14 assignments of error, which will be combined for review. See appendix.

{¶9} As an initial matter, we note that a vaguely titled motion to correct or vacate a sentence may be construed as a petition for postconviction relief where the motion was filed subsequent to a direct appeal, claimed a denial of constitutional rights, sought to render the judgment void, and asked for a vacation of the judgment and sentence. *State v. Meincke*, 8th Dist. Cuyahoga No. 96407, 2011-Ohio-6473, ¶ 8, citing *State v. Caldwell*, 3d Dist. Paulding No. 11-05-07, 2005-Ohio-5375; *State v. Reynolds*, 79 Ohio St.3d 158, 160-161, 679 N.E.2d 1131 (1997). In this case, Bandy failed to file a timely direct appeal from his original conviction. Because the time for filing his notice of appeal had expired, we find this standard to be equally applicable to Bandy's case and find that his motions to vacate his sentence should be construed as a petition for postconviction relief. See *Meincke* at *id.*, citing *State v. Wright*, 6th Dist. Wood No. WD-04-070, 2005-Ohio-4171, ¶ 28; see also *State v. Mayes*, 8th Dist. Cuyahoga No. 88426, 2007-Ohio-2374.

{¶10} Pursuant to R.C. 2953.21(A)(2), when no direct appeal is taken, a petitioner must file his or her petition for postconviction relief no later than 180 days after the expiration of the time for filing the direct appeal of the judgment of conviction. Here, Bandy was sentenced in June 2002 but did not file the two motions that are the subject of his appeal until March 2014, more than 11 years beyond the limit to timely file his petition for postconviction relief. Consequently, the trial court would generally have no jurisdiction to consider his untimely petition for postconviction relief. *State v. Schultz*, 8th Dist. Cuyahoga No. 85430,

2005-Ohio-6627, ¶ 11. A trial court, however, may entertain untimely petitions for postconviction relief if a defendant demonstrates either (1) he or she was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the defendant's situation. R.C. 2953.23(A)(1)(a). Neither of these exceptions apply to the instant case.

{¶11} The Ohio Supreme Court has discussed a court's obligation to recognize void sentences, vacate them, and order resentencing. *See State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 12. “[P]resumably, this means that a trial court, confronted with an untimely or successive petition for postconviction relief that challenges a void sentence, must ignore the procedural irregularities of the petition [and vacate the sentence if necessary].” *Meinke* at ¶ 13, quoting *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶ 19 (9th Dist.). Since the two motions that are the subject of this appeal challenge Bandy's original sentence, we will briefly touch upon Bandy's assignments of error to see if any alleged errors render his sentence void.

{¶12} In the first through fourth assignments of error, Bandy focuses on his March 10, 2014 motion, in which he argues that his June 2002 sentencing entry was not a final appealable order because it did not comply with Crim.R. 32(C).

{¶13} Crim.R. 32(C) sets forth what must be contained in a judgment of conviction and provides as follows:

A judgment of conviction shall set forth the fact of conviction and the sentence.

Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the

judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

{¶14} Bandy's argument that the judgment entry was not a final appealable order is based on *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, where the Ohio Supreme Court held that a judgment of conviction is not final and appealable unless it sets forth: "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *Id.* at the syllabus.

{¶15} *Baker* was modified by *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, where the court held that a judgment of conviction need not state the manner of conviction in order to be a final appealable order as long as it states the fact of the conviction, describes the sentence, contains the judge's signature, and is time-stamped by the clerk. *Id.* at paragraph one of the syllabus. If the judgment entry states the fact of conviction but does not state the manner of conviction, that clerical error can be corrected nunc pro tunc. The ensuing nunc pro tunc entry does not create a new final appealable order. *Id.* at paragraph two of the syllabus.

{¶16} Bandy claims that his June 2002 sentencing journal entry does not comply with *Baker* because it did not state that he initially pled not guilty and retracted his not guilty plea to plead guilty. But Bandy's sentencing journal entry indicated that he pleaded guilty to murder, was sentenced to 15 years to life in prison, contained the trial court's signature, and was filed with the clerk of courts. The judgment entry of conviction therefore complies with Crim.R. 32(C), is in accordance with *Lester*, and was a final, appealable order.

{¶17} Based on the above, the trial court was without jurisdiction to consider Bandy's

untimely postconviction motion on these grounds.

{¶18} Accordingly, the first through fourth assignments of error are overruled.

{¶19} In the fifth and sixth assignments of error, Bandy argues that his sentence should be vacated because he was not advised of his appellate rights during his June 2002 sentencing hearing. We find no merit to this argument, notwithstanding Bandy's untimely postconviction motion, because he never raised this issue with the trial court, has failed to present us with a certified complete transcript from his sentencing hearing, and is barred by res judicata from raising the issue on appeal.

{¶20} "When faced with an inadequate or incomplete record, we must presume the regularity of the trial court's actions and accept its judgment." *Meinke*, 8th Dist. Cuyahoga No. 96407, 2011-Ohio-6473, at ¶ 12; *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Bandy never filed a certified complete transcript from his June 2002 sentencing hearing. Therefore, we must presume that the trial court properly advised Bandy of his appellate rights.

{¶21} Bandy's argument is also barred by res judicata. The doctrine of res judicata holds that "a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in the conviction." *State v. Qunnie*, 8th Dist. Cuyahoga No. 100317, 2014-Ohio-1435, ¶ 11. Thus, any issue that a defendant could have raised on direct appeal, but chose not to, will be "barred by res judicata and not subject to review in subsequent proceedings." *Id.* Because Bandy could have raised this issue on direct appeal, but did not, his claim is now barred by res judicata. *State v. Brooks*, 8th Dist. Cuyahoga No. 98380, 2012-Ohio-5292, ¶ 8; *State v.*

Morris, 11th Dist. Trumbull No. 2013-T-0019, 2013-Ohio-5485, ¶ 22.

{¶22} Accordingly, Bandy's fifth and sixth assigned errors are overruled.

{¶23} In the seventh, eighth, and eleventh assignments of error, Bandy argues that he was afforded ineffective assistance of counsel because his trial counsel should have told him that he could appeal his conviction, should have challenged his speedy trial rights, and allegedly misused funds.

{¶24} "A guilty plea waives the right to appeal issues of ineffective assistance of counsel, unless the ineffective assistance of counsel caused the guilty plea to be involuntary." *State v. Bennett*, 6th Dist. Wood No. WD-08-005, 2008-Ohio-5812, ¶ 5; *State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (2d Dist.1991). In his brief, Bandy has not argued that his attorney's allegedly deficient performance caused the entry of his guilty plea to be less than knowing, intelligent, and voluntary.

{¶25} In addition, Bandy did not raise the ineffective assistance of counsel issue in either of the two March 2014 motions that are the subject of this appeal. Pursuant to App.R. 3(D), an appellant is required to designate judgments or orders in the notice of appeal; the notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." *Id.* This court has previously declined jurisdiction to review a judgment or order that is not designated in the notice of appeal. *In re P.M.*, 8th Dist. Cuyahoga No. 87671, 2006-Ohio-5917, ¶ 11.

{¶26} Finally, Bandy could have raised this issue on direct appeal, he did not, and it is therefore barred by res judicata.

{¶27} The seventh, eighth, and eleventh assignments of error are overruled.

{¶28} In the ninth and tenth assignments of error, Bandy challenges his plea hearing,

arguing that the trial court failed to comply with Crim.R. 11 when it accepted his guilty plea without first determining whether he was the principal offender and because the court failed to inform him of the maximum penalty for his crimes.

{¶29} Bandy's argument fails because he did not raise the adequacy of his plea hearing in his March 2014 motions; although it was the subject of prior motions filed in the trial court, he did not raise it in the two motions that form the basis of this appeal. Thus, similar to the previous assignments of error, this court can decline jurisdiction to review this assignment of error pursuant to App.R. 3(D).

{¶30} We also do not have a complete and certified transcript from the plea hearing; therefore, we will presume regularity with those proceedings. Finally, Bandy could have raised the issue on direct appeal and did not do so; therefore, this claim is barred by res judicata.

{¶31} The ninth and tenth assignments of error are overruled.

{¶32} In assignments of error 12 through 14, Bandy argues that the trial court erred when it failed to impose a statutorily mandated fine for his murder conviction, therefore, his sentence is void. These assignments of error were the basis of the motion Bandy filed on March 21, 2014.

{¶33} Once again, this is an issue Bandy should have raised on direct appeal; he did not and his claim is now barred by res judicata. Even if his claim was not barred, the trial court was not required to impose a fine on him for his murder conviction. R.C. 2929.02(B)(4) provides that an offender convicted of murder "may be fined an amount fixed by the court, but not more than fifteen thousand dollars." The fine is discretionary.

{¶34} Thus, the trial court did not err when it denied his untimely postconviction motion on these grounds.

{¶35} Accordingly, the remaining assignments of error are overruled.

{¶36} Finally, because a review of the record demonstrates that Bandy has previously raised identical claims as the ones he raises herein, and, further, that the trial court has repeatedly denied these claims, this court would be justified in summarily dismissing this appeal in its entirety. In *State v. Steimle*, 8th Dist. Cuyahoga No. 85162, 2005-Ohio-4412, ¶ 5, a defendant's attempt to present identical claims in an appeal from a successive motion was rejected by this court as an "untimely appeal from a prior appealable order." Nevertheless, it appears as though this court has more often addressed the merits of appeals such as this one. See, e.g., *State v. Jordan*, 8th Dist. Cuyahoga No. 100686, 2014-Ohio-2408; *State v. Jackson*, 8th Dist. Cuyahoga No. 99929, 2014-Ohio-927; *State v. Mayes*, 8th Dist. Cuyahoga No. 100425, 2014-Ohio-1086. This court's patience, however, is not unlimited; Bandy is hereby cautioned that his continued attempts to relitigate an issue that has been decided against him many times over may lead to his designation as a vexatious litigator. See Loc.App.R. 23(B).

{¶37} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

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.

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR

Appendix - Appellant's Assignments of Error

I: The defendant-appellant's 2002 sentencing entry failed to indicate that defendant-appellant had retracted his former plea of not guilty and the trial court's judgment entry that indicated what happened on a former day of court did not satisfy the requirements of Crim.R. 32(C) and R.C. 2505.02.

II: Defendant-appellant's sentencing entry is not a final order for the entry did not indicate that the defendant-appellant had entered a not guilty plea. The entry merely stated what happened on a former day and that defendant-appellant plead guilty and just a notation that a defendant had plead guilty on a former day is not a final order.

III: Defendant-appellant's sentencing entry did not comply fully with R.C. 2505.02 when the entry failed to indicate what actually happened and that the defendant-appellant had retracted his former not guilty plea.

IV: A judgment entry that fails to comply fully with the first requirements of R.C. 2505.02 is not a final-appealable order and a new revised sentencing entry is needed in which an appeal can be taken.

V: Trial court erred and prejudiced the defendant-appellant's due process and equal protection rights when trial court failed to inform the defendant-appellant during his guilty plea that he had a right to appeal his conviction and sentence within thirty days.

VI: Defendant-appellant did not knowingly and intelligently waive his rights to appeal nor did the defendant-appellant waive his rights to counsel for purposes of filing his first appeal as of right and defendant-appellant requested for the trial court to restore the defendant-appellant's appeal rights.

VII: Defendant-appellant has been denied effective assistance of counsel as provided for and by the Sixth Amendment of the United States Constitution when counsel had failed to inform the defendant-appellant that he had a right to appeal in which he had thirty days to file an appeal denied the defendant-appellant the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and the Federal Constitutions.

VIII: Defendant-appellant was provided with ineffective assistance of counsel when counsel had failed to file a motion to dismiss the charge against the defendant-appellant for trial court's failure to bring the defendant-appellant to trial within 270 days. The Sixth Amendment to the United States assures that defendant's be provided with effective assistance of counsel.

IX: The guilty plea proceedings finding defendant-appellant guilty did not purport

with The Ohio Rules of Criminal Procedure 11 and Crim. R. 11(C)(2)(a) in violation of defendant-appellant's rights secured by the United States of the Fifth, Sixth, and Fourteenth Amendments and failure of the trial court to inform the defendant of the maximum penalty of the charge of aggravated murder and murder.

X: Trial court erred for accepting the defendant-appellant plea as the principal offender where it was not determined whether defendant-appellant acted as the principal offender.

XI: Defendant-appellant was denied effective assistance of counsel when counsel misused the private investigator's fees and kept the monies for himself denied the defendant-appellant his rights to have effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

XII: Trial court erred for its failure to impose the mandatory fine upon the defendant-appellant when no affidavit of indigency was never filed prior to sentencing when trial court had informed the defendant-appellant that he is subject to a mandatory fine of \$15,000.

XIII: The sentencing court erred by not imposing a mandatory fine upon the defendant-appellant when such fine was required by law when the defendant-appellant did not demonstrate that he was indigent or that he was unable to pay such fine.

XIV: Ohio Revised Code 2929.18(B)(1) provides that a trial court to impose mandatory fine upon a defendant when there were no affidavit of indigency being filed prior to sentencing was mandatory and failure for the trial court to do so renders that part of the defendant-appellant's sentence void and a limited resentencing hearing is needed.

