

APPENDIX

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

KEVIN J. BARKER

Defendant-Appellant

C.A. CASE NO.: 27472

T.C. NO. 12-CR-477

(Criminal Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 25th day of May, 2018.

.....
MATHIAS H. HECK, JR., by ANDREW FRENCH, Atty. Reg. No. 69384, Assistant
Prosecuting Attorney, Montgomery County Prosecutor's Office, 301 W. Third Street, Fifth
Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JAMES SWEENEY, Atty. Reg. No. 86402, 341 S. Third Street, Suite 100, Columbus,
Ohio 43215
Attorney for Defendant-Appellant

KEVIN J. BARKER, #679074, London Correctional Institution, P.O. Box 69, London, Ohio
43140
Defendant-Appellant, pro se

.....
DONOVAN, J.

{¶ 1} Defendant-appellant, Kevin J. Barker, appeals a decision of the Montgomery County Court of Common Pleas, Criminal Division, as it relates to his "Motion to Correct Void Sentence and/or Judgment" which he originally filed on March 8, 2016. On September 30, 2016, the trial court sustained in part and overruled in part Barker's motion, finding that it had failed to properly state its reasons for imposing consecutive sentences in his underlying convictions. On February 7, 2017, the trial court issued an Amended Termination Entry in which it stated its findings for imposing consecutive sentences. Barker filed a timely notice of appeal with this Court on February 22, 2017.

{¶ 2} In June of 2012, Barker was indicted on one count of engaging in a pattern of corrupt activity, two counts of promoting prostitution, and three counts of possession of criminal tools. After a jury trial in March of 2013, Barker was convicted of all charges. The trial court sentenced Barker to an aggregate sentence of eight years in prison.

{¶ 3} Barker appealed, raising claims of ineffective assistance of counsel and that his convictions were based on insufficient evidence and against the manifest weight of the evidence. We rejected Barker's arguments and affirmed his convictions. ~~State v. Barker, 2d Dist. Montgomery No. 25732, 2014-Ohio-1269 (Barker I).~~ See also *State v. Barker*, 2d Dist. Montgomery No. 25722 (Decision and Final Judgment Entry, May 17, 2013) (dismissing appeal as duplicative of Case No. 25732). In September of 2015, Barker sought to reopen his direct appeal, but we denied his application as untimely.

{¶ 4} Also on March 8, 2016, Barker filed a motion in the trial court pursuant to Crim.R. 36 and App.R. 9(E) to correct the trial record. Barker's motion asserted that the trial court had failed to (1) state its position on whether the two violations of R.C. 2907.22(A)(2) (promoting prostitution) involved "alternative means" or "multiple acts," and

(2) rule on whether the playing of an audio recording precluded a detective from testifying about the content of the recording. On August 9, 2016, the trial court overruled as untimely Barker's motion to correct the record. We subsequently affirmed the decision of the trial court in *State v. Barker*, 2d Dist. Montgomery No. 27252, 2017-Ohio-6994.

{¶ 5} As previously stated, on March 8, 2016, Barker filed a "Motion to Correct Void Sentence and/or Judgment" which the trial court sustained in part and overruled in part on September 30, 2016. A resentencing hearing was held on November 2, 2016, and an amended termination entry was filed by the trial court on November 10, 2016. Barker appealed, and we issued an opinion dismissing his appeal and finding that the trial court did not have jurisdiction to issue the amended termination entry because Barker had another appeal pending at the time. *State v. Barker*, 2d Dist. Montgomery No. 27358, December 27, 2016, Decision and Final Judgment Entry.

~~_____~~ our opinion in CA No. 27358, we stated that once Barker's appeal was dismissed, "the trial court may re-enter the Amended Termination Entry" and "Barker may then file a new appeal from that order." Thereafter, the trial court filed a second amended termination entry on February 7, 2017, whereupon Barker filed the instant appeal.

~~_____~~ On July 26, 2017, Barker's appointed counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), in which counsel states that after a review of the record of the proceedings before the trial court, ~~he was unable to locate any arguably meritorious issues for appeal.~~ This Court notified Barker of his counsel's submission and ~~provided him an opportunity to file a pro se brief.~~ Barker filed his pro se appellate brief on August 23, 2017. The State filed its responsive brief on December 19, 2017, and Barker filed a reply brief on January 12, 2018.

Anders Standard

{¶ 8} *Anders* outlines the procedure counsel must follow to withdraw as counsel due to the lack of any meritorious grounds for appeal. In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Further, counsel must also furnish the client with a copy of the brief, and allow the client sufficient time to file his or her own brief, pro se. *Id.*

{¶ 9} Once the appellant's counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.* If we determine that the appeal is wholly frivolous, we may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 10} In the instant case, appointed counsel fully complied with the requirements of *Anders*, and Barker has filed a pro se brief in which he asserts five assignments error. *Id.* at 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493.

{¶ 11} Because they are interrelated, we will discuss assignments of error I-IV together as follows:

{¶ 12} "THE TRIAL COURT ERRED BY FAILING TO VACATE APPELLANT'S CONVICTIONS AND SENTENCES, AND EXCEEDED ITS JURISDICTION TO IMPOSE SENTENCES UPON THE APPELLANT, BASED ON UN-INDICTED OFFENSES, THEREBY VIOLATING APPELLANT'S RIGHT TO INDICTMENT BY GRAND JURY,

INFORMED ~~NATURE OF CHARGES, DUE PROCESS OF LAW AND FAIR TRIAL,~~
JURY TRIAL AND DOUBLE JEOPARDY, AS GUARANTEED BY THE 5TH, 6TH AND
14TH AMENDMENT[S], UNITED STATES CONSTITUTION; SECTION 5, 10 AND 16,
ARTICLE 1, OHIO CONSTITUTION."

{¶ 13} "THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO
PROVIDE JURY 'UNANIMITY' INSTRUCTIONS FOR 'MULTIPLE ACT' CASE,
RESULTED IN A VIOLATION OF APPELLANT'S RIGHTS TO ~~DUE PROCESS OF LAW~~
~~AND FAIR TRIAL, DOUBLE JEOPARDY AND JURY TRIAL,~~ AS GUARANTEED BY THE
5TH, 6TH AND 14TH AMENDMENT[S], UNITED STATES CONSTITUTION; SECTION
5, 10 AND 16, ARTICLE 1, OHIO CONSTITUTION, CRIM.R. 31(A) AND R.C.
2941.25(A)."

{¶ 14} "THE TRIAL COURT ERRED IN GRANTING STATE'S MOTION TO
UTILIZE CO-CONSPIRATOR'S STATEMENTS, RESTRICTING DEFENDANT'S
CROSS-EXAMINATION OF CO-CONSPIRATOR'S AND STATE'S KEY WITNESS DET.
ST. CLAIR, RESULTED IN A VIOLATION OF APPELLANT'S RIGHT TO ~~DUE PROCESS~~
~~OF LAW AND FAIR TRIAL, COMPULSORY PROCESS AND CONFRONTATION OF~~
ADVERSE WITNESS, AS GUARANTEED BY THE 5TH, 6TH AND 14TH
AMENDMENT[S], UNITED STATES CONSTITUTION; SECTION 5, 10 AND 16,
ARTICLE 1, OHIO CONSTITUTION."

{¶ 15} "THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MERGE
ALLIED OFFENSES, RESULTING IN A VIOLATION OF APPELLANT'S RIGHT TO ~~DUE~~
~~PROCESS AND DOUBLE JEOPARDY,~~ AS GUARANTEED BY THE 5TH, 6TH AND
14TH AMENDMENT[S], UNITED STATES CONSTITUTION; SECTION 5, 10 AND 16,

ARTICLE 1, OHIO CONSTITUTION.”

{¶ 16} For ease of discussion, Barker’s first four assignments can be categorized as follows: 1) his indictment was defective and therefore insufficient to serve as a basis for his convictions; 2) the trial court erred when it failed to properly instruct the jury; 3) the trial court erred when it granted the State’s motion to utilize statements made by co-conspirators and when it limited defense counsel’s cross-examination of certain witnesses; and 4) the trial court erred when it failed to merge his convictions as allied offenses.

{¶ 17} ~~Upon review, we find res judicata applicable. The doctrine bars re-litigation of matters that either were raised in a prior appeal or could have been raised in a prior appeal.~~ *State v. McCoy*, 2d Dist. Greene No. 04CA112, 2005–Ohio–6837, ¶ 15. ~~Even if Barker’s first four assignments of error address new arguments that he did not raise previously, he could have raised them in his direct appeal in *Barker I*. Therefore, any issues regarding the original indictment, the jury instructions, the admission and/or exclusion of evidence by the trial court, and the merger of allied offenses are barred by res judicata.~~

{¶ 18} Barker argues that res judicata does not apply in the instant case because his original termination entry was void since the trial court failed to include the requisite findings for the imposition of consecutive sentences. However, errors in the imposition of consecutive sentences, such as the failure to make the required statutory findings, render the sentences voidable, rather than void. *State v. Bowshier*, 2d Dist. Clark No. 2015–CA–53, 2016–Ohio–1416, ¶ 16 (“the Supreme Court of Ohio ‘has declined to find sentences void based on the court’s failure to comply with certain sentencing statutes,

including the consecutive sentencing statute.' ”).

{¶ 19} Here, the trial court's failure to include the requisite findings for the imposition of consecutive sentences did not render the original sentencing entry void, but merely voidable. Accordingly, res judicata still applies to all of the other aspects of the merits of Barker's convictions, including the determination of guilt and the lawful elements of the ensuing sentence. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, syllabus ¶ 3.

{¶ 20} Barker's assignments of error I-IV are without arguable merit.

{¶ 21} Barker's fifth and final assignment of error is as follows:

{¶ 22} "APPELLANT'S COUNSEL'S DEFICIENT PERFORMANCE AT TRIAL AND RE-SENTENCING HEARING RESULTED IN A VIOLATION OF APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE 6TH AMENDMENT, UNITED STATES CONSTITUTION; SECTION 10, ARTICLE 1."

{¶ 23} In his fifth assignment, Barker contends that he received ineffective assistance during his trial when counsel failed to object to the indictment and the jury instructions given by the trial court. Barker also argues that his counsel was deficient for failing to object to witness testimony and for not properly cross-examining certain witnesses.

{¶ 24} Initially, we note that Barker could have and did raise arguments regarding his trial counsel's alleged ineffectiveness in his direct appeal. The record establishes that in *Barker*, we considered and rejected Barker's arguments regarding his trial counsel's examination of witnesses. *Id.* at ¶¶ 22-25. Accordingly, Barker's argument is barred by res judicata. "Any ineffective assistance claim relating to matters contained

within the record should be brought through a direct appeal.” *State v. Lane*, 2d Dist. Greene No. 2014–CA–54, 2015-Ohio-2712, ¶ 13, citing *State v. Wilson*, 2d Dist. Montgomery No. 23129, 2013-Ohio-180, ¶ 47–48. “ ‘If an alleged constitutional error [such as ineffective assistance of counsel] could have been raised and fully litigated on direct appeal, the issue is res judicata and may not be litigated in a post[-]conviction proceeding.’ ” *Id.*, quoting *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶ 9, citing *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

~~{¶ 25}~~ In the instant case, it is clear that Barker could have raised the issue of his counsel’s ineffectiveness on direct appeal, as counsel’s failure to object to the indictment, jury instructions, and witness testimony does not rely on evidence outside the record. Therefore, the argument made by Barker regarding counsel’s alleged ineffectiveness at trial are barred by res judicata. *State v. Hawley*, 2d Dist. Montgomery No. 25897, 2014-Ohio-731, ¶ 10.

~~{¶ 26}~~ Barker also argues that he received ineffective assistance of counsel at his resentencing hearing on November 2, 2016. Specifically, Barker argues that his counsel “had no knowledge of trial facts, or rulings of law” and failed to object to imposition of a fine and court costs without considering his present or future ability to pay.

~~{¶ 27}~~ In order to establish ineffective assistance of counsel, Barker must establish that his trial counsel’s performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141–142, 538 N.E.2d 373 (1989). With respect to deficiency, Barker must show that his counsel’s performance “fell below an objective standard of reasonableness.” *Strickland* at 688, 104 S.Ct. 2052. With respect to prejudice, Barker

must show that there is a reasonable probability that but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 694, 104 S.Ct. 2052.

{¶ 28} In the instant case, the trial court held the resentencing hearing for the sole purpose of stating on the record its reasons for imposing consecutive sentences. Knowledge of all the facts underlying the indictment or the specific legal rulings made at trial were not necessary for counsel's representation of Barker at the resentencing. At the resentencing hearing defense counsel stated as follows:

Defense Counsel: *** In preparing for today's hearing I looked over
– I reviewed all of the pleadings, read all of the pleadings, including the
Second District Court of Appeals, post-conviction relief, all the motions that
were filed.

Tr. 23. We note that this would include access to Barker's pre-sentence investigation report (PSI).

{¶ 29} Moreover, we note that Barker did not argue on direct appeal that the imposition of consecutive sentences was contrary to law or not supported by the record. Barker also did not challenge the trial court's imposition of a fine and court costs in his direct appeal. As previously stated, the trial court's sole purpose of holding the resentencing hearing was to provide its basis for imposing consecutive sentences, and res judicata applies to all of the other aspects of the merits of Barker's convictions, including the determination of guilt and the lawful elements of the ensuing sentence. *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, syllabus ¶ 3. Thus, we find that Barker did not receive ineffective assistance of counsel at his resentencing

App-A

hearing.

{¶ 30} Barker's fifth assignment of error is without arguable merit.

Conclusion

{¶ 31} Barker's appointed counsel states in the *Anders* brief that he extensively reviewed the record, including the transcript of the resentencing hearing and our prior opinions issued in this case, and he concluded that he could not make any meritorious arguments on Barker's behalf. We also note that counsel did not present any potentially meritorious assignments of error for our consideration.

{¶ 32} Pursuant to our responsibilities under *Anders*, we have conducted an independent review of the entire record. Having done so, we agree with the assessment of appointed counsel that there are no arguably meritorious issues to present on appeal.

{¶ 33} Therefore, no potential assignments of error with arguable merit having been found, the judgment of the trial court is affirmed.

.....

FROELICH, J. and HALL, J., concur.

Copies mailed to:

- Andrew French
- James Sweeney
- Kevin J. Barker
- Hon. Barbara P. Gorman

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEVIN J. BARKER,

Petitioner,

v.

NORM ROBINSON, Warden,
London Correctional Institution,

Respondent.

Case No. 3:19-cv-67

JUDGE WALTER H. RICE

DECISION AND ENTRY ADOPTING UNITED STATES MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATIONS (DOC. #3) AND
SUPPLEMENTAL REPORT AND RECOMMENDATIONS (DOC. #11);
SUSTAINING IN PART AND OVERRULING IN PART PETITIONER'S
OBJECTIONS THERETO (DOC. #9, 16); DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS WITH PREJUDICE (DOC. #1);
JUDGMENT TO ENTER IN FAVOR OF RESPONDENT AND AGAINST
PETITIONER; DENYING CERTIFICATE OF APPEALABILITY AND
LEAVE TO APPEAL IN FORMA PAUPERIS; TERMINATION ENTRY

In March of 2013, Petitioner Keven Barker was convicted on several prostitution-related charges and sentenced to an aggregate term of eight years in prison. His convictions were affirmed on appeal. His first petition for a writ of habeas corpus, in Case No. 3:14-cv-321, was dismissed and he did not appeal. His second petition for a writ of habeas corpus, filed in Case No. 3:16-cv-166, was transferred to the United States Court of Appeals for the Sixth Circuit, which ultimately denied his request for authorization to file a second or successive petition.

On March 8, 2016, Barker filed a Motion to Correct Void Sentence and/or Judgment. The trial court agreed that it had failed to properly state, on the record, its reasons for imposing consecutive sentences. A resentencing hearing was held on November 2, 2016, so that the trial court could cure this defect. An Amended Termination Entry was filed on November 10, 2016.

Barker again appealed. The Second District Court of Appeals found that, because another appeal was still pending, the trial court lacked jurisdiction to enter the Amended Termination Entry. Accordingly, on February 7, 2017, after the earlier appeal was dismissed, the trial court re-filed the Amended Termination Entry. Again, Barker appealed. After his attorney filed an *Anders* brief, Barker filed a *pro se* brief, raising five assignments of error.¹ On May 25, 2018, the Second District Court of Appeals issued a decision affirming the amended judgment of the trial court. *State v. Barker*, 2d Dist. No. 27472, 2018-Ohio-2044 (May 25, 2018).

On March 5, 2019, Barker filed his third Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, Doc. #1, asserting eight grounds for relief. Although ✓ Barker filed two previous habeas petitions, the instant petition is not considered a ✓ "second or successive" petition under 28 U.S.C. § 2244(b), given that grows out ✓

¹ See *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that when appointed appellate counsel finds appeal to be wholly frivolous, he or she should so advise the court and request permission to withdraw, but must file a brief referring to anything in the record that may arguably support the appeal).

of the new judgment issued on February 7, 2017, following his resentencing. ✓

Magwood v. Patterson, 561 U.S. 320, 323-24 (2010). ✓

On March 6, 2019, United States Magistrate Judge Michael R. Merz issued a Report and Recommendations, Doc. #3, nevertheless recommending that the Court dismiss the Petition with prejudice. After Barker filed Objections, Doc. #9, the Court recommitted the matter to Magistrate Judge Merz, who issued a Supplemental Report and Recommendations, Doc. #11. This matter is currently before the Court on Barker's Objections, Doc. #16, to that judicial filing.

The Court is required to make a *de novo* review of any portions of the Report and Recommendations to which proper Objections have been filed. Fed. R. Civ. P. 72(b)(3). Based on the reasoning and citations of authority set forth by Magistrate Judge Merz in his Report and Recommendations, Doc. #3, and his Supplemental Report and Recommendations, Doc. #11, as well as upon a thorough *de novo* review of this Court's file and the applicable law, the Court ADOPTS said judicial filings. The Court SUSTAINS IN PART and OVERRULES IN PART Barker's Objections thereto, Docs. ##9, 16.

A.

Barker first objects to the Magistrate Judge's recommendation that his Petition be dismissed before Respondent is required to file an Answer and the full state court records. Rule 4 of the Rules Governing § 2254 cases, however, requires an initial screening of all petitions. Only if the petition survives that initial screening will a Respondent be required to file an Answer. For the reasons set

forth below, the Court finds that Magistrate Judge Merz properly concluded that the Petition does not survive the initial screening. Barker's Objection is, therefore overruled.

B.

In his Objections to the initial Report and Recommendations, Doc. #9, Barker stated that, in reviewing the 2013 trial proceedings, he had uncovered four "structural errors." In the Supplemental Report and Recommendations, Doc. #11, Magistrate Judge Merz found that these four claims were not included in Barker's Petition. To the extent that Barker wanted to add new claims, he could not do so in Objections to a Report and Recommendations.

Barker, however, denies that these are new claims. The Court sustains this Objection in part and overrules it in part. The Court agrees with Magistrate Judge Merz that Barker's claim that he was denied effective assistance of counsel when his attorney agreed with the prosecutor and the judge that Barker would not take the stand is not encompassed in the Petition. However, Barker's claims concerning the sufficiency of the indictment, the jury instructions, and the conviction on unindicted "other bad acts" are included in Grounds Two and Three of the Petition. Nevertheless, the Magistrate Judge's error does not affect the outcome of this case.

C.

Ground One of the Petition alleges as follows:

Ground One: The Montgomery County, Second District Court of

Appeals ruling, that [the] sentence[s] is voidable, and not void, therefore, *res judicata* bar[s] any constitutional issues from being raised, is contrary to law and rulings made by both the Ohio and United States Supreme Court, resulting in a violation of appellant's constitutional right of due process, as guaranteed by the 5th and 14th Amendment, United States Constitution; Article I, section 5, 10, and 16, Ohio Constitution.

Magistrate Judge Merz recommended dismissal of this claim, holding that "[t]he question of whether a state judgment entry is void or voidable because it does not include all formal statements required by state law is not a federal constitutional question." Doc. #3, PageID#45.

Barker continues to argue that, because the state court sentence was void, the state court improperly invoked the doctrine of *res judicata*. However, he has failed to show that such a claim is cognizable in habeas corpus. This Objection is therefore overruled.

D.

Magistrate Judge Merz found that the following claims were procedurally defaulted:

Ground Two: The trial court erred by failing to vacate Appellant's convictions and sentences, and exceeded its jurisdiction to impose sentences upon the appellant, based on un-indicted offenses, thereby violating appellant's right to indictment by grand jury, informed [sic] nature of charges, due process of law and fair trial and double jeopardy, as guaranteed by the 5th, 6th, and 14th Amendment[s], United States Constitution.

Ground Three: Trial court committed plain error by failing to provide jury "unanimity" instructions for "multiple act" case, resulted in a violation of appellant's right to due process of law and fair trial, double jeopardy and jury trial, as guaranteed by the 5th, 6th,

and 14th Amendment[s], United States Constitution.

Ground Four: Trial court erred in granting State's motion to utilize co-conspirator's statements, restricting defendant's cross examination of co-conspirators and State's key witness Det. St. Clair, resulted in a violation of Petitioner's right to due process of law and fair trial, compulsory process and confrontation of adverse witness, as guaranteed by the 5th, 6th, and 14th Amendment[s], United States Constitution.

Ground Five: The trial court abused its discretion in failing to merge allied offenses, resulting in a violation of Appellant's right to due process and double jeopardy, as guaranteed by the 5th, 6th, and 14th Amendment[s], United States Constitution.

Ground Six: Appellant's counsel's deficient performance at trial [], resulted in a violation of Appellant's right to effective assistance of counsel, as guaranteed by the 6th Amendment, United States Constitution.

As Magistrate Judge Merz noted, the state court did not reach the merits of these arguments, "finding them barred by *res judicata*, because they were or could have been raised in Barker's initial direct appeal." Doc. #3, PageID#40. This doctrine is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007). Magistrate Judge Merz further found that, even if the state court improperly applied the doctrine to bar Barker's claims, "that would be an error of state law which cannot be reached in habeas corpus." Doc. #11, PageID#85.

In his Objections, Barker correctly notes that the Sixth Circuit has held that ✓
when a new judgment is issued following a resentencing, the petitioner is entitled ✓
to file a petition challenging not only the new sentence, but also the original, ✓
undisturbed conviction, even on grounds that he could have raised in an earlier ✓
petition. *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015). It is true that, on ✓

habeas review, the doctrine of *res judicata* would not prevent this Court from reaching the merits of Barker's claims asserted in Grounds Two through Six even if the Court had dismissed the same claims in a previous habeas petition. *Id.* at 159-60. However, as the Sixth Circuit noted in *King*, even after a new judgment is entered and the habeas petitioner starts with a clean slate, all habeas petitioners are still required to "show that they did not procedurally default each claim and that they exhausted each claim." *Id.* at 160.

This brings us full circle. The state court determined that Barker's claims "regarding the original indictment, the jury instructions, the admission and/or exclusion of evidence by the trial court, and the merger of allied offenses" were barred by *res judicata* because he could have raised them in his direct appeal and did not. *Barker*, 2018-Ohio-2044, at ¶17. Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), Barker's claims are procedurally defaulted unless he can demonstrate cause for failing to raise them in his direct appeal and actual prejudice.

Barker argues that he could not have asserted these claims on direct appeal because they did not become "fully ripe" until his November 2, 2016, resentencing hearing. The Court disagrees. As the state court noted, the "sole purpose" of the resentencing hearing was so that the trial court could state "on the record its reasons for imposing consecutive sentences." *Barker*, 2018-Ohio-2044, at ¶28. Accordingly, to the extent that Barker now challenges the sufficiency of the indictment, the jury instructions, evidentiary rulings and the merger of allied

[Signature]
T. Jones

[Signature]
J. Smith

offenses, nothing prevented him from raising these issues on direct appeal. ✓

Because he has failed to demonstrate cause for the procedural default, the Court ✓

cannot reach the merits of these claims. The Court therefore overrules Barker's ✓

Objections concerning Grounds Two through Six. ✓

E.

In Ground Six, Barker also raised an ineffective-assistance-of-trial-counsel claim with respect to the November 2, 2016, resentencing hearing:

Ground Six: Appellant's counsel's deficient performance at [] resentencing hearing, resulted in a violation of Appellant's right to effective assistance of counsel, as guaranteed by the 6th Amendment, United States Constitution.

The Second District held that that, because the only purpose of the resentencing hearing was for the court to state on the record its reasons for imposing consecutive sentences, counsel's alleged failure to be fully informed of the facts of the case and the specific legal rulings previously made by the court did not satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Barker*, 2018-Ohio-2044, at ¶29.

Barker argues that, at the resentencing hearing, his new attorney should have raised the constitutional objections that Barker now asserts in his habeas petition. Magistrate Judge Merz noted, however, that "[i]t cannot be ineffective assistance of trial counsel to fail to raise issues that are outside the scope of the proceeding in which one is acting as counsel." Doc. #11, PageID#85.

The Court agrees with Magistrate Judge Merz that Barker has failed to show that the state court's decision is contrary to or an unreasonable application of clearly established Supreme Court precedent as set forth in *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, 28 U.S.C. § 2254(d)(1) and (2). Accordingly, the Court overrules Barker's Objection on this issue.

F.

Ground Seven asserts an ineffective-assistance-of-appellate-counsel claim:

Ground Seven: Appellant's appellate counsel's deficient performance on direct appeal by failing to raise winnable constitutional assignment[s] of error, resulted in a violation of Appellant's right to effective assistance of counsel, as guaranteed by the 6th Amendment, United States Constitution; Article I, Section 10 [of the Ohio Constitution].

Barker argues that, instead of filing an *Anders* brief, his appellate attorney should have raised the constitutional claims that Barker now asserts in Grounds 2-6 of his habeas petition. Magistrate Judge Merz found that, because the claims at issue were either barred by *res judicata* or without merit, they were not "winnable," and that Barker therefore failed to overcome the presumption of effective assistance of counsel.

Barker again argues that the state court erred in applying the doctrine of *res judicata*. The Court rejects this argument for the reasons previously stated and overrules Barker's Objection with respect to Ground Seven.

G.

Barker's Eighth Ground for Relief is as follow:

Ground Eight: Montgomery County Court of Appeals, Second Appellate District, abused its discretion by denying Appellant's App. R. 26(B) Motion, resulted in a violation of Appellant's right to due process and effective assistance of counsel as guaranteed by the 5th, 6th, and 14th Amendment[s], United States Constitution; Article I, Section 10 Ohio Constitution.

Magistrate Judge Merz noted that, in rejecting Barker's 26(B) Application, the Second District Court of Appeals found that the arguments raised in the Application were ones that it had already considered and rejected. Magistrate Judge Merz therefore concluded that appellate counsel could not be deemed ineffective in failing to raise issues that the court had already rejected.

Barker does not respond to this argument. He simply reiterates his claim that the Second District's denial of his Application resulted in violations of his constitutional rights. Given the Second District's explanation for the denial, the Court finds that Ground Eight fails on the merits.

H.

For the reasons set forth above, the Court DISMISSES WITH PREJUDICE Barker's Petition for Writ of Habeas Corpus, Doc. #1.

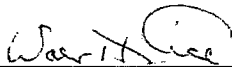
Given that Petitioner has not made a substantial showing of the denial of a constitutional right and, further, that the Court's decision herein would not be debatable among reasonable jurists, and because any appeal from this Court's

decision would be objectively frivolous, Petitioner is denied a certificate of appealability, and is denied leave to appeal *in forma pauperis*.

Judgment will be entered in favor of Respondent and against Petitioner.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

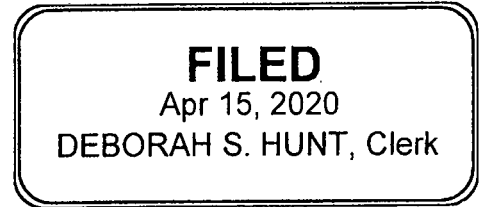
Date: September 23, 2019



WALTER H. RICE
UNITED STATES DISTRICT JUDGE

No. 19-4032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



KEVIN J. BARKER,)
)
 Petitioner-Appellant,)
)
 v.)
)
 NORM ROBINSON, Warden,)
)
 Respondent-Appellee.)

ORDER

Before: MOORE, Circuit Judge.

Kevin J. Barker, an Ohio prisoner proceeding pro se, applies for a certificate of appealability in his appeal from a district court judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. He also moves for in forma pauperis status.

In 2013, a jury convicted Barker of engaging in a pattern of corrupt activity, two counts of promoting prostitution, and three counts of possession of criminal tools. He was sentenced to eight years of imprisonment. His conviction was upheld on direct appeal in the state courts. *State v. Barker*, No. 25732, 2014 WL 1338684 (Ohio Ct. App. Mar. 28, 2014), *perm. appeal denied table*, 11 N.E.3d 1194 (Ohio 2014). Barker's first § 2254 petition was denied, *Barker v. Duffey*, No. 3:14-CV-321, 2014 WL 7015230 (S.D. Ohio Dec. 11, 2014), and he did not appeal. He was denied authorization to file a second petition. The state courts subsequently denied Barker's motion to correct the record.

In 2017, Barker was resentenced by the trial court to the same term, in order to have the court state on the record the reasons for running some of the sentences consecutively. His appeal from that sentence was unsuccessful. *State v. Barker*, No. 27472, 2018 WL 2383007 (Ohio Ct. App. May 25, 2018), *perm. app. denied table*, 153 N.E.3d 1261 (Ohio 2018), and 154 N.E.3d 1208 (Ohio 2019).

Barker then filed this petition, raising eight claims: 1) the state appellate court erred in finding that the claims raised in his second appeal were barred by res judicata; 2) his indictment was defective; 3) a jury unanimity instruction should have been given; 4) the trial court erred in certain evidentiary rulings; 5) allied offenses were not merged; 6) counsel was ineffective at trial and on resentencing; 7) counsel was ineffective on the second appeal; and 8) his post-conviction action was erroneously denied. A magistrate judge recommended that the petition be denied, finding several claims procedurally defaulted and others meritless. The district court referred Barker's objections to the magistrate judge again, who made the same recommendation. The district court overruled the objections to the supplemental recommendation and denied the petition. A motion for reconsideration was also denied.

In his application, Barker requests a certificate of appealability on each of the claims he raised below.

To be entitled to a certificate of appealability a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating, for claims decided on the merits, that reasonable jurists would find the district court's assessment of the constitutional claims debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For claims found to be procedurally defaulted, a petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Id.*

The district court rejected Barker's first claim on the merits because it raised only an issue of state law. Barker argued that the State erred in finding that claims he had not raised in his original appeal but raised after his resentencing were barred by res judicata. Barker relied on *Magwood v. Patterson*, 561 U.S. 320, 342 (2010), and *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015), which held that a federal habeas corpus petition filed after a resentencing is not a second or successive petition. But those cases say nothing about whether the State of Ohio is required to abandon its res judicata rules after resentencing. Barker was still required to show that his claims were not procedurally defaulted in the state courts. *King*, 807 F.3d at 160. Reasonable jurists

would not find the district court's assessment that this claim was an issue of state law only debatable.

The district court found claims two through five and the part of claim six referring to ineffective assistance of trial counsel procedurally defaulted for the reason stated by the Ohio Court of Appeals; i.e., that Barker could have raised all these claims in his original direct appeal in the state courts but did not. Procedurally defaulted claims will not be examined on the merits in a federal habeas action unless the petitioner establishes cause to excuse the default and prejudice resulting from it. *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017); *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015). Barker opted not to argue cause for his procedural default and instead to simply disagree with the court's analysis. Jurists of reason would not find it debatable whether the district court was correct in its procedural ruling.

In the second part of his sixth claim, Barker argued that his counsel at the resentencing hearing was ineffective because he was not familiar with the facts of the case and did not argue against the imposition of a fine. This claim was denied on the merits because Barker did not establish ineffective assistance under the clearly established law of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance cannot be deficient in failing to raise issues unrelated to the proceeding, which was solely focused on providing reasons on the record for running some of the sentences consecutively. In his seventh claim, Barker argued that appellate counsel was ineffective in failing to raise the issues that were barred by res judicata. Jurists of reason would not find the district court's assessment of these claims debatable.

Finally, Barker argued that the state court erred in denying his post-conviction action, concluding that it had already reviewed the claims when raised by Barker pro se in his appeal. However, claims arising from a state court post-conviction proceeding are not cognizable in a federal habeas corpus action. *Kirby v. Dutton*, 794 F.2d 245, 247-48 (6th Cir. 1986).

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For all the above reasons, Barker's application for a certificate of appealability is **DENIED**.
His motion for in forma pauperis status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk

No. 19-4032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 24, 2020
DEBORAH S. HUNT, Clerk

KEVIN J. BARKER,
Petitioner-Appellant,
v.
NORM ROBINSON, WARDEN,
Respondent-Appellee.

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ORDER

Before: COLE, Chief Judge; GUY and BUSH, Circuit Judges.

Kevin J. Barker, an Ohio state prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 19-4032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 09, 2020
DEBORAH S. HUNT, Clerk

KEVIN J. BARKER,
Petitioner-Appellant,
v.
NORM ROBINSON, WARDEN,
Respondent-Appellee.

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ORDER

Before: COLE, Chief Judge; GUY and BUSH, Circuit Judges.

Kevin J. Barker petitions for rehearing en banc of this court's order entered on April 15, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Maureen P

FILED

JAN 23 2019

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

Case No. 2018-1643

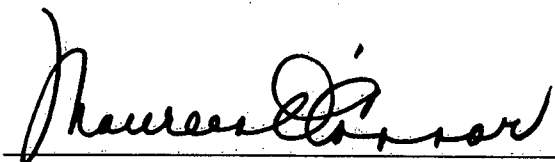
v.

ENTRY

Kevin J. Barker

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Montgomery County Court of Appeals; No. 27472)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED

OCT 24 2018

**CLERK OF COURT
SUPREME COURT OF OHIO**

State of Ohio

Case No. 2018-1184

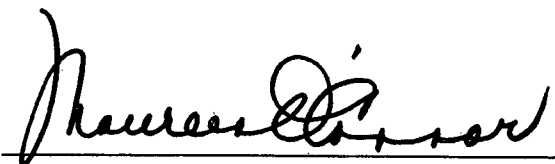
v.

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(Montgomery County Court of Appeals; No. 27472)



Maureen O'Connor
Chief Justice