

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court Case No. 18-0970
Appellee, : On Appeal from Hocking County
Court of Appeals,
Fourth Appellate District
v. : Court of Appeals
Case No. 17CA4
Melanie A. Ogle :
Appellant. :

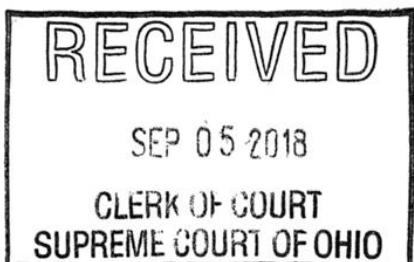
AMENDED NOTICE OF APPEAL

Appellant

Melanie A. Ogle
11575 Donaldson Road
Rockbridge, Ohio 43149
740-385-5959

Counsel for Appellee

Timothy P. Gleeson, Special Prosecuting Attorney
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AMENDED NOTICE OF APPEAL

Appellant, Melanie A. Ogle, hereby amends her notice of appeal to the Supreme Court of Ohio from the judgment of the Hocking County Court of Appeals, Fourth Appellate District, entered in *State of Ohio v. Melanie A. Ogle*, Court of Appeals No. 17CA4 on May 31, 2018 ENTRY ON MOTION FOR RECONSIDERATION and January 23, 2018 DECISION AND JUDGMENT ENTRY, **to include the district court's August 17, 2018 ENTRY ON MOTION TO CERTIFY CONFLICT which contains a sua sponte reconsideration and amends its decision and judgment entry with completely different reasons for dismissing Appellant's appeal.**

The district court's August 17, 2018 ENTRY ON MOTION TO CERTIFY CONFLICT specifically states:

{¶7} Upon review, **we need not address Appellant's motion to certify a conflict** because we *sua sponte* reconsidered our May 31, 2018 entry on motion for reconsideration.

{¶9}*** **Appellant's post-conviction petition was untimely; therefore, the trial court was not required to consider the merits of her arguments.**

{¶10} **Furthermore, Appellant's arguments that her Sixth and Fourteenth Amendment rights were violated are barred by res judicata.**

{¶11} In conclusion, we deny Appellant's motion for reconsideration. However, **our May 31, 2018 decision and judgment entry is hereby amended** to reflect: (1) our consideration of Appellant's argument pursuant to R.C. 2953.23; and, (2) the propriety of trial court's denial of her post-conviction motion, albeit for a different reason, that the court lacked jurisdiction to consider her untimely petition which failed to make the required showing. Our January 23, 2018 decision to dismiss her appeal remains unchanged.

Therefore, based on the district court's **completely different reasons** for

dismissing Appellant's appeal, which it filed on **August 17, 2018**, this case now involves the departing of the Fourth District Court of Appeals from this Court's previous rulings in at least:

State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238

State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197

State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795

State v. Gibson, 45 Ohio St.2d 376 N.E.2d 399 (1976)

regarding applicable law previously set forth by the Ohio Supreme Court for untimely and successive post-conviction petitions as they apply to VOID judgments, and res judicata as it applies to VOID judgments, and involves an unlawful and void sentence for a felony, which in turn raises a substantial Constitutional question.



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CERTIFICATE OF SERVICE

An exact copy of the foregoing AMENDED NOTICE OF APPEAL has been mailed this 4th day of September, 2018 to:

Timothy P. Gleeson, Special Prosecuting Attorney
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Logan, Ohio 43138

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

STATE OF OHIO, : Case No. 17CA4

Plaintiff-Appellee, : ENTRY ON MOTION TO

vs. : CERTIFY CONFLICT

MELANIE OGLE, : APPEARANCES:

Defendant-Appellant. :

Melanie Ogle, Rockbridge, Ohio, Pro Se Appellant.

Timothy P. Gleeson, Special Assistant Prosecuting Attorney, Logan, Ohio, for Appellee.

McFarland, J.

{¶1} Appellant Melanie A. Ogle has filed a motion requesting this court to certify the record in this case to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and App. R. 25. In this motion, Appellant asserts our previous decisions rendered on January 23, 2018 and May 31, 2018 are in conflict with the applicable law for untimely and successive post-conviction petitions in ten other appellate districts. For the following reasons, we find Appellant's argument is moot and deny the motion to certify a conflict.



{¶2} In August 2011, Appellant was convicted by a Hocking County jury of assault on a peace officer, a felony. In 2012, Appellant entered a plea to criminal damaging, a misdemeanor. Both of Appellant's convictions for assault and criminal damaging were affirmed in *State v. Ogle*, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12, and 12CA19, 2013-Ohio-3420. Appellant filed a motion for delayed reconsideration of this court's decision affirming her convictions in her direct appeal. On December 2, 2013, we found that Appellant had not made new arguments or cited new case law, and we found no error or oversight in our judgment affirming her convictions. A motion for delayed appeal was denied by the Supreme Court of Ohio. *See State v. Ogle*, 138 Ohio St.3d 1431, 2014-Ohio-889, 4 N.E.3d 1049 (Table).

{¶3} On September 7, 2016, Appellant filed a petition pursuant to R.C. 2953.21, requesting the trial court vacate the original September 28, 2011 sentencing entry as an unlawful, unauthorized and void judgment entry of conviction and sentence. Appellant argued her constitutional rights to counsel under the Sixth and Fourteenth Amendments were violated during the trial court's September 27, 2011 sentencing hearing. Thus, she concluded, the September 28, 2011 judgment entry of conviction and all subsequent entries and orders are unlawful and void.

{¶4} On March 17, 2017, the trial court overruled her petition as follows: “This matter comes to be heard on the Defendant’s motion for post-conviction relief filed on September 7, 2016. The Motion is overruled.” Appellant timely appealed the trial court’s March 17, 2017 entry.

{¶5} We reviewed Appellant’s appeal and issued a decision and judgment entry on January 23, 2018. We found that because the trial court summarily denied the motion without stating a reason, the trial court’s March 17, 2017 entry was not a final appealable order because it did not contain findings of fact and conclusions of law. We concluded we were without jurisdiction to consider Appellant’s appeal and therefore it was dismissed.

{¶6} On January 31, 2018, Appellant filed a motion for reconsideration of the January 23, 2018 decision and judgment entry. On May 31, 2018, this court filed its entry on motion for reconsideration, finding that Appellant had failed to call to our attention an obvious error or raise an issue that we either completely failed to consider or failed to consider on appeal. As such, we denied her motion for reconsideration.

{¶7} Upon review, we need not address Appellant’s motion to certify a conflict because we *sua sponte* reconsidered our May 31, 2018 entry on motion for reconsideration. In determining whether to grant a motion for

reconsideration filed pursuant to App.R. 26(A)(1)(a), the test “ ‘is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.’ ” *State v. Beckwith*, 8th Dist. Cuyahoga No. 102544, 2016-Ohio-3267, at ¶ 2, quoting *State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1982).

{¶8} In Appellant’s motion to reconsider, she argued that the trial court’s March 17, 2017 entry does constitute a final appealable order for the reasons that her September 7, 2016 petition was filed beyond the period set forth in R.C. 2953.21(A)(2), and was also a successive petition. R.C. 2953.21(A)(2), petition for post-conviction relief, provides that except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction * * *.” Appellant emphasized that her post-conviction motion could have been considered only pursuant to R.C. 2953.23, and therefore, the trial court was not required to issue findings of fact and conclusions of law. R.C. 2953.23(A)(1) further provides that a

court may not entertain an untimely petition unless both of the following 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 * * *.”

{¶9} Appellant's post-conviction petition filed in 2016 was clearly untimely and successive. Therefore, Appellant had to satisfy the criteria set forth in R.C. 2953.23(A) before the trial court could consider the merits of the petition. Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider an untimely petition for post-conviction relief. *State v. McDougald*, 4th Dist. Scioto No. 09CA3278, 2009-Ohio-4417, at ¶ 7; *State v. Collins*, 4th Dist. Athens No. 06CA40, 2007-Ohio-3558, at ¶ 11, citing *State v. Gibson*, 4th Dist. Washington No. 05CA20, 2005-Ohio-5353, appeal not allowed, 108 Ohio St.3d 1439, 842 N.E.2d 64, 2006-Ohio-421, at ¶ 10. Moreover, once it is determined that a petition is untimely, no further inquiry into the merits of

the case is necessary. *See State v. Taylor*, 4th Dist. Highland No. 06CA20, 2007-Ohio-1185, at ¶ 10. Appellant's post-conviction petition was untimely; therefore, the trial court was not required to consider the merits of her arguments.

{¶10} Furthermore, Appellant's arguments that her Sixth and Fourteenth Amendment rights were violated are barred by res judicata. We have previously explained the doctrine of res judicata as follows:

“ ‘Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.’ *State v. Wolke*, 4th Dist. Adams No. 17CA1048, 2018-Ohio-2119, at ¶ 10, quoting *State v. Hamilton*, 4th Dist. Hocking No. 16CA17, 2017-Ohio-1294, at ¶ 11; *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *see also State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 28. ‘Res judicata does not, however, apply only to direct appeals, but to all post-conviction proceedings in which an issue was or could have been raised.’ *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 18, quoting *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).’”

In our December 2, 2013 Decision and Judgment Entry on Motion for Reconsideration, we observed at ¶ 12:

“In her motion to reconsider, Appellant asserts she was not afforded counsel at either her September 27, 2011 sentencing

hearing or a November 22, 2011 revocation hearing. Appellant raised these issues in her previous appeal * * *.”

{¶11} In conclusion, we deny Appellant’s motion for reconsideration. However, our May 31, 2018 decision and judgment entry is hereby amended to reflect: (1) our consideration of Appellant’s argument pursuant to R.C. 2953.23; and, (2) the propriety of trial court’s denial of her post-conviction motion, albeit for a different reason, that the court lacked jurisdiction to consider her untimely petition which failed to make the required showing. Our January 23, 2018 decision to dismiss her appeal remains unchanged.

{¶12} Based on the foregoing, we find Appellant’s arguments in her motion to certify a conflict are rendered moot. We hereby deny her motion.

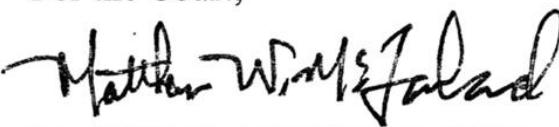
MOTION DENIED.

Abele, J.: Concurs.

Harsha, J.: Concurs in Judgment Only.

For the Court,

BY:



Matthew W. McFarland, Judge