

[Cite as *State v. Martin*, 2014-Ohio-5723.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

)

)

PLAINTIFF-APPELLEE,

)

)

CASE NO. 13 MA 178

V.

)

)

OPINION

DRUCE MARTIN,

)

)

DEFENDANT-APPELLANT.

)

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 94CR749

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellee

Paul Gains  
Prosecutor  
Ralph M. Rivera  
Assistant Prosecutor  
21 W. Boardman St., 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant

Druce Martin – Pro-se  
#320-205  
P.O. Box 57  
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JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite

Dated: December 16, 2014

[Cite as *State v. Martin*, 2014-Ohio-5723.]  
DONOFRIO, J.

{¶1} Defendant-appellant, Druce Martin, appeals from a Mahoning County Common Pleas Court judgment denying his “Motion for Allied Offense Determination.”

{¶2} Appellant was convicted in 1996, on two counts of murder and one count of aggravated robbery in the deaths and robbery of Toby Flack and Stacey Kroner. He was sentenced to 15 years to life in prison on each of the murder charges, and ten to 25 years in prison for aggravated robbery, all to be served consecutively. This court upheld the convictions and sentences. *State v. Martin*, 7th Dist. No. 96 C.A. 21, 1997 WL 816524 (Dec. 29, 1997).

{¶3} On November 4, 2008, appellant filed a motion to vacate a void judgment, which the trial court denied. Appellant did not appeal from this judgment.

{¶4} On July 2, 2012, appellant filed an “Urgent Motion for Declariter.” The trial court overruled the motion. Appellant filed an appeal from this judgment. We affirmed the trial court’s overruling of the motion. *State v. Martin*, 7th Dist. No. 12 MA 167, 2013-Ohio-2881.

{¶5} On October 4, 2013, appellant, acting pro se, filed a Motion for Allied Offense Determination. He alleged that the trial court should have made an “allied offense determination” and indicated that the indictment, jury verdict, and judgment entry did not contain file stamps. He contended that the two counts of murder and one count of aggravated robbery were allied offenses of similar import and that the trial court should only have sentenced him on one of the counts.

{¶6} The trial court denied appellant’s motion, holding that it was barred by the doctrine of res judicata.

{¶7} Appellant filed a timely notice of appeal on November 22, 2013.

{¶8} Appellant raises a single assignment of error, which states:

WHETHER THE FEDERAL CONSTITUTION’S FIFTH AMENDMENT ‘DOUBLE JEOPARDY’ PROTECTIONS (AND AS CODIFIED IN: O.R.C. § 2941.25), ARE SUBJECT TO WAIVER EVEN UNDER THE GUISE OF RES JUDICATA.

{¶19} Appellant first argues that the judgment entry imposing his sentence, dated January 22, 1996, does not contain a file stamp and, therefore, did not constitute a final, appealable order. Additionally, he contends the same judgment entry does not “articulate any findings” regarding the firearm specifications with which he was charged.

{¶10} Appellant goes on to assert that a defendant cannot agree by waiver to more convictions and more punishments than allowed by law. He asserts that he was convicted of and punished for allied offenses. Thus, appellant concludes his sentence is null and void and he can attack it at any time. He asks that we reverse the trial court’s denial of his motion and remand the matter to the trial court so it can conduct an “allied offense determination.”

{¶11} When, after a direct appeal, a criminal defendant files a motion seeking vacation or correction of his sentence arguing that his constitutional rights have been violated, we construe the motion as a petition for postconviction relief as defined in R.C. 2953.21. *State v. Kapsouris*, 7th Dist. No. 08 MA 265, 2010-Ohio-754, ¶13, citing *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus.

{¶12} A petition for post-conviction relief must be filed within 180 days of the date on which the trial transcript is filed in the court of appeals in the direct appeal, unless certain exceptions apply. R.C. 2953.21(A)(2).

{¶13} We cannot reach the merits of appellant's argument because his postconviction motion was untimely. Likewise, the trial court was without jurisdiction to consider appellant’s late motion.

{¶14} The requirement that a petition for postconviction relief be filed timely is jurisdictional. R.C. 2953.23(A) (“a court may not entertain a petition filed after the expiration of the period prescribed [in R.C. 2953.21]”). Unless the petition is filed timely, the court is not permitted to consider the substantive merits of the petition. *State v. Beaver*, 131 Ohio App.3d 458, 461, 722 N.E.2d 1046 (11th Dist.1998) (the trial court should have summarily dismissed appellant's untimely petition without addressing the merits).

{¶15} If a postconviction relief petition is filed beyond the 180-day time limitation or the petition is a second or successive petition for postconviction relief, R.C. 2953.23(A) precludes the court from entertaining the petition unless: (1) the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based, or (2) after the 180-day time period expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. R.C. 2953.23(A)(1)(a).

{¶16} Unless the defendant makes the showing required by R .C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for post-conviction relief. *State v. Carter*, 2d Dist. No. 03-CA-11, 2003-Ohio-4838, citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998).

{¶17} In this case, appellant's petition was unquestionably filed beyond the 180-day time limit set forth in R.C. 2953.21. The trial transcripts in appellant's direct appeal were filed on February 3, 1997, over 16 years prior to appellant filing his Motion for Allied Offense Determination. And appellant did not even attempt to demonstrate a timeliness exception under R .C. 2953.23. Therefore, appellant's petition was untimely and the trial court was without jurisdiction to entertain it. As such, the trial court properly denied the motion.

{¶18} Moreover, even if the trial court had jurisdiction to consider appellant's motion, his arguments would be barred by the doctrine of res judicata. The doctrine of res judicata provides that any issue that could have been raised on direct appeal, and was not, is barred in later proceedings and not subject to review. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶16. A trial court may dismiss a postconviction petition without a hearing where the claims are barred by res judicata. *State v. West*, 7th Dist. No. 07 JE 26, 2009-Ohio-3347, ¶24.

{¶19} In his motion, appellant argued his convictions are for allied offenses of similar import and, therefore, he should not have been sentenced on all three counts.

He also took issue with whether his indictment and various judgments were time-stamped.

{¶20} The issue of merger of allied offenses of similar import must be raised in an appellant's direct appeal or it is barred by res judicata. *State v. Dillard*, 7th Dist. No. 12 JE 29, 2014-Ohio-439, ¶23-24. Thus, in this case, the issue of allied offenses is barred by res judicata.

{¶21} Additionally, in appellant's previous postconviction motion he asserted that his indictment was defective due to the lack of a proper time stamp. We previously found: "The issue regarding the timestamp was required to be raised prior to trial and was not, and was not raised in the direct appeal either. The matter is deemed waived and is res judicata." *Martin*, 2013-Ohio-2881, ¶16. Issues regarding timestamps are likewise barred in this case.

{¶22} Moreover, a review of the record indicates that both the indictment and the sentencing judgment entry are in fact file-stamped (November 22, 1995, and January 22, 1996, respectively).

{¶23} Accordingly, appellant's sole assignment of error is without merit.

{¶24} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.

Waite, J., concurs.