

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

v.

LAWRENCE E. ROSS,
Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0156.

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 96 CR 192.

BEFORE:

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

JUDGMENT:

Affirmed.

Atty. Paul Gains, Mahoning County Prosecutor and *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Lawrence Ross, *Pro se*, #332-055, P.O. Box 57, Marion, Ohio 43301, for Defendant-Appellant.

Dated:

June 28, 2018

Donofrio, J.

{¶1} Defendant-appellant, Lawrence Ross, appeals the judgment of the Mahoning County Court of Common Pleas dismissing his petition for post-conviction relief.

{¶2} This action stems from events heard by this Court in *State v. Ross*, 7th Dist. Nos. 96 C.A. 247, 96 C.A. 251, 1999 WL 826223. On March 22, 1996, appellant was indicted on three counts: aggravated murder with a death specification, aggravated burglary, and having weapons while under disability. Each count carried a firearm specification.

{¶3} Appellant was tried on the aggravated murder and aggravated burglary counts first. This trial was before a jury. The jury returned guilty verdicts on both counts. At sentencing, the jury recommended life imprisonment with parole eligibility after thirty years.

{¶4} After appellant was sentenced on the first two counts, a bench trial was held on his having weapons while under disability count. Appellant was convicted of this count as well and sentenced to three to five years of incarceration to run consecutively with his sentence for aggravated murder and aggravated burglary.

{¶5} Appellant filed a direct appeal to this Court asserting three assignments of error. All three of his assignments of error challenged the admission of certain testimony or evidence at appellant's trial for aggravated murder and aggravated burglary. This Court overruled all three assignments of error and affirmed appellant's conviction.

{¶6} In 2003, appellant filed a petition for a writ of mandamus in this Court seeking the unsealing and release of a speedy trial motion he filed prior to his second trial and to have the trial court issue findings of fact as to why said motion was denied. This Court dismissed the petition on the basis that it did not contain the required affidavit pursuant to R.C. 2969.25. This Court also held that even if the required affidavit were present, appellant's petition would still be denied because mandamus was not applicable as appellant had an adequate remedy at law (direct appeal) and he did not raise these issues in his direct appeal. *State v. Ross*, 7th Dist. Nos. 96 CA 247, 96 CA

251, 2003-Ohio-4889. This decision was affirmed by the Ohio Supreme Court in *State v. Ross*, 102 Ohio St.3d 73, 2004-Ohio-1827, 806 N.E.2d 553.

{¶7} In 2007, appellant filed a petition for a writ of procedendo in this Court raising identical claims from his previous petition for a writ of mandamus. This Court denied the petition on the basis that appellant's claims were barred by res judicata due to *State v. Ross*, 2003-Ohio-4889, and that appellant had an adequate remedy at law (direct appeal). *State ex rel. Ross v. Krichbaum*, 7th Dist. No. 07 MA 151, 2007-Ohio-7198.

{¶8} In 2008, appellant filed another petition for a writ of mandamus raising identical claims from the previous two petitions. This petition was dismissed on the basis of res judicata due to the previous two petitions from appellant and on the basis that appellant had an adequate remedy at law (direct appeal). *State ex rel. Ross v. Krichbaum*, 7th Dist. No. 09 MA 142, 2009-Ohio-5514. Appellant appealed this Court's decision to the Ohio Supreme Court, but the Court dismissed his appeal for failure to prosecute. *State ex rel. Ross v. Krichbaum*, 124 Ohio St.3d 1436, 2010-Ohio-187, 920 N.E.2d 368.

{¶9} In 2011, appellant filed various motions with the trial court. These motions included: a petition for a resentencing hearing pursuant to R.C. 2929.19(B)(3), an "Objection in Opposition for a Resentencing Hearing," and a "Motion for Hearing on Pretrial Motion to Dismiss Speedy Trial Delay in Trial Pursuant to O.R.C. 2945.73." The trial court overruled all of these motions. Appellant appealed to this Court arguing that his prior counsel was ineffective for failing to object to a defective sentencing entry. This Court held that while the trial court's original sentencing entry was defective, appellant experienced no prejudice as the proper remedy was to issue a revised sentencing entry (which the trial court did) and not grant appellant a new sentencing hearing. *State v. Ross*, 7th Dist. No. 11-MA-32, 2012-Ohio-2433, ¶ 30-31.

{¶10} On August 29, 2016, appellant filed a petition to vacate or set aside judgment or sentence pursuant to R.C. 2953.21. In this petition, appellant argued that certain evidence should have been suppressed at his trial, the plaintiff-appellee, State of Ohio, failed to disclose exculpatory evidence, and that his trial counsel was ineffective. The trial court denied this petition and appellant appealed to this Court.

{¶11} This Court affirmed the trial court's denial of appellant's petition on the basis that it was untimely filed which relieved the trial court of jurisdiction to hear the petition. This Court held that because appellant's petition was filed over 19 years after the transcripts in his original appeal were filed and appellant offered no reason as to the delay, it was untimely pursuant to R.C. 2953.23(A). *State v. Ross*, 7th Dist. No. 16 MA 0180, 2017-Ohio-9408.

{¶12} Beginning in 2017, appellant began filing numerous other motions with the trial court. These motions included: a motion to dismiss on the ground that the prosecution failed to preserve exculpatory evidence, two motions for sentencing, a motion for establishment of a date certain for oral hearing or a motion for summary hearing, and a motion for a conveyance order.

{¶13} Appellant's motion to dismiss raised no facts pertaining to what exculpatory evidence the prosecution allegedly failed to preserve. In both of appellant's motions for sentencing, appellant argued that his original sentencing order was a violation of Crim.R. 32(C) and should be declared void. In his motion for establishment of a date certain for oral hearing and motion for summary hearing, appellant argued that because his sentencing entry was void and over five years old, it should have been considered a dormant judgment which was unenforceable against him. In the motion for a conveyance order, appellant requested that the Mahoning County Sheriff transport him to the Mahoning County Jail for an oral hearing concerning his various motions.

{¶14} The state filed a response to appellant's motion to dismiss on October 6, 2017. In this response, the state argued that appellant was filing a petition for post-conviction relief and did not meet his burden pursuant to R.C. 2925.21(C). The state also argued that appellant's motion made merely conclusory statements and did not set forth a prima facie case. Finally, the state argued that appellant's petition was untimely.

{¶15} In a judgment entry dated October 23, 2017, the trial court overruled all of appellant's motions. Appellant timely filed this appeal on November 3, 2017. Appellant now raises three assignments of error. Appellant's assignments of error are as follows:

{¶16} First Assignment of Error:

WHETHER THE TRIAL COURT'S FAILURE TO RENDER AN ADJUDICATION OF GUILT WITH RESPECT TO THE UNDERLYING AND CORRELATIVE WEAPON UNDER DISABILITY OFFENSE FLOWING FROM A 'BENCH TRIAL,' IMPLICATED BOTH: 1) A FINAL APPEALABLE ORDER; AND 2) THE CORRELATIVE CONVICTION FOR AGGRAVATED MURDER (internal citations omitted).

{¶17} Second Assignment of Error:

WHETHER THE OFFICE OF NUNC PRO TUNCH IS AVAILABLE TO: 1) SUPPLY OMITTED ACTION, AND 2) TO REVIEW FORMER JUDGMENTS OF THE COURT AND IN THE DEFENDANT'S ABSENCE (internal citations omitted).

{¶18} Third Assignment of Error:

WHETHER A JURY VERDICT FORM, IF IT DOES NOT STATE THE DEGREE OF THE OFFENSE OR STATE ELEMENTS TO DISTINGUISH IT FROM A MISDEMEANOER ('IS SELF-EXECUTING') AS BEING SOLELY DETERMINATIVE OF AN ENSUING CRIMINAL SANCTION (internal citations omitted).

{¶19} We do not reach the merits of appellant's assignments of error because appellant failed to comply with the statutory requirements for petitions for post-conviction relief and appellant's arguments are all barred by res judicata.

{¶20} Regarding the statutory requirements for petitions for post-conviction relief, "[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such motion is construed as a petition for post-conviction 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, (1979). Since appellant's most recent motions with the trial court and this appeal challenge appellant's conviction and sentence on constitutional grounds, this action is one for post-conviction relief.

{¶21} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief shall be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment or conviction. According to the state, the transcripts in appellant's direct appeal were filed on March 6, 1997. The motions at issue were filed in 2017, and are thus in violation of R.C. 2953.21(A)(2).

{¶22} There is an exception to the 365 day requirement of R.C. 2953.21(A)(2). This exception states, in relevant part:

(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:

(1) Both of the following apply:

(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.

(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 * * *.

R.C. 2953.23(A).

{¶23} Appellant does not satisfy either requirement of R.C. 2953.23(A)(1). None of his motions with the trial court or his brief on this appeal explain why there is over a

twenty year delay on this current action. Additionally, appellant does not argue that a constitutional error at his trial would have rendered a reasonable factfinder from finding him guilty. Instead, appellant argues that the judgment against him is void. But appellant's judgment is not void because we found no error with appellant's trial in his original appeal. Moreover, the only error with appellant's sentence was the sentencing entry itself which has since been corrected.

{¶24} Regarding res judicata, "a valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). "An existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit." *Id.* quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986). Res judicata is particularly appropriate in the criminal context because without finality, criminal law is deprived of much of its deterrent effect which is essential to the operation of the criminal justice system. *State v. Lankford*, 7th Dist. No. 07 BE 3, 2007-Ohio-3330, ¶ 8 citing *State v. McCall*, 9th Dist. No. 95CA0092691.

{¶25} All of appellant's assignments of error on this appeal challenge his conviction or his sentence. These are challenges that could have and should have been brought up on direct appeal. Moreover, appellant filed five previous petitions with the trial court or this Court alleging the same or similar claims and arguments to the case at bar. This Court held that appellant's previous petitions were either untimely or barred by res judicata. Therefore, appellant's claims in this petition are barred by res judicata.

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

Waite, J., concurs.

Robb, P. J., concurs

For the reasons stated in the Opinion rendered herein, all three assignments of error are 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.