

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RICKY D. MAYER,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 18 MA 0069**

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Criminal Appeal from the  
Court of Common Pleas of Mahoning County, Ohio  
Case No. 96 CR 207

**BEFORE:**

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

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**JUDGMENT:**

Affirmed.

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

*Ricky D. Mayer*, *Pro se*, Inmate No. 322-642, Warren Correctional Institution, P.O. Box 120, Lebanon, Ohio 45036, for Defendant-Appellant.

Dated: June 26, 2019

**WAITE, P.J.**

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{¶1} Appellant Ricky Mayer appeals the May 30, 2018, decision of the Mahoning County Common Pleas Court denying his motion for resentencing. In this motion he argued that his sentence was void because his aggravated robbery and kidnapping charges were allied offenses of similar import which should have been merged at sentencing. Based on the record here, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

#### Factual and Procedural History

{¶2} In November of 1995, Marcie Reagan ("Reagan"), the victim in this matter, was introduced to Appellant. Reagan has a mental disability and lived alone. The two developed a close relationship and Reagan allowed Appellant to stay in her home for four days around the time of the incident. On November 8, 1995, Reagan and Appellant got into an argument when Reagan alleged Appellant had stolen money from her home. The following day, Reagan went to work with her brother at his restaurant. Her brother brought her home later that evening. When she entered the house, Appellant was waiting. He forced her into the bedroom, where he tied her up with cat leashes and nylons and forced a sock in her mouth. Appellant also put a blanket over her head.

{¶3} The following day, November 10, 1995, Reagan's brother arrived to take her work. When he discovered Reagan was not waiting for him to arrive as usual, he exited his car and heard her muffled cries coming from inside the house. He entered the home and found his sister lying on the floor with her ankles and hands bound and a rope around her neck. After freeing his sister he searched the house and discovered a number of items, including a VCR, jewelry, and money, were missing.

{¶4} Appellant was subsequently arrested and charged with kidnapping and two counts of aggravated robbery. The matter proceeded to a jury trial on one count of

aggravated robbery and one count of kidnapping. Appellant was found guilty of those charges and subsequently pleaded guilty to a second count of aggravated robbery which he had perpetrated against a second victim, unrelated to the instant case. The trial court sentenced Appellant to an indefinite term of not less than ten nor more than twenty-five years on the kidnapping charge; an indefinite prison term of not less than ten nor more than twenty-five years on the first count of aggravated robbery; and an indefinite prison term of not less than five nor more than twenty-five years for the second count of aggravated robbery. The court ordered the sentences to be served consecutively.

{¶15} Appellant filed a timely direct appeal alleging the trial court erred in permitting the state to mention his prior convictions during cross-examination and that the evidence against him was insufficient to convict. We affirmed the judgment of the trial court in *State v. Mayer*, 7th Dist. Mahoning No. 96 C.A. 119, 2000 WL 179039 (Feb. 8, 2000).

{¶16} On January 16, 2018, nearly twenty-two years after sentencing, Appellant filed a "Motion to Correct a Void Sentence Contrary to Law," urging that his sentence was void. Appellant claims the aggravated robbery and kidnapping convictions are allied offenses of similar import and should have been merged for sentencing. The state filed a motion in opposition, arguing that this Court affirmed Appellant's convictions, rendering the claims in the motion moot. On May 30, 2018, the trial court overruled Appellant's motion, stating only that it was moot. Appellant filed this timely appeal from that judgment entry.

#### ASSIGNMENT OF ERROR NO. 1

APPELLANT'S SENTENCE WAS CONTRARY TO LAW AND THUS VOID IN VIOLATION OF R.C. 2941.25, DOUBLE JEOPARDY AND DUE PROCESS OF LAW. THE TRIAL JUDGE ABUSED HIS DISCRETION AND COMITTED [SIC] PLAIN ERROR BY SENTENCING MR. MAYER TO CONSECUTIVE SENTENCES FOR ALLIED OFFENSES VIOLATING THE SEPARATION OF POWER DOCTRINE.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED IT [SIC] DISCRETION BY SENTENCING THE DEFENDANT TO CONSECUTIVE, MAXIMUM SENTENCES BY NOT CONSIDERING OR HAVE A JURY CONSIDER FACTORS USED TO ENHANCE HIS SENTENCE.

{¶7} In Appellant's first assignment of error he asserts that the sentences imposed by the trial court are contrary to law because the offenses of aggravated robbery and kidnapping are allied offenses of similar import, and should have been merged at sentencing. In Appellant's second assignment of error he contends the trial court erred in imposing maximum, consecutive sentences without making the requisite statutory findings.

Postconviction Petition

{¶8} A motion to correct a sentence is construed as a postconviction petition if it is a motion that was filed subsequent to a direct appeal; contains claims alleging a denial of constitutional rights; seeks to render a judgment void; and asks for the sentence to be vacated. *State v. McBride*, 7th Dist. Mahoning No. 17 MA 0130, 2018-Ohio-2492, ¶ 6

citing *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). Appellant’s motion satisfies all of the criteria and is, therefore, construed as a postconviction petition.

{¶9} To prevail on a postconviction claim for relief, the petitioner has the burden of demonstrating that there was a denial or infringement of his rights in the proceedings that rendered his convictions void or voidable under the Ohio or United States Constitutions. *State v. Agee*, 7th Dist. Mahoning No. 14 MA 0094, 2016-Ohio-7183, ¶ 9, citing R.C. 2953.21(A)(1). A hearing on the postconviction petition is not automatic. The court must determine whether the petitioner has demonstrated “substantive grounds for relief.” *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982); R.C. 2953.21(D). The petitioner, through supporting affidavits, documentary evidence, files, and records pertaining to the proceedings, bears the burden of demonstrating “substantive grounds for relief.” R.C. 2953.21(D) and (F). A petitioner may not utilize a postconviction petition to relitigate issues that were or could have been raised in a direct appeal; therefore, *res judicata* operates to preclude many claims. *Agee*, at ¶ 10.

{¶10} Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted offender from raising and litigating in any proceeding, except a direct appeal of that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in the judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *State v. Bush*, 7th Dist. Mahoning No. 16 MA 0016, 2017-Ohio-4450, ¶ 12. To survive a *res judicata* bar, Appellant must demonstrate that his alleged constitutional error is supported by evidence that exists outside the record, which would have prevented him from fully litigating the claim in a direct appeal. *State v. Green*,

7th Dist. Mahoning No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997).

### Timeliness

{¶11} R.C. Chapter 2953 provides for both timely and delayed postconviction petitions. A timely postconviction petition must “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.” R.C. 2953.21(A)(2). Pursuant to R.C. 2953.23(A)(1)(a), a delayed postconviction petition may be appropriate under two circumstances:

[T]he petitioner was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, \* \* \* 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.

{¶12} To prevail in asserting a delayed postconviction petition, the petitioner must show “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.” R.C. 2953.23(A)(1)(b).

{¶13} A review of the instant record reveals that Appellant filed a trial transcript with this Court on August 7, 1996. Appellant’s postconviction petition was filed on January 16, 2018, over twenty-one years after the filing of the transcripts. Therefore, on its face, the petition is untimely. Appellant provides no arguments regarding either of the exceptions enumerated in R.C. 2953.21(A)(1)(a)-(b) and, in fact, does not address the

timeliness of the petition in any manner. Appellant contends only that his conviction for kidnapping should have merged with his conviction for aggravated robbery. When a trial court either, (1) finds that offenses are not allied offenses of similar import, or (2) fails to make any finding whether the offenses are allied, imposing a separate sentence for each offense is not contrary to law, and any error in sentencing must be asserted in a direct appeal. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26. Any postconviction proceeding that raises the issue will be barred by *res judicata*. *Id.* Appellant filed a direct appeal of his conviction but did not raise any issue regarding sentencing. In its judgment entry, the trial court concluded that Appellant's petition was moot. This is not entirely accurate. Instead, Appellant's petition, asserted more than twenty-one years after sentencing, is both untimely and barred by *res judicata*.

{¶14} Therefore, Appellant's first and second assignments of error are without merit and are overruled.

#### Conclusion

{¶15} In this postconviction petition, Appellant raises two issues: (1) that his convictions for aggravated robbery and kidnapping are contrary to law because the trial court failed to merge them for sentencing; and (2) the trial court's imposition of maximum, consecutive sentences are contrary to law because the trial court did not properly consider the necessary statutory factors. Both issues raised by Appellant were required to be raised in his direct appeal. His arguments are untimely and barred by *res judicata*. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are 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 to be taxed against the Appellant.

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.**