

Supreme Court of Ohio

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

A petition for post-conviction relief is the vehicle by which a criminal defendant can raise issues for which there is evidence from outside, or *dehors*, the record. Specifically, R.C. § 2953.21(A) provides, in relevant part:

(a) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * *, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

R.C. § 2953.21(A)(1)(a).

Often, as here, it is the only vehicle by which defendants can bring to a court's attention issues arising from the ineffective assistance of trial counsel. Indeed, evidence of counsel's performance is oft times not reflected in the trial court record. As such, a petition for post-conviction relief is likely the only way a defendant can ensure that the representation he received at trial was the effective assistance contemplated by the Constitutions of the United States and the State of Ohio. In this way, a petition for post-conviction relief is one of the most important avenues for relief after conviction at trial. As one appellate court noted, “[in] general, it is almost always difficult, if not impossible, to adjudicate a claim of ineffective assistance of trial counsel with reference solely to matters contained in the record of the original trial, because the record of a trial is not made up on the issue of trial counsel's effectiveness, but on the issue of the defendant's guilt of the crime or crimes charged.” *State v. Hennis*, 844 N.E.2d 907, paragraph 11, 165 Ohio App.3d 66, 2006 Ohio 41 (Ohio App., 2006).

Unfortunately, most criminal defendants, having been made aware of the right to appeal at a sentencing hearing, are unaware of this other vital path for relief. And when they are made aware of the right to file a petition for post-conviction relief (if they become aware, at all), defendants or their counsel are faced with what can be a tight timeline. This timeline is set forth in R.C. § 2953.21(A)(2) and provides, in relevant part:

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

R.C. § 2953.21(A)(2).

Given these statutory rules, a conviction is a prerequisite for a trial court to entertain and rule upon a petition for post-conviction relief. And a “judgment of conviction requires a sentence and a defendant is not convicted until sentenced.” See *State v. Benford*, 2010-Ohio-54 (9th Dist.), paragraph 4, citing *State v. Boyd*, 95 Ohio App.3d 679, 686 (8th Dist.). Therefore, if an appellate court has remanded a case for resentencing, and the trial court has not yet resentenced the defendant, a defendant’s petition cannot be dismissed as untimely.

And that is the issue presented by this appeal.

STATEMENT OF THE CASE & FACTS

Mr. El-Amin was found guilty on July 7, 2005, of two counts of rape. On August 5, 2005, the court sentenced him to serve consecutive terms of 10 years on each count for an aggregate term of 20 years. He appealed those convictions and part of the transcripts from that trial were filed on April 14, 2006. On June 7, 2007, a motion was granted to supplement the record with an additional trial transcript. On August 3, 2007, before the record was supplemented, the Sixth

District Court of Appeals remanded the matter for resentencing. As the Sixth District explained in its decision in this matter, the court “affirmed the jury's *verdicts* but remanded for *resentencing* upon finding that the trial court, prior to imposing a consecutive sentence, failed to make the necessary additional findings under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, excising R.C. 2929.14(E)(4) and 2929.41(A). *State v. El-Amin*, 6th Dist. Lucas No. L-05-1286, 2007-Ohio-3949.” *State v. El-Amin*, 6th Dist. Lucas No. L-22-1158 (emphasis added). Notably, the court did not affirm Mr. El-Amin's *convictions*, rather the court affirmed the jury's *verdicts*.

After the appellate court remanded for resentencing, the record was supplemented with a transcript on October 31, 2008.

On June 3, 2011, Mr. El-Amin filed his petition for post-conviction relief. He was resentenced on May 5, 2021. No action was taken on the 2011 petition until June 16, 2022. Mr. El-Amin then appealed the denial of his petition to the Sixth District Court of Appeals.

The Sixth District agreed with the trial court that the petition filed in June of 2011 was untimely. It did so despite the fact that there was no conviction until the trial court resentenced Mr. El-Amin in May of 2021.

A Motion to Certify Conflict was filed with the Sixth District Court of Appeals on May 22, 2023. That motion is pending.

This appeal followed.

CONCISE ARGUMENT:

A conviction requires both a finding of guilt and the imposition of a sentence. A petition for post-conviction relief requires a conviction. When an appellate court remands a matter for resentencing, there is no conviction. Until there is a conviction, i.e. a court resentsences the

defendant, a defendant's petition cannot be dismissed as untimely.

As discussed previously, a petition for post-conviction relief is, most times, the only available vehicle by which a defendant can bring to a court's attention a claim of ineffective assistance of counsel. As such, the temporal window for filing a petition is of utmost importance. After an appellate court remands a matter for resentencing, there is no longer a conviction as a conviction requires both a verdict of guilty and a sentence. See *State v. Benford*, 2010-Ohio-54 (9th Dist.), paragraph 4, citing *State v. Boyd*, 95 Ohio App.3d 679, 686 (8th Dist.).

Here, the trial court dismissed Mr. El-Amin's petition for post-conviction relief as untimely. The appellate court affirmed that decision. However, Mr. El-Amin's petition was filed well in advance of his resentencing hearing in 2021.

In a somewhat similar case, the Third District was confronted with a dismissal of a petition for post-conviction relief that was filed before the defendant was resentenced on a remand order from the appellate court. In *State v. Parsons*, the Third District found that the petition filed by Mr. Parsons, before his resentencing hearing, was premature. See *State v. Parsons*, 2018 Ohio 1346 (3rd Dist. 2018). In doing so, the court noted that because the court had not yet resentenced Mr. Parsons, there was no conviction. *Id.* paragraphs 11-13.

It is contrary to the spirit and, indeed, the language of R.C. 2953.21, for a trial court to dismiss as untimely a petition for post-conviction relief that is filed before a resentencing hearing. The Third District decision in *Parsons* and the Sixth District decision below cannot coexist.

If the Third District is correct, that a defendant cannot file a petition until he is resentenced, and the Sixth District is correct that filing outside of the (now) 365-day window renders a petition untimely, a defendant could lose forever his right to raise issues simply

because a trial court drags its feet in conducting a resentencing hearing. An absurd result from a statute designed to protect one of the most important rights of a criminal defendant – the right to the effective assistance of counsel.

CONCLUSION

Clarity is needed. And this Honorable Court is the only court that can provide that clarity. It is paramount that defendants and counsel on post-conviction matters understand the impact of a remand for resentencing on the temporal window for filing a petition. And it cannot be the result that a defendant who has his case remanded for resentencing loses forever his right to petition for post-conviction relief, if the trial court waits out the statutory time period.

Respectfully Submitted,

/s/ Neil S. McElroy

CERTIFICATION

The undersigned hereby certifies that a copy of the foregoing was sent via email to the Lucas County Prosecutor's Office (Evy Jarrett - ejarrett@co.lucas.oh.us) on the date of filing.

/s/ Neil S. McElroy