

[Cite as *State v. Walker*, 2010-Ohio-4008.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93749

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL WALKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-180834

BEFORE: Sweeney, J., Gallagher, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 26, 2010

FOR APPELLANT

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Michael Walker (“Walker”), appeals pro se from the trial court’s journal entry and opinion that denied his motion to vacate void judgment. For the reasons that follow, we affirm.

{¶ 2} On April 18, 1983, Walker was indicted for aggravated murder with specifications, two counts of aggravated robbery, aggravated burglary, and two counts of felonious assault. In September 1983, the trial commenced and the jury found Walker guilty of all counts and specifications in the indictment. Walker received an aggregate prison sentence of 64 years to 105 years and or life

imprisonment. Walker appealed following his convictions, which this Court affirmed in *State v. Walker* (May 31, 1984), Cuyahoga App. No. 47616.¹ The facts that gave rise to Walker's indictment and convictions are set forth in *Walker* and incorporated here by reference.

{¶ 3} Walker has filed various motions and petitions throughout the years, including but not limited to: motion for delayed reconsideration, motion to modify sentence, petition for postconviction relief, motion to have sentence corrected pursuant to double jeopardy, and application for reopening of his appeal, all of which were denied. On September 2, 2008, Walker filed a "motion to dismiss void indictment, judgment of conviction and sentence pursuant to Ohio Revised Code 2953.21(A)(1), which he later amended and ultimately voluntarily dismissed in January 2009. About a month later, Walker filed a document styled "petitioner's common law motion to vacate void judgment," which the State opposed and the trial court denied. This is the basis of the instant appeal.

{¶ 4} Because all of Walker's assignments of error concern the propriety of the trial court's decision to deny his motion to vacate void judgment, they are addressed together.

{¶ 5} "1. The trial court erred when it abused its discretion by granting the State's motion for summary judgment.

¹ The Ohio Supreme Court dismissed Walker's appeal as not involving a substantial constitutional question in *State v. Walker* (2001), 93 Ohio St.3d 1474, 757 N.E.2d 772.

{¶ 6} “II. The trial court erred when it abused its discretion in failing to recognize its inherent power to vacate a void judgment, in contravention of the United States and Ohio Consitution[s].

{¶ 7} “III. The trial court erred when it abused its discretion in failing to determine whether subject matter jurisdiction had been properly acquired in 1983 pursuant to the filing of a fatally defective indictment in contravention of the United States and Ohio Constitution[s].”

{¶ 8} Walker’s motion to vacate is founded upon his argument that the trial court lacked jurisdiction to convict him due to alleged defects in his indictment; specifically, that certain counts did not contain the mens rea element.

{¶ 9} While Walker casts his motion as one being premised upon the common law, “there are no common law crimes and no common law criminal procedures in Ohio.” *State v. Lisbon Sales Book Co.* (1964), 176 Ohio St. 482, 200 N.E.2d 590, paragraph two of the syllabus; *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph one of the syllabus. When no procedure is specifically prescribed by Criminal Rule, the trial court in a criminal case is permitted to look to the rules of civil procedure and to the applicable law for guidance. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶10.

{¶ 10} Walker’s motion was filed subsequent to his direct appeal, claimed a denial of his constitutional rights, sought to render the judgment void, and asked for vacation of the judgment and sentence. Under identical circumstances, the

Ohio Supreme Court held that such a motion “could have been filed as a petition for postconviction relief. Thus, it is not necessary to look to * * * other applicable law for guidance * * * because a procedure ‘specifically prescribed by rule’ exists, i.e., Crim.R. 35.” *Id.* at ¶12. This Court has held that the proper form in which to assert lack of jurisdiction due to a defective indictment is pursuant to postconviction relief under R.C. 2953.21. *State v. Malone* (Jan. 30, 1997), Cuyahoga App. No. 71094. Walker filed the subject motion approximately 25 years after this Court affirmed his conviction on direct appeal. His motion was not filed within the time allowed by R.C. 2953.21 and was, therefore, properly denied.

{¶ 11} Furthermore, Walker’s claims are barred by *res judicata* because he could have raised them on direct appeal but did not. *State v. Holt*, Cuyahoga App. No. 87019, 2006-Ohio-3327, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus; see, also, *State v. Tucker*, Montgomery App. No. 23408, 2010-Ohio-2642, ¶6, citing *State v. Johnson*, 179 Ohio App.3d 151, 2008-Ohio-5769, 900 N.E.2d 1079.

{¶ 12} Walker relies upon *State v. Cimpritz* (1953), 158 Ohio St. 490, 110 N.E.2d 416 to support his proposition that a defect in his indictment rendered his judgments of conviction void and left the trial court without jurisdiction to convict him. However, other courts addressing these arguments have distinguished *Cimpritz* and concluded otherwise. E.g., *Tucker*, *supra*; *State v. Howe*,

Montgomery App. No. 23423, 2010-Ohio-1621, ¶14-19. The Ohio Supreme Court clarified and reconciled its holding in *Cimpritz* with the following dicta:

{¶ 13} “As stated in paragraph six of the syllabus of *State v. Cimpritz*, supra (158 Ohio St. 490, 110 N.E.2d 416, 418), ‘an indictment,’ such as that in the instant case, ‘which does not charge an offense is void * * * and may be successfully attacked * * * by a collateral proceedings.’ *However, after a judgment of conviction for the crime sought to be charged in such indictment, such a collateral attack would no longer be effective because the judgment of conviction necessarily binds a defendant, where the court rendering it had jurisdiction of the person of the defendant and also jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted. Such a judgment of conviction is necessarily binding as between the state and the defendant and can only be set aside by a direct and not a collateral attack.*” *State v. Wozniak* (1961), 172 Ohio St. 517, 522, 178 N.E.2d 800, emphasis added.

{¶ 14} There is no dispute that Walker did not challenge the sufficiency of his indictment at or before trial or on direct appeal. The trial court distinguished *Cimpritz* as set forth in its judgment entry and opinion and properly denied Walker’s motion on this basis as well. Accordingly, the assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR