

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 18AP-578
 : (C.P.C. No. 13CR-2345)
 Antonio M. Jones, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 21, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

On brief: *Antonio M. Jones*, pro se.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Antonio M. Jones, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for postconviction relief. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This court set forth the facts underlying appellant's conviction and sentence in *State v. Jones*, 10th Dist. No. 14AP-796, 2015-Ohio-2357 ("*Jones I*"):

By indictment filed May 2, 2013, plaintiff-appellee, State of Ohio, charged Jones with one count of murder, in violation of R.C. 2903.02, an unclassified felony, with an accompanying firearm specification and repeat violent offender specification; one count of felony murder, in violation of R.C. 2903.02, an unclassified felony, with an accompanying

firearm specification and repeat violent offender specification; one count of tampering with evidence, in violation of R.C. 2921.12, a third-degree felony, with an accompanying firearm specification; and one count of having a weapon while under disability, in violation of R.C. 2923.13, a third-degree felony, with an accompanying firearm specification. All the charges related to the shooting death of James Edward Lane on April 20, 2013. Jones entered a plea of not guilty to all charges.

Jones elected to waive his right to a jury trial for Count 4 of the indictment, having a weapon while under disability, and have a bench trial for that charge only. As to the other three charges contained in the indictment, a jury trial commenced June 23, 2014. * * *

* * *

[T]he jury returned guilty verdicts for both murder counts and the tampering with evidence count, as well as the accompanying firearm specifications. The parties stipulated to Jones' prior convictions, and the trial court found Jones guilty of having a weapon while under disability and the repeat violent offender specifications. Following a sentencing hearing on September 12, 2014, the trial court merged Count 2, felony murder, into Count 1, murder, and sentenced Jones to an aggregate sentence of 33 years to life. The trial court journalized Jones' convictions and sentence in a September 15, 2014 judgment entry.

Id. at ¶ 2-3, 11.

{¶ 3} Appellant timely appealed to this court from the judgment of conviction and sentence. In his sole assignment of error, appellant alleged: "The verdict is against the sufficiency and manifest weight of the evidence." *Id.* at ¶ 12. This court overruled appellant's assignment of error and affirmed appellant's conviction.

{¶ 4} In the succeeding years, appellant filed several postconviction motions and petitions. In a recent decision affirming the trial court's denial of appellant's May 3, 2017 "motion for relief from judgment," we summarized appellant's postconviction efforts to vacate his convictions, in relevant part, as follows:

Appellant * * * filed a pro se motion for leave to file a delayed motion for new trial. The trial court denied appellant's motion for leave and this court affirmed on appeal, holding that appellant did not show he was prevented from discovering the evidence he sought to use to support his delayed motion for

new trial. *State v. Jones*, 10th Dist. No. 16AP-13, 2016-Ohio-5387, ¶ 1 ("*Jones II*"). Appellant also filed a *pro se* petition to vacate or set aside his judgment of conviction, pursuant to R.C. 2953.21, asserting ineffective assistance of trial counsel. The trial court denied appellant's petition, finding several of his claims of ineffective assistance of counsel were barred by res judicata and that appellant failed to present evidence demonstrating deficient performance and/or prejudice as to his claims. *State v. Jones*, 10th Dist. No. 16AP-128, 2017-Ohio-1121, ¶ 7-8 ("*Jones III*"). This court affirmed on appeal, holding the trial court did not abuse its discretion by denying appellant's petition. *Jones III* at ¶ 32-34.

(Emphasis added.) *State v. Jones*, 10th Dist. No. 17AP-431, 2018-Ohio-306, ¶ 3 ("*Jones IV*").

{¶ 5} Subsequent to this court's decision in *Jones IV*, we affirmed the trial court's denial of appellant's second motion for leave to file a delayed motion for new trial in *State v. Jones*, 10th Dist. No. 18AP-59, 2018-Ohio-3463 ("*Jones V*").

{¶ 6} Appellant filed the instant "motion to vacate and set aside judgment of conviction" on May 15, 2018 and a "motion to proceed to judgment pursuant to Civil Rule 12(C)" on June 26, 2018. In his "motions," appellant argues the trial court erred and violated his constitutional rights by failing to instruct the jury on certain lesser-included offenses. Appellee did not file a memorandum in opposition.

{¶ 7} On July 11, 2018, the trial court issued a decision on the pending motions. The trial court construed the May 15, 2018 motion as a successive petition for postconviction relief, pursuant to R.C. 2953.23, and ruled that res judicata barred appellant's motion. The trial court denied as moot appellant's "motion to proceed to judgment pursuant to Civil Rule 12(C)."

{¶ 8} Appellant timely appealed to this court from the judgment of the trial court.

II. ASSIGNMENT OF ERROR

{¶ 9} Appellant assigns the following as trial court error:

APPELLANT CONTENDS THAT THE TRIAL COURT DENIED HIM SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE 1ST, 5TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS AND ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT FAILED TO ADHERE TO THE OHIO'S LEGISLATIVE INTENT WHEN

DEFINING THE ELEMENTS OF MURDER, AND AS SUCH
CONSTITUTES AN ACT OF FRAUD UPON THE COURT.

(Sic passim.)

III. LEGAL ANALYSIS

A. Appellant's Assignment of Error

{¶ 10} In appellant's assignment of error, appellant argues the trial court erred when it denied his motion to vacate his conviction and sentence. We disagree.

{¶ 11} Preliminarily, we note that appellant does not contend the trial court erred when it construed his motion as a successive motion for postconviction relief. In *Jones IV*, this court noted "[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged. * * * Notwithstanding appeals under R.C. 2953.08, a petition for postconviction relief is the exclusive remedy by which a defendant may bring a collateral challenge to a conviction or sentence." (Internal citations and quotations omitted.) *Id.* at ¶ 8. Similarly, "[t]his court has repeatedly recognized that motions '[seeking] to correct or vacate sentence should be construed as a motion for postconviction relief under R.C. 2953.21.'" *State v. Mitchell*, 10th Dist. No. 12AP-572, 2013-Ohio-1059, ¶ 5, quoting *State v. Banks*, 10th Dist. No. 12AP-96, 2012-Ohio-3770, ¶ 6, citing *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079. See also *State v. Lariva*, 10th Dist. No. 08AP-413, 2008-Ohio-5499.

{¶ 12} Appellee argues the trial court did not have jurisdiction of appellant's second petition for postconviction relief. In the alternative, appellee contends the trial court correctly ruled res judicata barred appellant's petition. Even though the trial court did not consider the issue of subject-matter jurisdiction, this court may nevertheless consider the jurisdictional question in ruling on appellant's appeal from the trial court's denial of his petition. *Banks* at ¶ 11, fn. 2, citing *State v. White*, 10th Dist. No. 11AP-908, 2012-Ohio-1969, ¶ 15; *State v. James*, 10th Dist. No. 11AP-246, 2011-Ohio-6457, ¶ 14 (the jurisdictional limitations in R.C. 2953.21(A)(2) and 2953.23(A) may not be waived or forfeited); *State v. Gaddis*, 8th Dist. No. 77058 (Oct. 12, 2000) ("Even though the court did not rely on timeliness as a basis for dismissing the petition, we affirm the denial of the motion."). On consideration of the jurisdictional question, we agree with appellee that the trial court

lacked jurisdiction to entertain appellant's second or successive petition for postconviction relief.

{¶ 13} "A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). "The postconviction relief process 'is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction.'" *State v. Conway*, 10th Dist. No. 17AP-90, 2019-Ohio-382, ¶ 9, quoting *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000), citing *State v. Jackson*, 64 Ohio St.2d 107 (1980).

{¶ 14} Because the instant petition is not appellant's first petition for postconviction relief, R.C. 2953.23 governed the trial court proceedings. Under R.C. 2953.23(A), a court of common pleas may entertain a successive petition for postconviction relief only under the following circumstances:

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 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.

(Emphasis added.)

{¶ 15} "A trial court lacks subject-matter jurisdiction over an untimely or successive petition for postconviction relief unless the petition satisfies the criteria set forth under R.C. 2953.23(A)." *Conway* at ¶ 8, citing *State v. Apanovitch*, ___ Ohio St.3d ___, 2018-Ohio-4744, ¶ 36 (slip opinion) ("a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition"). Because "'the question [of] whether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely [or successive] petition for postconviction relief is a question of law,"' an appellate court applies a de novo standard of review to the trial court's determination." *Conway* at ¶ 8, quoting *Apanovitch* at ¶ 24, quoting *State v. Kane*, 10th Dist. No. 16AP-781, 2017-Ohio-7838, ¶ 9.

{¶ 16} Appellant failed to establish either of the exceptions under R.C. 2953.23(A)(1) that would allow the trial court to consider his successive petition for postconviction relief. Appellant made no claim in the trial court that any of the R.C. 2953.23(A)(1) exceptions applied to his petition, and his argument on appeal is limited to the merits of his petition. Because appellant's petition is a second or successive petition for postconviction relief, and because appellant failed to produce evidence to support a finding that any of the R.C. 2953.23(A)(1) exceptions applied, the trial court lacked jurisdiction to entertain appellant's petition. *Apanovitch; Kane*.

{¶ 17} This court has previously advised that trial courts should dismiss a petition for postconviction relief when jurisdiction is lacking rather than denying the petition on some other grounds. *See, e.g., Banks* at ¶ 11 ("the trial court did not err in denying appellant's petition, though technically the petition should have been dismissed for lack of jurisdiction"); *State v. Mangus*, 10th Dist. No. 06AP-1105, 2009-Ohio-6563, ¶ 13 (affirming denial of postconviction petition as untimely filed even though trial court should have dismissed the petition for lack of jurisdiction); *State v. Russell*, 10th Dist. No. 05AP-391, 2006-Ohio-383, ¶ 10 (the trial court did not err in denying appellant's petition on the merits, though technically the petition should have been dismissed for lack of jurisdiction); *State v. Elkins*, 10th Dist. No. 10AP-6, 2010-Ohio-4605, ¶ 17 (though the untimely postconviction petition should have been dismissed for lack of jurisdiction, the trial court did not err by denying the petition on the merits).

{¶ 18} We nevertheless conclude that the trial court did not err in its disposition of appellant's petition, and we affirm the trial court's judgment, albeit for different reasons than the trial court. *Banks* at ¶ 11; *Mangus* at ¶ 13; *Russell* at ¶ 10; *Elkins* at ¶ 17.

IV. CONCLUSION

{¶ 19} Our disposition of the jurisdictional issue renders moot appellant's assignment of error, which addresses the merits of his petition. *Banks* at ¶ 12, citing *Elkins* at ¶ 17; *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 11. *See also Mangus* at ¶ 14, citing *State v. Hatfield*, 10th Dist. No. 07AP-784, 2008-Ohio-1377, ¶ 9, citing *State v. Raines*, 10th Dist. No. 03AP-1076, 2004-Ohio-2524, ¶ 7. Having determined appellant's sole assignment of error is moot, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and BRUNNER, JJ., concur.
