

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-L-022
DANIEL J. AMATO,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 95 CR 000502.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Robert Troll Lynch, 26300 Seville Drive, Suite 104, Beachwood, OH 44122 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Daniel J. Amato, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court denied Amato's petition for postconviction relief.

{¶2} Amato engaged in several incidents of sexual conduct with an underage female. These activities occurred when the victim was 12 to 17 years old.

{¶3} As a result of this conduct, Amato was indicted on ten counts of rape and several counts of corruption of a minor. The first rape count in the indictment alleged the victim was less than 13 years old when the sexual conduct occurred. Amato pled not guilty to these charges, and a jury trial was held. The jury found Amato guilty on all ten rape charges and three counts of corruption of a minor.

{¶4} The trial court sentenced Amato to a term of life imprisonment for his conviction for forceful rape that occurred when the victim was less than 13 years old. The trial court imposed prison sentences of ten to 25 years for his convictions on the remaining nine counts of rape. The trial court ordered these sentences to be served consecutively. At the sentencing hearing, the trial court noted that the charges for corruption of a minor merged with some of the rape convictions. Accordingly, the trial court did not impose separate sentences for these charges.

{¶5} Amato appealed his convictions and sentence to this court. In deciding his direct appeal, this court affirmed Amato's convictions and sentence. *State v. Amato* (Sept. 26, 1997), 11th Dist. No. 96-L-045, 1997 Ohio App. LEXIS 4362, at *24.

{¶6} In 2002, the trial court adjudicated Amato a sexual predator. Amato appealed his sexual predator classification to this court, which affirmed the trial court's judgment adjudicating him a sexual predator. *State v. Amato*, 11th Dist. No. 2002-L-133, 2004-Ohio-1173, at ¶25. See, also, *State v. Amato*, 11th Dist. No. 2002-L-133, 2004-Ohio-4540, at ¶5-6.

{¶7} In 2004, Amato filed a motion for a new trial, which the trial court denied. Amato appealed the trial court's judgment entry to this court. On appeal, this court

affirmed the trial court's denial of his motion for a new trial. *State v. Amato*, 11th Dist. 2005-L-054, 2006-Ohio-1789, at ¶21.

{¶8} In 2007, Amato filed a petition for postconviction relief. He attached a "memorandum in support of time waiver" to his petition. Amato attached his own affidavit to this pleading, wherein he states that he was not informed by his attorneys about postconviction relief or the time restrictions set forth in Ohio's statute. The state filed a response to Amato's petition. The trial court denied Amato's petition for postconviction relief, finding it untimely.

{¶9} Amato now appeals the trial court's denial of his petition for postconviction relief to this court. Amato raises two assignments of error. His first assignment of error is:

{¶10} "The trial court erred in not permitting the valid and legal waiver of the time deadline for post-conviction relief petition."

{¶11} Amato argues the trial court should have considered his untimely petition for postconviction relief.

{¶12} This court has held that "[p]ursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed within 180 days of the date the trial transcript is filed with the court of appeals in the direct appeal. *** However, an exception to the 180-day rule is set forth in R.C. 2953.23[.]" *State v. Scuba*, 11th Dist. No. 2006-G-2713, 2006-Ohio-6203, at ¶12. (Internal citation omitted.) R.C. 2953.23 provides, in part:

{¶13} "(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or

successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶14} “(1) Both of the following apply:

{¶15} “(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.

{¶16} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶17} “(2) [This subsection is not applicable. It pertains to an inmate’s actual innocence as demonstrated by the results of DNA testing.]”

{¶18} The transcripts were filed with this court in Amato’s direct appeal in September 1996. He did not file his petition for postconviction relief until November 2007. Thus, since his petition was filed more than 180 days after the trial transcript was filed, it is untimely. R.C. 2953.21(A)(2).

{¶19} Amato argues he was precluded from discovering the fact that he could file a petition for postconviction relief because none of his attorneys informed him of this right or of the time restrictions. However, we note the statute requires Amato to show

that he was unable to discover the “facts upon which the petitioner must rely to present the claim.” R.C. 2953.23(A)(1)(a). (Emphasis added.) Amato’s assertion that he was not informed of the procedural mechanism of postconviction relief does not satisfy this requirement. In addition, we note that all of the facts pertaining to Amato’s purported double jeopardy violation are included in the original record.

{¶20} Even if it could be argued that Amato met the requirements in R.C. 2952.23(A)(1)(a), he has not met the requirement of R.C. 2953.23(A)(1)(b) by showing by clear and convincing evidence that no reasonable jury would have found him guilty of the rape charges without the perceived constitutional error. As noted below, there was no double jeopardy violation, as Amato was only convicted and sentenced on the rape charges. Thus, subsection (A)(1)(b) does not apply.

{¶21} As Amato’s petition for postconviction relief was filed beyond the 180-day time period and none of the exceptions provided in R.C. 2952.23 are applicable, the trial court was not permitted to consider the petition. *State v. Scuba*, 2006-Ohio-6203, at ¶21, citing *State v. Luther*, 9th Dist. No. 05CA008771, 2006-Ohio-2414, at ¶12.

{¶22} The trial court did not err by denying Amato’s petition for postconviction relief.

{¶23} Amato’s first assignment of error is without merit.

{¶24} Amato’s second assignment of error is:

{¶25} “The trial court erred in failing to recognize the due process/double jeopardy/indictment violations based on federal and state constitutional law.”

{¶26} As the state notes, even if Amato’s petition was timely, his claim would be barred by the doctrine of res judicata.

{¶27} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in the judgment of conviction, or on an appeal from that judgment.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

{¶28} In a petition for postconviction relief, “[t]o overcome the *res judicata* bar, evidence offered *dehors* the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record.” *State v. Lawson* (1995), 103 Ohio App.3d 307, 315. (Citation omitted.)

{¶29} Amato’s double jeopardy claim was solely based on information in the original record, including the indictment, transcripts, and the trial court’s judgment entries. As such, this is a claim he could have raised at his trial or in his direct appeal. However, Amato did not raise this issue at either of these times. Thus, Amato’s double jeopardy claim is barred by the doctrine of *res judicata*.

{¶30} Finally, we note Amato’s claim would fail on its merits. The Double Jeopardy Clauses of the Ohio and United States constitutions prohibit “multiple punishments for the same offense.” *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶11. Ohio’s multiple-count statute provides, in part, “[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” R.C. 2941.25(A).

{¶31} Amato claims he should not have been convicted of “both rape and other sex charges.”¹ He argues the “elements of rape are identical to the proof found to support the elements of various other sex crimes charged.” While the jury found Amato guilty of ten counts of rape and three counts of corruption of a minor, the trial court merged the corruption of a minor charges into the rape charges. Accordingly, he was only convicted of the rape charges. Thus, there was no double jeopardy violation.

{¶32} Amato’s second assignment of error is without merit.

{¶33} The judgment of the trial court is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

1. Amato does not challenge his multiple rape convictions on double jeopardy grounds. However, we note that each of the rape convictions stemmed from separate sexual activity, which occurred at various locations on separate dates over a five-year time period. Accordingly, there was no double jeopardy violation regarding the multiple rape convictions. See, e.g., *State v. Ludwick*, 11th Dist. No. 2002-A-0024, 2004-Ohio-1152, at ¶121-122.