

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-13-065

Appellee

Trial Court No. 2008-CR-352

v.

Ronald J. Dority

DECISION AND JUDGMENT

Appellant

Decided: March 14, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Ronald J. Dority, pro se.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Ronald J. Dority, appeals from the judgment of the Erie County Court of Common Pleas, which denied, without a hearing, his postconviction “Motion for Allied Offenses Determination.” We affirm.

A. Facts and Procedural Background

{¶ 2} This is the third time appellant has appeared before our court in this matter. In 2009, appellant pleaded guilty to violation of a protection order, kidnapping, and felonious assault, and was sentenced to a total prison term of 12 years. Appellant appealed his conviction and sentence, which we affirmed on May 20, 2011, in *State v. Dority*, 6th Dist. Erie No. E-09-027, 2011-Ohio-2438. Notably, in his appeal, appellant argued that the kidnapping and violation of a protection order charges were allied offenses, but we held that the offenses were not committed with a single state of mind, and thus were not subject to merger. *Id.* at ¶ 30.

{¶ 3} Thereafter, on October 25, 2012, appellant filed a motion to withdraw his guilty plea. The trial court denied his motion. On November 15, 2013, we affirmed the trial court's decision in *State v. Dority*, 6th Dist. Erie No. E-13-018, 2013-Ohio-5068.

{¶ 4} While his second appeal was pending, appellant filed a "Motion for Allied Offenses Determination" on August 30, 2013. The trial court again denied his motion without a hearing. It is from this decision that appellant presently appeals.

B. Assignment of Error

{¶ 5} Appellant offers one assignment of error for our review:

1. Whether the Federal Constitution's Fifth Amendment "double jeopardy" protections (and as codified in: O.R.C. § 2941.25), are subject to waiver even under the guise of res judicata. see: *Brown v. Ohio*, 432 U.S.

161, 165; North Carolina v. Pearce, 395 U.S.711, 717; and, Ohio v. Johnson, 467 U.S. 493, 498.

II. Analysis

{¶ 6} In his assignment of error, appellant argues that the trial court was required by R.C. 2941.25(A) to conduct an allied offenses analysis at his original sentencing. Because the court did not conduct such an analysis, appellant argues that his sentence is void. Therefore, appellant concludes that he is entitled to challenge his void sentence in a postconviction petition, and requests that we remand the matter to the trial court for an allied offenses determination. Furthermore, appellant argues that refusing to conduct an allied offenses analysis on the basis of res judicata or the timeliness of his petition is tantamount to impermissibly forcing him to waive his constitutional right against double jeopardy. We disagree.

{¶ 7} Appellant's arguments are not new to this court. *See, e.g., State v. Yee*, 6th Dist. Erie No. E-12-017, 2013-Ohio-5184; *State v. Porter*, 6th Dist. Lucas No. L-12-1243, 2013-Ohio-1360; *State v. Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728. We begin by noting that appellant's "Motion for Allied Offenses Determination" is properly characterized as a petition for postconviction relief. *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus ("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”). We review a trial court’s decision granting or denying a postconviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion connotes that the trial court’s attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} A petition for postconviction relief “shall be filed no later than one hundred eighty 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). Here, the trial transcripts were filed on August 10, 2009. Thus, appellant’s petition is well beyond the 180-day statutory time limit.

{¶ 9} A trial court “may not entertain” an untimely petition for postconviction relief unless the untimeliness is excused. R.C. 2953.23(A). Under R.C. 2953.23(A)(1), the time limit is excused if both (1) it can be shown that either the petitioner was unavoidably prevented from discovering the facts relied on in the claim for relief, or that 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; and (2) the petitioner presents clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty.

{¶ 10} Here, appellant does not argue that this timeliness exception applies. Further, we find that the circumstances of appellant’s case do not support application of

the exception. Therefore, the trial court could not have considered his untimely petition for postconviction relief, and as a result, it did not abuse its discretion in denying his petition.

{¶ 11} Appellant attempts to escape this result by arguing that his conviction is void because the court did not conduct a merger analysis, and thus his conviction is subject to attack at any time. *See State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 30 (res judicata does not bar a trial court from correcting a void sentence). However, appellant is incorrect on the former point: “the failure to merge allied offenses at sentencing does not render a sentence void.” *Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728 at ¶ 8. Because appellant’s sentence is not void, it is subject to res judicata. In particular, we have held, “The res judicata bar applies to any defense that was raised or could have been raised in a criminal defendant’s prior direct appeal from his conviction and/or sentence.” *Yee*, 6th Dist. Erie No. E-12-017, 2013-Ohio-5184 at ¶ 10, quoting *State v. Collins*, 2d Dist. Montgomery No. 25612, 2013-Ohio-3645, ¶ 9. Therefore, even if the trial court could have entertained appellant’s untimely postconviction petition, appellant’s petition would be barred by res judicata as he has already raised an allied offenses claim in his direct appeal.

{¶ 12} Accordingly, appellant’s assignment of error is not well-taken.

III. Conclusion

{¶ 13} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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