

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHRISTOPHER McBRIDE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0130

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 02 CR 900 A; 02 CR 943 A

BEFORE:

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, 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

Christopher McBride, #A444-136
Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430, *Pro se*
Appellant.

Dated: June 20, 2018

WAITE, J.

{¶1} Appellant, Christopher McBride, appeals the judgment of the Mahoning County Common Pleas Court denying his motion for resentencing on his convictions for multiple counts of aggravated burglary, robbery and burglary. A review of the matter indicates Appellant's appeal is untimely and barred by *res judicata*. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On March 25, 2003, Appellant pleaded guilty in Mahoning County Common Pleas Case No. 2002 CR 900 A to the following: count one, burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree; count two, aggravated burglary in violation of R.C. 2911.01(A)(1), a felony of the first degree; count three, aggravated burglary in violation of R.C. 2911.01(A)(1), a felony of the first degree; count four, aggravated burglary in violation of R.C. 2911.01(A)(1), a felony of the first degree; count five, robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree; and count six, robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. Counts two, three, and four had accompanying firearm specifications, violations of R.C. 2941.145(A).

{¶3} Moreover, also on March 25, 2003, in Mahoning County Common Pleas Case No. 2002 CR 943 A, Appellant also pleaded guilty to aggravated burglary in violation of R.C. 2911.01(A)(1), a felony of the first degree; and robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. On June 3, 2003, the two cases proceeded to a single sentencing hearing. In case no. 02 CR 900 A, the trial court sentenced Appellant to three years of incarceration on the burglary charge in count one;

three years on the aggravated robbery in count two; three years on the aggravated robbery in count three; three years on the aggravated robbery in count four; three years for the firearm specification in count four; three years on the robbery in count five and three years on the robbery in count six. All of these sentences were to be served consecutively. In case no. 02 CR 943 A, Appellant was sentenced to seven years of incarceration in count one (to be served consecutively to the sentences imposed under case no. 02 CR 900 A) and three years for robbery in count two, to be served concurrently to the sentence imposed in count one. Appellant's entire sentence in both cases totaled 28 years. The trial court also ordered this total sentence to be served consecutively to a sentence imposed on Appellant in a separate Trumbull County Court of Common Pleas case. Appellant did not appeal these sentences.

{¶4} On June 22, 2005, Appellant filed a motion to withdraw his guilty pleas. The trial court denied the motion on August 25, 2005. Appellant did not appeal that judgment. On October 18, 2007, Appellant filed a motion for a delayed appeal of the trial court's June 6, 2003 entry of conviction and sentences. We denied Appellant's request for delayed appeal because it was improperly filed. *State v. McBride*, 7th Dist. No. 07 MA 185. On November 2, 2010, Appellant filed a second motion to withdraw his guilty pleas. The trial court denied Appellant's motion in a judgment entry dated November 22, 2010. Appellant did not appeal. On October 5, 2015, Appellant filed a third motion to withdraw his guilty pleas. On December 3, 2015, the trial court denied the motion. Appellant filed an appeal to this Court. On appeal, Appellant's appointed counsel filed a no merit brief. After reviewing the record, we affirmed the trial court's

denial of Appellant's motion to withdraw his pleas. *State v. McBride*, 7th Dist. No. 16 MA 0002, 2017-Ohio-4281

{¶15} On April 24, 2017, Appellant filed a motion for resentencing, arguing that his sentence violated due process because, pursuant to Ohio felony sentencing laws, the trial court improperly considered his juvenile adjudications. The trial court denied the motion without a hearing. Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING MCBRIDE'S MOTION FOR RESENTENCING IN VIOLATION OF HIS DUE PROCESS PROTECTIONS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION § 16 OF THE OHIO CONSTITUTION.

Postconviction Petition

{¶16} 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 outside of a direct appeal, asserts a violation of a constitutional right, claims that his sentence is void, and asks for his sentence to be vacated.

{¶7} To successfully raise 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” through the record or any supporting affidavits. *Agee* at ¶ 9. 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. *Id.* at ¶ 10.

{¶8} 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, the 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).

Timeliness of the Postconviction Petition

{¶9} The state argues that 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 contends 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 nearly thirteen years after the one-year period expired and has failed to provide an explanation of his delay.

{¶10} 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 found in R.C. 2953.23(A)(1)(a)-(b). 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.

{¶11} 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.”

{¶12} The record in the case *sub judice* reflects that Appellant did not timely file an appeal, and no trial transcripts were ever filed with this Court. Thus, his deadline to file for postconviction relief was in July of 2004. Appellant filed his postconviction petition on April 24, 2017, a time span of almost thirteen years. Pursuant to R.C. 2953.21(A)(2), this petition is untimely unless Appellant can show that his case falls within the exception provided by R.C. 2953.23(A)(1)(a)-(b). Appellant does not provide an explanation for his untimeliness. As such, the trial court correctly determined that Appellant's petition was untimely and his tardiness was not excused pursuant to R.C. 2953.23(A)(1)(a)-(b).

Sentencing

{¶13} In this matter, Appellant argues that the Ohio Supreme Court's holding in *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, operates retroactively and entitles him to a vacation of his sentence. The Ohio Supreme Court in *Hand* held that R.C. 2901.08(A), which treated a juvenile adjudication as a prior conviction in order to enhance either the degree or the sentence in a subsequent offense committed by the same offender as an adult, violated due process. *Id.*, paragraph one of the syllabus. The Court further held that as a juvenile adjudication does not involve a right to a trial by a jury, it cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum. *Id.*, paragraph two of the syllabus, following *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

{¶14} In reaching that decision, the Ohio Supreme Court noted that under *Apprendi*, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at ¶ 21. The Court also noted that the United States Supreme Court expanded *Apprendi*’s holding and determined that facts increasing a mandatory minimum sentence must also be submitted to a jury and found beyond a reasonable doubt. *Hand* at ¶ 22.

{¶15} The *Hand* Court also held that the “prior conviction” exception to *Apprendi*’s general rule must be limited to prior convictions which were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. *Id.* at ¶ 31.

{¶16} In the instant matter, Appellant contends that the rationale in *Hand* should apply to all sentencing statutes, including R.C. 2929.12 and R.C. 2929.14(C)(4). Therefore, Appellant argues the trial court erred in considering his juvenile adjudications when imposing his sentence. He argues he should be resentenced by the trial court and only his prior convictions should be considered. Appellant concedes in his brief that *Hand* addressed only the issue of whether a defendant’s juvenile delinquency adjudications could be used to increase a sentence beyond a statutory maximum or mandatory minimum in violation of *Apprendi*, and that nothing in *Hand* permits a trial court from considering a defendant’s prior criminal history, including juvenile adjudications, when considering and weighing the recidivism factors in R.C. 2929.12.

{¶17} Pursuant to *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 1, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2) when

reviewing felony sentences. The Court held, “an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *Id.*

{¶18} In addition, as the Ohio Supreme Court has held, R.C. 2929.11 and R.C. 2929.12 do not require the trial court to engage in judicial factfinding but, rather, the court is required to merely consider the purposes and principles of sentencing in R.C. 2929.11 and the statutory factors enumerated in R.C. 2929.12. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 42.

{¶19} As juvenile adjudications are one of the factors in R.C. 2929.12 which a trial court is required to consider in imposing sentence, and *Hand* does not prohibit a sentencing court from considering those adjudications, the trial court in the instant matter did not violate *Hand* in imposing sentence. As the Ohio Supreme Court noted in *Hand*, “there is a significant difference between allowing a trial judge to consider an adjudication during adult sentencing and requiring a mandatory prison term to be imposed because of it.” *Id.* at ¶ 20. Thus, the trial court did not err in considering Appellant’s juvenile adjudications when imposing sentence and Appellant’s sentencing argument is additionally barred by the doctrine of *res judicata*.

Res Judicata

{¶20} As noted above, 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.” *Croom, supra*, ¶ 7. Even if Appellant’s postconviction petition were timely, his arguments are barred by *res judicata*. Appellant contends his

sentence should be vacated based on the Ohio Supreme Court's holding in *State v. Hand*. As noted above, the consideration of Appellant's juvenile adjudications in imposing sentence did not violate *Hand*. Appellant should have previously raised his substantive arguments in a direct appeal. As Appellant failed to raise his arguments in a direct appeal, *res judicata* bars Appellant from raising them in his postconviction petition. See *State v. Brown*, 7th Dist. No. 13 MA 176, 2014-Ohio-4008. Accordingly, Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶21} Many years after the fact, Appellant is now challenging his sentence. As Appellant's motion amounts to an untimely postconviction petition and is barred by *res judicata*, his arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.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 waived.

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.