[Cite as *State v. Lindsay*, 2017-Ohio-595.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 16CA39
	:	
WENDELL LINDSAY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 10-CR-419 D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	February 6, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND COUNTY PROSECUTOR DANIEL M. ROGERS 38 South Park Street Mansfield, OH 44902	WENDELL R. LINDSAY, PRO SE Inmate # A591-512 Richland Correctional Institution 1001 Olivesburg Road Mansfield, OH 44905

Delaney, J.

{¶1} Defendant-Appellant Wendell Lindsay appeals the May 24, 2016 judgment entry of the Richland County Court of Common Pleas denying his Motion for Resentencing/Sentence Reduction. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} On March 4, 2010, the ten-year-old victim approached her guidance counselor at school and told her "my mother's boyfriend has been raping me." (T. 197). During the investigation into the sexual assault, the victim disclosed that her mother's boyfriend, Wendell Lindsay, had come into the room that she shared with her younger sister on the morning of March 4th, pulled down her underwear and stuck his tongue in her vagina. (T. at 198; 269). This was not the first time a sexual incident had occurred. The victim told the social worker who interviewed her that Lindsay had placed his mouth on her vagina approximately six times and penetrated her vagina with his penis a total of seven times. (T. at 271).

{¶3} After the disclosures, the victim's father took her to the hospital for a sexual assault examination. The nurse who performed the exam found physical evidence consistent with the victim's allegations. As part of the examination, swabs were taken of the victim's pubic area and the underwear she was wearing at the time of the examination were collected. DNA collected from the underwear and the pubic area of the victim was consistent with Lindsay's DNA.

{¶4} Lindsay was indicted by the Richland County Grand Jury with five separate counts of rape, five separate counts of sexual battery, and five separate counts of gross sexual imposition.

{¶5} Following the jury trial, Lindsay was convicted of one count of rape, one count of sexual battery and one count of gross sexual imposition. The jury returned verdicts of not guilty to the remaining charges.

{¶6} A sentencing hearing was held on October 27, 2010. The trial court found the three charges were allied offenses. The State elected to go forward on the charge of rape and requested that Lindsay be sentenced to ten years to life. The trial court merged the offenses for sentencing purposes and sentenced Lindsay to a term of ten years to life.

{¶7} Lindsay filed a direct appeal of his sentence and conviction for rape, sexual battery, and gross sexual imposition. The trial transcript was filed on March 7, 2011.

{¶8} We confirmed Lindsay's conviction and sentence in *State of Ohio v. Wendell Lindsay*, 5th Dist. Richland No. 2010-CA-0134, 2011-Ohio-4747. The Ohio Supreme Court did not accept Lindsay's appeal for review. *State v. Lindsay*, 131 Ohio St.3d 1555, 2012-Ohio-2263, 967 N.E.2d 765.

{¶9} On December 14, 2011, Lindsay filed an application to reopen his appeal. We denied the application on January 26, 2012. Lindsay filed a motion to reconsider, which we also denied. Lindsay appealed our denial to the Ohio Supreme Court, which the Court dismissed on June 7, 2012.

{¶10} On September 26, 2012, Lindsay filed an amended motion for acquittal pursuant to Crim.R. 29 with the trial court. Lindsay filed a motion for new trial on February 26, 2013.

{¶11} In February 2013, Lindsay filed a petition for writ of habeas corpus. Upon review, the magistrate judge recommended the petition be dismissed with prejudice. *Lindsay v. Tibbals*, N.D. Ohio No. 1:13-CV-00309, 2014 WL 11128199.

{¶12} The trial court considered Lindsay's motion for acquittal as a petition for postconviction relief. On March 18, 2013, the trial court found the motion untimely and his arguments were barred by the doctrine of res judicata. Lindsay appealed the trial court's judgment entry to this court and we affirmed in *State v. Lindsay*, 5th Dist. Richland No. 13CA28, 2013-Ohio-3332.

{¶13} On January 17, 2014, the trial court denied Lindsay's motion for new trial. Lindsay appealed the judgment to this court, but the appeal was dismissed for failure to prosecute.

{¶14} On April 5, 2016, Lindsay filed an Application for DNA Testing. The State filed a response, arguing that pursuant to R.C. 2953.74(A), the DNA test conducted on the biological evidence in the case was a definitive DNA test; therefore, the trial court was statutorily required to reject Lindsay's application.

{¶15} Also on April 5, 2016, Lindsay filed a Motion for Resentencing/Sentence Reduction. The State responded that Lindsay's motion should be denied as an untimely and successive petition for postconviction relief.

{¶16} On March 24, 2016, the trial court denied both motions. Lindsay appealed both judgments. In Case No. 16CA38, Lindsay appeals the trial court's judgment denying his Application for DNA Testing. In Case No. 16CA39, Lindsay appeals the trial court's judgment denying his Motion for Resentencing/Sentence Reduction.

{¶17} This opinion addresses Lindsay's Motion for Resentencing/Sentence Reduction.

ASSIGNMENTS OF ERROR

{¶18} Lindsay raises two Assignments of Error:

{¶19} "I. THE VERDICT FORM SIGNED BY THE JURY DID NOT COMPLY PURSUANT TO R.C. 2945.75(A)(2), INWHERE [SIC] THE VERDICT FORM WAS WITHOUT ANY OF THE REQUIRED ELEVATING FACTORS; AGGRAVATING ELEMENTS REQUIRED TO ALLOW THE TRIAL COURT TO SENTENCE THE APPELLATE [SIC] TO A HIGHER DEGREE FELONY, AND NOT DISTINGUISHING THE THREE (3) FOUND GUILTY OFFENSES THAT WERE ALLEGED FROM ONE (1) SINGLE ACT; GROSS SEXUAL IMPOSITION; R.C. 2907.05(A)94) – A THIRD DEGREE FELONY, ELEVATING TO SEXUAL BATTERY; R.C. 2907.03(A)(5) – A SECOND DEGREE FELONY, TO THE HIGHEST DEGREE FELONY OFFENSE FOUND GUILTY, RAPE; R.C. 2907.02(A)(1)(B) – A FIRST DEGREE FELONY, AND SENTENCING THE APPELLANT WITHOUT A VERDICT FORM ALLOWING THE TRIAL COURT TO DOD SO, AND IN DOING SO, VIOLATED THE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTH AND THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION, AS THE SENTENCE IS VOID, THE PROVISIONS ARE OF NO EFFECT, NULL AND EXPECTED TO BE VALID, BUT BECAUSE THEY WERE NOT, THE OUTCOME RESULTED IN AN INVALID ACTION, IN WHERE THE ONLY SOLUTION, RESENTENCING THE APPELLANT TO THE LOWEST DEGREE FELONY FOUND GUILTY.

{¶20} "II. THE TRIAL COURT FAILED TO EMPLOY THE PRE-H.B. (86) SENTENCING SCHEME TO ELEVATE THE DEGREE OF THE FOUND GUILTY

OFFENSES TO A FIRST DEGREE SEXUAL ASSAULT, WHEN THREE (3) OFFENSES FROM A SINGLE ACT WAS ALLEGED, PREJUDICING THE APPELLANT DURING THE SENTENCING, AND DENYING HIM OF HIS DUE PROCESS RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES; AMENDMENT SIX, ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION, MAKING THE SENTENCE VOID, AND OR VOIDABLE."

ANALYSIS

{¶21} We consider Lindsay's two Assignments of Error together because they are interrelated. Lindsay argues the trial court erred when it overruled his motion for resentencing/sentence reduction. We disagree.

{¶22} The trial court considered Lindsay's motion for resentencing/sentence reduction as a petition for postconviction relief under R.C. 2953.21 and *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1132 (1997). In *Reynolds*, the Court stated, "where 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 a motion is a petition for postconviction relief as defined in R.C. 2953.21. *Id*. at 160; *State v. Wofford*, 5th Dist. Stark No. 2016CA00087, 2016-Ohio-4628, ¶ 15.

{¶23} The trial court considered Lindsay's motion for resentencing/sentence reduction to be a petition for postconviction relief and determined it was without jurisdiction to consider the petition. First, pursuant to R.C. 2953.23(A)(2), the trial court found the petition was untimely filed. The transcript in the original direct appeal was filed on March 7, 2011. Lindsay filed the motion for resentencing/sentence reduction in April

2016, four years after the petition was due under the guidelines of the statute. Second, the trial court found the motion for resentencing/sentence reduction was Lindsay's second petition for postconviction relief. A trial court may entertain a late or successive petition for postconviction relief only if a petitioner satisfies the statutory requirements set forth in R.C. 2953.23(A). In the instant case, Lindsay did not demonstrate he was unavoidably prevented from discovering facts to present his claim or that a new federal or state right accrued retroactively to his claim. R.C. 2953.23(A)(1). Nor did Lindsay demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found him guilty of the offense. R.C. 2953.23(A)(2). Without that showing, the trial court was without authority to entertain the petition. *State v. Johnson*, 5th Dist. No. 16CAA030011, 2016-Ohio-4617, ¶ 27.

{¶24} The trial court next found Lindsay's arguments were barred by the doctrine of res judicata. "Under the doctrine of res judicata, a final judgment of conviction bars the defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at the trial which resulted in that judgment of conviction or on appeal from that judgment." *State v. Snyder*, 5th Dist. Tuscarawas No.2015AP070043, 2016–Ohio–832, ¶ 26 quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Further, "[i]t is well-settled that, 'pursuant to res judicata, a defendant cannot raise an issue in a [petition] for postconviction relief if he or she could have raised the issue on direct appeal.' " *State v. Elmore*, 5th Dist. Licking No.2005–CA–32, 2005–Ohio–5940, ¶ 21 quoting *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997).

{¶25} We agree that Lindsay's arguments are barred by the doctrine of res judicata. The arguments raised by Lindsay regarding his sentence were either raised or capable of being raised via the direct appeal of his original conviction and sentence or through the appeal of the denial of his subsequent motions for postconviction relief.

{¶26} In its judgment entry, the trial court recognized Lindsay was attempting to circumvent the doctrine of res judicata by arguing his sentence was void. "Our jurisprudence on void sentences 'reflects a fundamental understanding of constitutional democracy' that the power to define criminal offenses and prescribe punishment is vested in the legislative branch of government, and courts may impose sentences only as provided by statute. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 21–22. Because '[n]o court has the authority to impose a sentence that is contrary to law,' *Id*. at ¶ 23, when the trial court disregards statutory mandates, '[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.' *Id*. at ¶ 30." *State v. Williams*, -- Ohio St.3d --, 2016-Ohio-7658, -- N.E.3d -- , ¶ 22. Lindsay argued the trial court lacked jurisdiction or authority to impose sentence because the jury verdict forms were insufficient to convict him of aggravating factors to enhance his sentence. The trial court determined Lindsay's arguments failed on the merits.

{¶27} The jury found Lindsay guilty of one count of raping a minor, in violation of R.C. 2907.02(A)(1)(b); one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4); and one count of sexual battery, in violation of R.C. 2907.03(A)(5). The trial court found the three offenses were allied offenses and the State elected to proceed on the charge of rape. (Lindsay has never appealed this issue.) The trial court merged

the offenses and sentenced Lindsay on the one count of rape, imposing a sentence of ten years to life in prison.

{¶28} R.C. 2907.02(A)(1)(b) states, "no person shall engage in sexual conduct with another who is not the spouse of the offender when * * * the other person is less than thirteen years of age, whether or not the offender knows the age of the person." The jury verdict form on the count of rape specified the victim was less than 13 years old at the time of the offense. The victim's age was not an aggravating factor, but rather an element of the crime for which Lindsay was convicted and sentenced. The State did not allege any aggravating factors in the case, such as use of force or serious physical harm, and none were listed on the jury verdict form.

{¶29} A violation of R.C. 2907.02(A)(1)(b) is a first-degree felony for which the trial court shall impose a mandatory prison term in the range available for a first-degree felony or an indefinite term of ten years to life in prison. R.C. 2907.02(B); R.C. 2971.03(B)(1). The trial court properly imposed a prison term within the mandatory sentencing range.

{¶30} In this case, Lindsay has no right to appeal his sentence on the grounds that his "sentence is contrary to law." His sentence is not void (or even voidable); therefore, "a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence * * *." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 19.

{¶31} We find the trial court thoroughly examined Lindsay's complicated arguments and properly overruled his motion for resentencing/sentence reduction.

{¶32} Lindsay's two Assignments of Error are overruled.

CONCLUSION

{¶33} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.