

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 108258
 v. :
 :
 DAVEION PERRY, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 12, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-16-610816-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Mary M. Frey, Assistant Prosecuting
Attorney, *for appellee*.

Daveion Perry, *pro se*.

SEAN C. GALLAGHER, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Daveion Perry appeals the denial of his “Motion to Vacate Conviction and Suppress Evidence in Violation of Fourth Amendment of

the United States Constitution and Article I, Section 14 of the Ohio Bill of Rights.” The trial court lacked jurisdiction to consider Perry’s motion, and thus we affirm.

{¶ 2} In 2016, Perry was charged under a 15-count indictment with aggravated murder and other felony offenses that arose from an incident that resulted in the death of a 15-year-old boy. In exchange for Perry’s guilty pleas, the state agreed not to seek the death penalty. The trial court accepted Perry’s guilty pleas and sentenced him to an aggregate term of life in prison without parole to be served consecutive to six years in prison on the firearm specifications.

{¶ 3} Despite his plea agreement, Perry has spent the past three years seeking to undo his plea. *State v. Perry*, 8th Dist. Cuyahoga No. 107596, 2019-Ohio-547, ¶ 7. In the direct appeal, Perry’s appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Perry filed a pro se brief in which he challenged his guilty pleas, the plea agreement, and the court’s jurisdiction to accept his guilty pleas. *State v. Perry*, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324. The panel granted the appointed counsel’s motion to withdraw and dismissed the appeal upon finding that “no meritorious argument exists and that the appeal would be wholly frivolous.” *Id.* at ¶ 13.

{¶ 4} While the direct appeal was pending, Perry filed a petition for postconviction relief seeking to vacate or set aside the judgment of conviction or sentence, in which he raised a number of constitutional claims that included an assertion of ineffective assistance of counsel. After the panel reversed the trial court’s initial ruling that it lacked jurisdiction to rule on the petition, the trial court

issued a ruling that denied postconviction relief on December 15, 2017. That decision was not appealed.

{¶ 5} On November 9, 2017, appellant, pro se, filed a postsentence motion to withdraw his pleas pursuant to Crim.R. 32.1. On December 26, 2017, the trial court denied the motion “for all the reasons stated in the court’s ruling on defendant’s motion for post-conviction relief[.]” On appeal from that ruling, the panel concluded that all of the issues raised in appellant’s motion to withdraw were barred by the doctrine of res judicata and the trial court’s decision was not in error. *State v. Perry*, 8th Dist. Cuyahoga No. 106723, 2018-Ohio-4117, ¶ 11. Before that panel released its decision, on August 10, 2018, Perry filed a motion to vacate his pleas, claiming that he did not receive effective assistance of counsel and raising several claims similar to those previously raised. In that direct appeal, the panel affirmed. *Perry*, 8th Dist. Cuyahoga No. 107596, 2019-Ohio-547.

{¶ 6} In addition to those appeals, Perry filed an original action seeking to compel the trial court to issue a final appealable order. *State ex rel. Perry v. McClelland*, 8th Dist. Cuyahoga No. 107535, 2019-Ohio-354. According to Perry, the trial court failed to impose a valid sentence. The writ was denied.

{¶ 7} Undeterred by the unsuccessful attempts to get his convictions back before the trial court, Perry filed the underlying motion “to Vacate Conviction and Suppress Evidence in Violation of Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Bill of Rights.” In that motion,

Perry claims his trial counsel was ineffective for failing to seek suppression of certain evidence before Perry pleaded guilty. The trial court denied that motion.

{¶ 8} There is no error. The trial court lacked jurisdiction to consider Perry's motion, which must be treated as a successive petition for postconviction relief under R.C. 2953.23. Perry has exhausted the appellate review of his convictions and already once availed himself of the postconviction-relief statute. Thus, the trial court's jurisdiction to consider the latest motion is the sole issue to be resolved in this appeal. Perry had two options to invoke the trial court's continuing jurisdiction: file a motion to vacate a void conviction, or file a successive petition for postconviction relief. *State v. Rippey*, 10th Dist. Franklin No. 06AP-1229, 2007-Ohio-4521, ¶ 8, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304, 679 N.E.2d 1131 (after a direct appeal, any motion seeking to vacate or correct a sentence based on claimed constitutional errors should be treated under the postconviction-relief statutory framework); *State v. Braden*, Slip Opinion No. 2018-Ohio-5079, ¶ 17, citing *State v. Gilbert*, 143 Ohio St.3d 150, 2014-Ohio-4562, 35 N.E.3d 493, ¶ 9, and *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 20 (trial courts lack jurisdiction to reconsider final convictions unless to correct a clerical error or a void sentence). Perry is not claiming his convictions are somehow void, but instead is claiming that his guilty plea was a product of ineffective assistance of counsel for the failure to file a motion to suppress before Perry pleaded guilty. Although Perry did not expressly invoke R.C. 2953.21, that is the only basis for his motion based on the arguments presented.

{¶ 9} R.C. 2953.23(A), however, only permits a successive petition for postconviction relief (1) if the defendant was unavoidably prevented from discovering facts upon which the petition must rely, or (2) if the “United States Supreme Court recognized a new federal or state right that applies retroactively,” and but for that error at trial, no reasonable factfinder would have found the defendant guilty. Perry pleaded guilty, and the claimed error did not occur during trial. *State v. Swanson*, 8th Dist. Cuyahoga No. 106566, 2018-Ohio-4111, ¶ 17; *State v. Mitchell*, 11th Dist. Portage No. 2018-P-0047, 2019-Ohio-844, ¶ 14. R.C. 2953.23(A) does not apply in this case, nor does Perry argue otherwise. *Swanson*. Without a jurisdictional basis to consider the merits of Perry’s arguments, the trial court correctly denied Perry’s motion.

{¶ 10} Perry’s conduct, through the continued filing of appeals and original actions is perpetuating long-ago settled issues. *See, e.g., Henderson v. Saffold*, 8th Dist. Cuyahoga No. 100406, 2014-Ohio-306, ¶ 19; *State v. Henderson*, 8th Dist. Cuyahoga No. 100374, 2014-Ohio-2274 (declaring Henderson a vexatious litigator based on the subsequent appeal raising the same arguments). We acknowledge that Perry was warned that his conduct in filing appeals not warranted based on existing law could result in sanctions. *Perry*, 8th Dist. Cuyahoga No. 107596, 2019-Ohio-547, at ¶ 12, citing *State v. Williams*, 8th Dist. Cuyahoga No. 106254, 2018-Ohio-852, ¶ 13-15, and *State v. Jordan*, 8th Dist. Cuyahoga No. 100686, 2014-Ohio-2408, ¶ 7, fn. 1. That admonishment, however, occurred a month before the current appeal was initiated and approximately a month and a half before this accelerated appeal

was fully briefed. Accordingly, we will not take the extraordinary step of declaring Perry a vexatious litigator at this time. Our leniency in this matter, however, should not be construed as an invitation for continued frivolity. Any future frivolous conduct on Perry's part will be sanctioned.

{¶ 11} We affirm.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR