

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-170431
	:	TRIAL NO. B-0600007
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
CHRISTOPHER SMITH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Christopher Smith appeals the Hamilton County Common Pleas Court’s judgment overruling his “Motion for Leave to File a Motion for New Trial.” We affirm the court’s judgment as modified.

Smith was convicted in 2006 upon no-contest pleas to two counts of attempted murder, three counts of felonious assault, two counts of aggravated robbery, two counts of robbery, and single counts of carrying a concealed weapon and having weapons under a disability. Following our remand for resentencing, *State v. Smith*, 1st Dist. Hamilton No. C-060991, 2008-Ohio-2561, *appeal not allowed*, 120 Ohio St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 652, he stood convicted on two counts of attempted murder, two counts of felonious assault, and single counts of aggravated robbery, robbery, carrying a concealed weapon, and having weapons under a disability.

Smith unsuccessfully challenged his convictions in postconviction motions filed in 2006, 2007, and 2013. See *State v. Smith*, 1st Dist. Hamilton No. C-070624, 2008-Ohio-3789; *State v. Smith*, 1st Dist. Hamilton No. C-140421 (May 1, 2015), *appeal not accepted*, 143 Ohio St.3d 1440, 2015-Ohio-3427, 36 N.E.3d 188. In 2017, he again sought

postconviction relief by filing with the common pleas court a Crim.R. 33 “Motion for Leave to File a Motion for New Trial” and a Crim.R. 32.1 “Motion to Withdraw No Contest Plea.”

In this appeal, Smith advances two assignments of error challenging the denial of the relief sought in his “Motion for Leave to File a Motion for New Trial.”<sup>1</sup> We address together and overrule the assignments of error, because the common pleas court had no jurisdiction to grant that relief.

In his motion, Smith sought leave under Crim.R. 33 to move for a “new trial” on the ground that newly discovered evidence demonstrated his trial counsel’s ineffectiveness in counseling his no-contest pleas. And he sought correction of his sentences on the ground that the postrelease control was not imposed in conformity with the requirements of R.C. 2967.28.

Crim.R. 33 did not provide a means for Smith to challenge his convictions, when those convictions were based upon no-contest pleas. *State v. Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948), paragraph thirteen of the syllabus.

The ineffective-counsel claim presented in his motion was reviewable by the common pleas court under the standards provided by R.C. 2953.21 et seq., governing the proceedings on a petition for postconviction relief, because with that claim, Smith sought relief from his convictions based on an alleged constitutional violation in the proceedings leading to his convictions. *See* R.C. 2953.21(A)(1); *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 and syllabus. But the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain that claim. His motion was filed well after the time prescribed by R.C. 2953.21(A)(2) had expired. And he failed to satisfy the jurisdictional requirements for entertaining a late postconviction claim, when the record does not demonstrate that, but for the claimed constitutional violation, “no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted.” *See* R.C. 2953.23(A)(1)(b).

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<sup>1</sup> He also appealed the overruling of his Crim.R. 32.1 motion, in the case numbered C-180081.

Smith's postrelease-control challenge was not reviewable under the standards provided by the postconviction statutes, because it alleged a statutory, rather than constitutional, violation. Nor could relief upon that claim have been afforded under any other postconviction procedure provided by statute or the criminal rules. *See State v. Dardinger*, 1st Dist. Hamilton No. C-160467, 2017-Ohio-1525, ¶ 8-9.

Finally, the relief sought could not have been afforded under the jurisdiction to correct a void judgment. *See State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. Smith's ineffective-counsel challenge, even if demonstrated, would not have rendered his convictions void. *See State v. Hayes*, 1st Dist. Hamilton No. C-130450, 2014-Ohio-1263, ¶ 5. And while the improper imposition of postrelease control renders that portion of a sentence void, *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus and ¶ 27, the record on appeal cannot be said to demonstrate the alleged deficiency in Smith's postrelease-control notification, when the record does not include a transcript of the proceedings at his resentencing, conforming with the requirements of App.R. 9(B).

Because the common pleas court had no jurisdiction to entertain Smith's "Motion for Leave to File a Motion for New Trial," the motion was subject to dismissal. *See R.C. 2953.21(C) and 2953.23(A)*. Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect the dismissal of the motion. And we affirm the judgment as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., ZAYAS and MILLER, JJ.**

To the clerk:

Enter upon the journal of the court on September 28, 2018  
per order of the court \_\_\_\_\_.

Presiding Judge