

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT  
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BENJAMIN URSIC,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 21 HA 0007**

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Criminal Appeal from the  
Court of Common Pleas of Harrison County, Ohio  
Case No. CRI-2017-0083

**BEFORE:**

Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

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**JUDGMENT:**

Affirmed.

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*Atty. Lauren E. Knight*, Harrison County Prosecutor, 111 W. Warren Street, P.O. Box 248, Cadiz, Ohio 43907, for Plaintiff-Appellee. No Brief Filed.

*Benjamin Ursic, Pro se*, #A749008, Belmont Correctional Institution, 68518 Bannock Road, S.R. 331, P.O. Box 540, St. Clairsville, Ohio 43950-0540, Defendant-Appellant.

Dated: September 29, 2022

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WAITE, J.

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{¶1} Appellant Benjamin Ursic appeals a July 15, 2021 Harrison County Common Pleas Court judgment entry which denied his postconviction petition as untimely. Appellant argues that the trial court held an incorrect understanding of the timeframe for filing his petition. Although Appellant correctly asserts that his original postconviction petition which was filed through counsel was timely, his *pro se* amended petition was not. Regardless, claims raised by Appellant in each petition are barred by *res judicata*. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This is Appellant's third appeal in this matter, having previously filed a direct appeal and an application to reopen his appeal. We affirmed Appellant's conviction and sentence in *State v. Ursic*, 7th Dist. Harrison No. 18 HA 0006, 2019-Ohio-5088 ("*Ursic I*"). Appellant then filed an application to reopen his appeal which we denied in *State v. Ursic*, 7th Dist. Harrison No. 18 HA 0006, 2020-Ohio-3620 ("*Ursic II*"). The underlying facts of the incident which was the subject of these appeals was described most recently in *Ursic II*:

Appellant was indicted on December 11, 2017 on two counts of felony assault on a police officer in violation of R.C. 2903.11(A)(2) and (D)(1)(a), felonies of the first degree, and one count of felony failure to comply with an order of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a felony of the third degree. The charges stemmed from an altercation between Appellant and two deputies from the Harrison County Sheriff's

Department. Appellant had fled from his residence after a neighbor notified the police that there were the sound of gunshots coming from Appellant's house. The deputies searched the area for Appellant, which led to an extended high-speed car chase, ultimately called off by the deputies when it proved fruitless. The deputies were later informed that a vehicle matching the description of Appellant's vehicle was sitting atop a nearby hill with its headlights on. The deputies approached the vehicle on foot, drew their weapons and ordered Appellant to exit the vehicle. Instead, Appellant drove his vehicle directly towards the deputies, causing them to dive for cover behind trees to avoid being struck by Appellant's vehicle.

A jury trial commenced on October 4, 2018, wherein Appellant was found guilty on all counts. Appellant was sentenced to four years of incarceration on each conviction for felony assault on a police officer and one year for failure to comply with an order of a police officer, to be served consecutively, for a total stated prison term of nine years.

*Ursic II* at ¶ 2-3.

{¶3} Appellant has filed a number of motions both in the trial court and in this Court. Relevant to the instant matter, Appellant filed a postconviction petition through counsel on March 6, 2020. On April 30, 2021, Appellant filed a *pro se* postconviction petition after his counsel withdrew from the case. On July 15, 2021, the trial court denied the amended petition as untimely. It is from this entry that Appellant timely appeals.

### ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Ursic's post-conviction petition on the basis of untimeliness in its July 15, 2021 Judgement Entry.

{¶4} In order to successfully assert a postconviction petition, “the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions.” *State v. Agee*, 7th Dist. Mahoning No. 14 MA 0094, 2016-Ohio-7183, ¶ 9, citing R.C. 2953.21(A)(1).

{¶5} The petitioner bears the burden of demonstrating “substantive grounds for relief” through the record or any supporting affidavits. *Agee* at ¶ 9. However, as a postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, *res judicata* bars many claims. *Agee* at ¶ 10.

{¶6} As a threshold issue, there is a timing component to a postconviction petition. R.C. 2953.21(A)(2) requires a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition:

[S]hall 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[.] \* \* \* 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.

{¶17} Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he meets the criteria found in R.C. 2953.23(A)(1)(a)-(b). Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show that he: “was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, \* \* \* 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.”

{¶18} Here, the trial court found that Appellant had 180 days to file his petition. However, R.C. 2953.21 was amended effective March 23, 2015, and changed the deadline for filing petitions for postconviction relief from 180 days to 365 days from the date on which the trial transcript is filed with the court of appeals in the direct appeal, or, if a direct appeal was not pursued, after the expiration of the time in which a direct appeal could have been filed. Based on the court's misunderstanding of the timeframe, the court denied Appellant's petition as untimely.

{¶19} The trial transcripts were filed in this Court on March 8, 2019. Appellant ordinarily would have had until March 8, 2020 to file a petition. However, as noted by Appellant, March 8th fell on a Sunday, thus extending his deadline until March 9, 2020. Appellant filed his initial petition on March 6, 2020, which was timely. However, Appellant filed a second, amended petition. Although the trial court misstated the statutory timeline, the trial court's determination that Appellant's *amended* petition, filed on April 30, 2021, was untimely is correct. It is apparent that the amended petition, filed more than one year after the original petition, is, in fact, untimely regardless of the court's misstatement. Appellant has not introduced any evidence to show that he was unavoidably prevented

from discovering facts necessary for relief or that the United States Supreme Court has recognized a new state or federal right that applies retroactively to persons in the petitioner's position.

{¶10} Even so, the doctrine of res judicata “bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal.” *State v. Croom*, 7th Dist. Mahoning No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). Only in instances where “an alleged constitutional error is supported by evidence that is de hors the record, res judicata will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal.” *State v. Green*, 7th Dist. Mahoning No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). To overcome the res judicata bar, the petitioner must demonstrate that the claim could not have been appealed based on the original trial record. *Agee* at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

{¶11} Appellant raised three grounds in his original petition: (1) whether the trial court failed to properly merge his convictions for purposes of sentencing, (2) whether his specific actions were sufficient to find he acted with intent, and (3) whether additional facts presented to the grand jury would have resulted in an acquittal.

{¶12} There is no question that each of these claims have been or could have been raised on direct appeal. In his direct appeal, Appellant challenged the sufficiency of the evidence supporting a finding of intent and the court's failure to merge his convictions. See *Ursic I* at ¶ 6, 24. While Appellant contends that his third argument involves “evidence de hors the record,” this is not accurate. (3/6/20 Postconviction

Petition, p. 18.) In the state’s first indictment, it failed to name the victims. The state secured a second indictment naming the police officers as victims. The third indictment “required the jury to find that the named victims were peace officers.” (3/6/20 Postconviction Petition, p. 18.) Appellant argued that his trial counsel was ineffective for challenging the indictment, causing a more serious offense to be charged. Appellant clearly knew his counsel had successfully challenged these indictments and that the newest indictment caused him to be indicted for a more serious offense.

{¶13} Within his amended petition, Appellant raised six issues: (1) ineffective assistance for various reasons of his trial and appellate counsel, (2) whether the finding of intent was supported by sufficient evidence, (3) whether his right against self-incrimination was violated, (4) whether his indictments were proper, (5) he suffered prejudice when a paid expert witness failed to attend trial and testify, (6) and that he had been provided limited discovery. Appellant raised most of these issues in *Ursic II* and it is readily apparent that the remaining issues could have been raised on direct appeal as Appellant was on notice of these issues at that time.

{¶14} Thus, even if Appellant’s petition had been timely filed, his claims were barred by *res judicata*. As such, Appellant’s sole assignment of error is without merit and is overruled.

### Conclusion

{¶15} Appellant asserted various arguments within his amended postconviction petition. Although Appellant’s original postconviction petition, filed through counsel, was timely, his *pro se* amended petition was not. Even so, claims raised by Appellant in each

petition are barred by *res judicata*. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.



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For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**