

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CRAIG FRANKLIN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0127

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 05 CR 988

BEFORE:

Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and
Atty. Ralph M. Rivera, Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Craig Franklin, *Pro se*, #504-597
Mansfield Correctional Institution, P.O. Box 788, Mansfield, Ohio 44901

Dated: June 21, 2018

WAITE, J.

{¶1} Appellant Craig Franklin appeals the judgment of the Mahoning County Common Pleas Court denying his motion to declare the allegedly unlawful sentence for his convictions on felony murder and aggravated robbery void. A review of the matter reveals that Appellant's appeal is untimely and barred by *res judicata*. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter stems from the robbery of Atway's Market in Youngstown in 2005. Appellant and an accomplice entered the market followed a few seconds later by three other individuals. All were juveniles. The group announced they were robbing the store. Two of the five juveniles had guns. One of the perpetrators pointed his gun at one store owner's face. Another held the other store owner at gunpoint. A third store owner pushed one of the perpetrators into a candy rack. At that point, the first store owner was able to reach his own gun and fired two shots, the first injuring one of the perpetrators and the second hitting a second, who subsequently died. Two of the robbers eventually confessed to the crime and implicated Appellant as the mastermind.

{¶3} A jury convicted Appellant of complicity to commit murder and complicity to commit aggravated robbery. Appellant was sentenced to fifteen years to life imprisonment for complicity to commit murder and ten years on complicity to commit aggravated robbery, to be served consecutively.

{¶4} Appellant filed a timely appeal with this Court in which we affirmed the judgment of the trial court. *State v. Franklin*, 7th Dist. No. 06-MA-79, 2008-Ohio-2264. On July 10, 2017, Appellant filed a *pro se* motion to correct his allegedly unlawful and/or void sentence. The trial court denied Appellant's motion, deciding it was filed untimely

and failed to satisfy the requirements of R.C. 2953.23(A)(1). Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT WAS IN EARROR [SIC] WHEN IT DENIED DEFENDANT MOTION FOR VOID AND RESENTENCEING [SIC] UNDER THE 8TH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT.

{¶5} Appellant contends the trial court erred in denying his motion to correct his unlawful and/or void sentence. We must consider whether Appellant’s motion comported with the requirements of a postconviction petition.

Postconviction Petition

{¶6} A motion which is not specifically authorized under the Ohio Rules of Criminal Procedure is classified as a postconviction petition if “it is a motion that (1) was filed subsequent to [the defendant’s] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” *State v. Hudson*, 7th Dist. No. 16 JE 0007, 2017-Ohio-4280, ¶ 9, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). Appellant’s motion falls within these criteria, as his motion was filed subsequent to his direct appeal, raises a violation of a constitutional right, claims that his sentence is void, and asks for his sentence to be vacated.

{¶7} To successfully assert a postconviction petition, “the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions.” *State v. Agee*, 7th Dist. No. 14 MA 0094, 2016-Ohio-7183, ¶ 9,

citing R.C. 2953.21(A)(1). A hearing on the petition is not automatic. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). Pursuant to R.C. 2953.21(C), the petitioner bears the burden of demonstrating “substantive grounds for relief” within the record or any supporting affidavits. However, as a postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, *res judicata* bars many claims. *Agee* at ¶ 10.

Timeliness of the Postconviction Petition

{¶8} The state asserts the trial court properly dismissed Appellant's postconviction petition as untimely. R.C. 2953.21(A)(2) and R.C. 2953.23(A)(1) require a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. The state argues that failure to comply with these statutes is fatal to a petition unless the petitioner can show that he was unavoidably prevented from discovering facts necessary to his claim or that the U.S. Supreme Court has recognized a new retroactive right and no reasonable factfinder could find him guilty but for the alleged error. The state notes that Appellant has filed this petition more than ten years after the one-year period expired and has failed to provide an explanation of his delay.

{¶9} R.C. 2953.21(A)(2) provides that a postconviction petition “shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.” Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he meets the criteria of R.C. 2953.23(A)(1). Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show that he:

was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, * * * 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.

{¶10} Pursuant to R.C. 2953.23(A)(1)(b), the petitioner must show “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.”

{¶11} The record in the instant case reflects that Appellant filed a timely appeal and trial transcripts were filed with this Court on March 19, 2007. Thus, his deadline to file for postconviction relief was March of 2008. Instead, Appellant filed his postconviction petition on July 10, 2017, a time span of over ten years. Pursuant to R.C. 2953.21(A)(2), this petition is untimely unless Appellant can show that his case falls within the exception set forth in R.C. 2953.23(A)(1)(a)-(b). Appellant does not provide an explanation for his untimeliness. Hence, the trial court correctly determined that Appellant's petition was untimely and his untimeliness was not excused pursuant to R.C. 2953.23(A)(1)(a)-(b).

Res Judicata

{¶12} The doctrine of *res judicata* “bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal.” *State v. Croom*, 7th Dist. No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). However, where “an alleged

constitutional error is supported by evidence that is de hors the record, *res judicata* will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal.” *State v. Green*, 7th Dist. No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). In order to overcome the *res judicata* bar, petitioner must demonstrate that the claim could not have been appealed based on the original trial record. *Agee* at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

{¶13} Even if Appellant’s postconviction petition were timely, his arguments are barred by *res judicata*. Appellant filed a timely direct appeal in this matter but did not raise these claims on direct appeal. Moreover, Appellant presents no evidence outside of the record to demonstrate that the claims now raised could not have been asserted in his direct appeal. See *State v. Brown*, 7th Dist. No. 13 MA 176, 2014-Ohio-4008. Thus, Appellant’s claims are barred by *res judicata*.

Sentencing

{¶14} Appellant contends his sentence should be vacated based on United States Supreme Court cases, *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In *Graham* the defendant was on probation for crimes he committed as a juvenile. Defendant violated his probation and was sentenced to life imprisonment without the possibility of parole. The United States Supreme Court ultimately held that the Eighth Amendment prohibits imposition of a life sentence without parole for a juvenile offender who did not commit homicide, and that a state must give such a

juvenile offender a meaningful opportunity to obtain release. *Id.*, paragraphs one and two of the syllabus.

{¶15} In *Miller*, the defendants were each convicted of capital murder committed when they were 14 years old. The United States Supreme Court granted certiorari in each case and held that mandatory life imprisonment without parole for an individual under the age of 18 at the time the crime was committed violated the Eighth Amendment prohibition against cruel and unusual punishment. *Id.*, syllabus.

{¶16} In *Graham* and *Miller* the juvenile offenders were sentenced to life imprisonment without parole. Conversely, Appellant was sentenced to fifteen years to life for felony murder and ten years for aggravated robbery, to be served consecutively. Appellant, however, retains the opportunity for parole. As Appellant was not sentenced to life imprisonment without parole, the Eighth Amendment stricture against cruel and unusual punishment does not apply. See *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890. The Eighth Amendment violations applicable to the juvenile offenders in both *Graham* and *Miller* have no relevance to Appellant, precluding his contention that his sentence constitutes cruel and unusual punishment.

Conclusion

{¶17} Appellant asserts arguments challenging his sentence. As noted in the foregoing, Appellant's motion amounts to an untimely postconviction petition and is barred by *res judicata*. Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.