

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ALLEN D. TAPSCOTT, JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0112

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2010 CR 01267

BEFORE:

Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

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

Allen D. Tapscott, Pro se, Inmate Number 600-248, Toledo Correctional Institution, 2001 East Central Avenue, P.O. Box 80033, Toledo, Ohio 43608.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellant, Allen D. Tapscott, Jr., appeals the judgment entry of the Mahoning County Court of Common Pleas overruling his “Motion for Void Sentence.” In his motion, Appellant asserts that the trial court violated his constitutional rights under the Double Jeopardy Clause because he received multiple punishments for the same offenses. Because Appellant’s appeal was not timely filed, this Court does not have jurisdiction to entertain the petition. Therefore, its dismissal is affirmed, albeit on different grounds.

Factual and Procedural History

{¶2} Appellant was indicted on two counts of aggravated robbery with a deadly weapon, one count of aggravated burglary with a deadly weapon, three firearm specifications, and one count of having a firearm while under disability. The last count was severed. A bench trial was to take place on that count after a jury trial was held on the first three counts. Following jury trial, Appellant was found guilty on all three counts, with firearm specifications. The court thereafter found Appellant guilty of having weapons while under a disability. On January 28, 2011, Appellant was sentenced to ten years of imprisonment on the first three offenses, three years for each firearm specification, and five years for the weapons while under a disability charge. The court merged the firearm specifications into one. The court also determined that the aggravated burglary conviction merged with the convictions for aggravated robbery, and those sentences were ordered

to run concurrently. The trial court refused Appellant’s request to merge the two aggravated robbery convictions and ordered those sentences to run consecutively to each other, and consecutively to both the sentence for the gun specification and the weapons sentence, for a total stated prison term of 28 years.

{¶3} Appellant appealed his convictions and sentences in *State v. Tapscott*, 7th Dist. Mahoning No. 11 MA 26, 2012-Ohio-4213 (“*Tapscott I*”). On September 14, 2012, we overruled Appellant’s challenges to the admissibility of certain evidence and his argument that the two aggravated robbery convictions should have merged. However, we sua sponte concluded:

The trial court merged the firearm specifications so that only one remained for sentencing and merged the aggravated burglary with the aggravated robberies so that only the robberies remained for sentencing. Although the trial court merged these offenses, the court still entered sentences on all offenses, apparently believing that merger is satisfied by running the sentences on the merged offenses concurrently.

However, when a court merges offenses, it cannot run the sentences for the merged offenses concurrently. Rather, the court must refrain from entering a sentence on one of the merged offenses.

Tapscott I, ¶ 47-48.

{¶4} We remanded the matter to the trial court for the state to select whether it wished Appellant to be sentenced on the two aggravated robberies but not the aggravated burglary or on the aggravated burglary and one of the aggravated robbery counts.

Tapscott I also noted that the firearm specifications were appropriately merged into one specification, so an election by the state was not required on remand. However, we instructed the trial court to correct its sentencing on the specifications so that a sentence was ordered on only one firearm specification, instead of sentencing on all three and running the sentences concurrently. *Id.* at ¶ 51.

{¶5} After a resentencing hearing was held, the trial court issued a judgment entry on October 12, 2012, imposing the following:

On the charge of Aggravated Robbery, a felony of the first degree on Count One, it is hereby Ordered that Defendant be taken from here to the Mahoning County Justice Center and from there to the Department of Rehabilitation and Corrections to serve a term of ten years of incarceration.

On the charge of Aggravated Robbery, a felony of the first degree on Count Two, it is hereby Ordered that Defendant be taken from here to the Mahoning County Justice Center and from there to the Department of Rehabilitation and Corrections to serve a term of ten years of incarceration.

Pursuant to the directives of the Seventh District Court of Appeals, the charge of Aggravated Burglary, a felony of the first degree on Count Three merges with the offenses in Counts One and Two, therefore, no sentence is imposed on Count Three or on the Firearm Specification to Count Three.

On the charge of Having Weapons While Under Disability, a felony of the third degree on Count Four, it is hereby Ordered that Defendant be taken

from here to the Mahoning County Justice Center and from there to the Department of Rehabilitation and Corrections to serve a term of five years of incarceration.

The sentences imposed on Counts One, Two, and Four are Ordered to be served consecutively to one another in the Department of Rehabilitation and Corrections.

By agreement of the parties herein and as a matter of law, the Firearm Specifications herein merge, therefore, a single sentence of three years of actual incarceration in the Department of Rehabilitation and Corrections is imposed for the Firearm Specification to Count One and is Ordered to be served prior to and consecutively to the sentence imposed in Count One as required by O.R.C. 2941.145(A).

Therefore, Defendant is again Ordered to serve a total sentence of twenty eight years of incarceration in the Department of Rehabilitation and Corrections on the sentences imposed by the Court this date.

(10/12/12 Sentencing J.E.)

{¶6} Appellant did not appeal this sentence. Instead, nearly eight years later, on September 9, 2020, Appellant filed a “Motion for Void Sentence” and a “Motion for Summary Judgment,” both contending that the state’s election not to merge the two counts of aggravated robbery was error because they were allied offenses of similar import and should have been merged for sentencing. On September 21, 2020, the state

filed a motion for judgment on the pleadings. On September 24, 2020, the trial court issued a short judgment entry overruling Appellant's motions and granting the state's motion for judgment on the pleadings.

{¶17} Appellant filed a notice of appeal in this matter on October 26, 2020.

ASSIGNMENT OF ERROR

The Trial Court erred when it sentenced Mr. Tapscott to [two] 10 year sentences for aggravated robberies two counts R.C. 2911.01(A)(1)(c) a felony of the first degree of two alleged victims stemming from the same incident in violation of R.C. 2941.25.

{¶18} A postconviction proceeding is a collateral civil attack on the judgment, and the right to file a postconviction petition is a statutory right, not a constitutional right; thus, a postconviction petitioner receives no more rights than those granted by the statute. *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Moreover, postconviction relief proceedings are governed by the Ohio Rules of Appellate Procedure applicable to civil, not criminal, actions. *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984). In this matter, the trial court issued its judgment entry overruling Appellant's motions on September 24, 2020. Pursuant to App.R 3(A) and 4(A), notice of an appeal must be filed within thirty days of the judgment or final order from which the appeal is taken. Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider the merits. Appellant filed his appeal to this Court on October 26, 2020. At first blush, his appeal appears untimely. However, the 30th day following

judgment in this case fell on a Saturday. Therefore, Appellant's notice is considered to be timely filed. However, even a cursory review of the petition reveals it to be barred both procedurally and substantively.

{¶9} When, subsequent to a direct appeal, a criminal defendant files a motion seeking to vacate or correct his sentence on the basis that his constitutional rights have been violated, the motion is construed as a petition for post-conviction relief as defined by R.C. 2953.21. *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Pursuant to R.C. 2953.21(A)(2):

Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(i), (ii), or (iii) of this section 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

R.C. 2953.21(A)(2)(a).

{¶10} R.C. 2953.23 provides an exception to the 365-day requirement and reads, in pertinent 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 * * * 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 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.

{¶11} A trial court does not have jurisdiction to consider a petition for postconviction relief that is filed outside of the statutory time limit. *State v. Davis*, 7th Dist. Mahoning No. 08 MA 16, 2008-Ohio-6211, ¶ 9. Lack of subject matter jurisdiction may be raised sua sponte by a court at any stage of the proceedings and may be raised for the first time on appeal. *Id.* at ¶ 10.

{¶12} The trial transcripts on direct appeal in this case were filed on July 12, 2011. Appellant filed his postconviction petition on July 31, 2020, well beyond the required 365-day deadline. A trial court has jurisdiction to consider an untimely petition for postconviction relief only if the petitioner shows that he was “unavoidably prevented from discovering the facts upon which his petition is based or the United States Supreme Court has recognized a new retroactive right.” *State v. Johnson*, 144 Ohio App.3d 222, 226, 2001-Ohio-3301, 759 N.E.2d 889 (7th Dist.) Appellant has made no such showing, here. Therefore, the record reflects that Appellant failed to timely file his petition for postconviction relief pursuant to R.C. 2953.21(A)(2) and the exceptions in R.C. 2953.23(A)(1) do not apply.

{¶13} Even assuming that Appellant’s claims were not procedurally barred, his petition fails substantively, because it does not establish a constitutional violation using evidence found outside of the record. Appellant has not offered any evidence dehors the record. Consequently, the claims he currently relies on were required to be raised on direct appeal. *State v. Paige*, 7th Dist. Mahoning No. 17 MA 146, 2018-Ohio-2782, ¶ 22. Appellant failed to file a direct appeal of the trial court’s resentencing entry. Therefore, Appellant is also foreclosed from raising the issue in this postconviction proceeding even had he timely filed his postconviction request.

{¶14} Accordingly, Appellant’s assignment of error is without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D’Apolito, 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.