



FILED 4

2009 JAN -8 P 12:24

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO,

Plaintiff-Respondent,

- vs -

DANIEL MONTGOMERY,

Defendant-Petitioner.

Case No. CR-433325

Judge Joan Synenberg

Findings of Fact and Conclusions of Law

This cause came on for consideration upon the petition for post-conviction relief ("petition") filed by Defendant-Petitioner Daniel Montgomery ("Montgomery"). Upon review of the files and records in this case, the court denies Montgomery's petition, finding it both untimely and meritless.

Trial Court Proceedings

On February 11, 2003, Montgomery was charged in a multi-count indictment related to the shooting death of Father William Gulas. Montgomery was indicted for the following offenses:

- ▶ Murder with a firearm specification (F¹ offense) (one count);
- ▶ Aggravated murder with a felony murder specification and a firearm specification (F¹ capital offense) (one count);
- ▶ Aggravated arson with a firearm specification (F¹) (two counts).

On October 9, 2003, Montgomery, who was represented by counsel, pled guilty in an amended indictment to one count of murder with a three-year firearm specification and one count of aggravated arson with a three-year firearm specification. In consideration for the plea, the State dismissed Counts Two and Four, which included the capital specification. Montgomery and the

State of Ohio ("State") agreed to a sentence of 24-years-to-life in prison, to be served as follows: six years on the arson charge, consecutively with three years for the firearm specification, both terms to be served prior to, and consecutively with, a sentence of 15-years-to-life imprisonment on the amended murder charge.

The court accepted the recommended sentence and, on October 9, 2003, sentenced Montgomery in accordance with the agreement reached between Montgomery, through his attorney, and the State, through the prosecutor.

Montgomery's Direct Appeal

In December 2003, Montgomery filed a delayed appeal. His appeal was dismissed in 2004 pursuant to *Anders v. California* (1967), 386 U.S. 738. However, three years later, in November 2006, Montgomery filed an application to reopen his appeal. The Eighth District Court of Appeals treated Montgomery's application as a motion to reconsider, granted it, and, in 2007, reinstated the original appeal. On February 7, 2008, the court of appeals affirmed the sentence imposed by the court.

Montgomery's Petition For Post-Conviction Relief

Montgomery filed his petition for post-conviction relief on November 6, 2006. In the petition, Montgomery claims that his sentence should be vacated pursuant to what he characterizes as the "newly recognized rule" in *Blakely v. Washington* (2004), 542 U.S. 296. Two-and-a-half years had passed between the date *Blakely* was decided and the date he filed his petition; three years had passed between the date sentence was imposed (October 9, 2003) and the date he filed his petition. In either event, Montgomery's petition was filed well beyond the time permitted pursuant to R.C. § 2953.23.

Even assuming that Montgomery's petition were timely, it must be denied as a matter of law. As noted in *State v. Montgomery*, 2008 Ohio 443, (Ohio Ct. App., Cuyahoga County Feb. 7, 2008), Montgomery's direct appeal, *Blakely* cannot apply to a jointly recommended sentencing agreement.

State v. Montgomery

In his direct appeal, Montgomery raised three assignments of error for our review. Two of those assignments are identical to the issues raised in the petition under review (the third assignment of error is not relevant to the issues raised in Montgomery's petition).

In his first assignment of error, Montgomery claimed that "[t]he trial court erred when it sentenced appellant to a more than the minimum prison term, pursuant to R.C. 2929.14(B), based upon finding[s] of fact not presented to a jury or admitted during his plea and sentencing hearing in violation of appellant's state and federal due process and trial by jury rights."

In his second assignment of error, Montgomery claimed that "[t]he trial court erred by imposing consecutive prison terms upon appellant, pursuant to R.C. § 2929.14(E) and R.C. § 2929.14(A), after making judicial findings of fact not presented to a jury or admitted during appellant's plea or sentencing hearing, thus violating appellant's due process and trial by jury rights of the Ohio and United States Constitutions."

Addressing these two assignments of error, the Eighth District stated:

In both of these assignments of error, Montgomery is arguing that the trial court erred in imposing sentences pursuant to sentencing statutes that were deemed unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856. We disagree. We find that because the sentence was agreed to by the parties as part of a plea bargain, Montgomery's sentence is not subject to appellate review. *State v. Ranta*, Cuyahoga App. No. 84976, 2005 Ohio 3692.

Before *Foster* was decided, several Ohio appellate courts had held that an appellant waives any arguments under *Apprendi v. New Jersey* (2000), 530 U.S. 466 ... and

Blakely v. Washington (2004), 542 U.S. 296 . . . if there is a jointly recommended sentencing agreement. [citations omitted]. Because *Foster* is premised on *Blakely*, we have found that the holding in *Foster* also does not apply to a jointly recommended sentence. [citations omitted].

State v. Montgomery, ¶¶ 6-7; *discretionary appeal not allowed*, 2008 Ohio 3369 (July 9, 2008).

Ultimately, the appellate court held that it had “no jurisdiction to review an agreed upon sentence that is not contrary to law and, further, agreed upon sentences are not subject to the *Foster* mandate to vacate sentences made under S.B. 2.” *Id.* at ¶ 8.

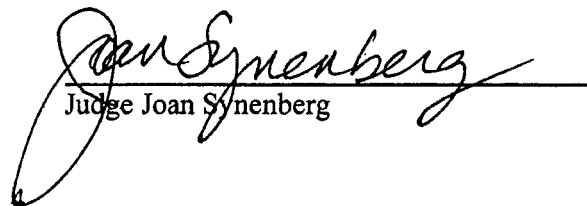
Conclusion

This court has no more jurisdiction than the appellate court to vacate a sentence authorized by law and also recommended by Montgomery. Therefore, in addition to being untimely, Montgomery’s petition is wholly without merit.

It is well settled that “[t]he mere filing of a petition for post-conviction relief does not automatically entitle the petitioner to an evidentiary hearing. Rather, the trial court need only conduct an evidentiary hearing where the petition, its supporting documents and the record reveal the petitioner has set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Harrington*, 172 Ohio App.3d 595, 600 (Ohio Ct. App. 2007). Upon review of Montgomery’s petition and the files and records of the case, the court concludes that the petition was not timely pursuant to R.C. § 2953.23; further, that he has failed to sustain his burden under R.C. § 2953.21. Therefore, Montgomery’s petition fails on its merits, and Montgomery is not entitled to a hearing.

Montgomery’s Petition for Post-Conviction Relief is denied.

IT IS SO ORDERED.


Judge Joan Synenberg