

[Cite as *State v. Sparks*, 2013-Ohio-3598.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-1063
v.	:	(C.P.C. No. 11CR-03-1336)
	:	
Wayne A. Sparks,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 20, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

Wayne A. Sparks, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Wayne A. Sparks, appeals from the judgment of the Franklin County Court of Common Pleas denying his motion to vacate sentence and void conviction without a hearing. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} According to this court's decision in appellant's direct appeal, appellant was indicted on March 10, 2011 on one count of aggravated burglary, in violation of R.C. 2911.11, two counts of aggravated robbery, in violation of R.C. 2911.01, four counts of robbery, in violation of R.C. 2911.02, two counts of kidnapping, in violation of R.C. 2905.01, and one count of having a weapon while under disability, in violation of R.C. 2923.13. The charges arose out of a robbery of a residence that occurred on November 21,

2010. *State v. Sparks*, 10th Dist. No. 11AP-702, 2012-Ohio-2653. The matter came for trial before a jury beginning June 27, 2011. *Id.* Following deliberations, the jury returned verdicts finding appellant guilty on all counts. *Id.* By judgment entry filed August 3, 2011, the trial court sentenced appellant to an aggregate term of incarceration consisting of 26 years.

{¶ 3} Appellant filed a direct appeal raising two assignments of error. In those assigned errors, appellant argued the introduction of extrinsic evidence violated his constitutional rights, his convictions were against the manifest weight of the evidence, and his convictions were not supported by sufficient evidence. This court overruled appellant's two assignments of error and affirmed appellant's convictions and sentence. The Supreme Court of Ohio declined review. *State v. Sparks*, 133 Ohio St.3d 1425, 2012-Ohio-4902.

{¶ 4} On November 23, 2012, appellant filed a motion to vacate and void conviction on the basis that his statutory speedy trial rights were violated because he did not consent to any continuances of his trial date. By entry filed November 28, 2012, the trial court denied appellant's motion.

II. ASSIGNMENT OF ERROR

{¶ 5} This appeal followed, and appellant brings the following assignment of error for our review:

Trial Counsel gave falsifying information to acquire waiver of "Speedy Trial" against Defendant[']s consent.

III. DISCUSSION

{¶ 6} We construe appellant's motion to vacate sentence and void conviction as a petition for post-conviction relief. *See State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997) ("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"). *See also State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11 (treating defendant's motion to vacate or set aside sentence imposed pursuant to R.C. 2941.25 as a petition for post-conviction relief since it was filed subsequent to the direct appeal, it was based on an alleged violation of his constitutional

rights, it asserted that the judgment was void, and it requested that his sentence be vacated).

{¶ 7} A petition for post-conviction relief in Ohio is a statutorily created remedy set forth in R.C. 2953.21 that is designed to provide an avenue to correct a violation of a defendant's constitutional rights in his or her criminal trial. The post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). It is a means by which a defendant may allow the court to reach constitutional issues that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the defendant's criminal conviction. *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). The petition for post-conviction relief is thus not intended to provide a defendant with a second opportunity to litigate his conviction; nor is the defendant automatically entitled to an evidentiary hearing on the petition. *State v. Jackson*, 64 Ohio St.2d 107 (1980).

{¶ 8} To warrant an evidentiary hearing on a petition for post-conviction relief, the defendant bears the initial burden of providing evidence that demonstrates a cognizable claim of constitutional error. R.C. 2953.21(C); *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 33. A trial court may deny a defendant's petition for post-conviction relief without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun* at paragraph two of the syllabus.

{¶ 9} The most significant restriction on Ohio's statutory procedure for post-conviction relief is the doctrine of res judicata. The doctrine requires a defendant to support the error claimed in the petition with evidence outside the record that was created from the direct criminal proceedings. " 'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment or conviction, *or on an appeal from that judgment.*' " (Emphasis sic.) *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "Res judicata

also implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *Hessler* at ¶ 27.

{¶ 10} Apart from the substantive restrictions that affect post-conviction relief petitions, the pertinent statute contains time restrictions for filing a petition. R.C. 2953.21 requires that a petition under R.C. 2953.21(A)(1) 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 or adjudication." R.C. 2953.21(A)(2). The record establishes that the transcript of appellant's trial was filed in the court of appeals on September 29, 2011. Therefore, pursuant to R.C. 2953.21(A)(2), appellant's post-conviction petition was due by March 27, 2012. Appellant, however, did not file the instant request for post-conviction relief until November 23, 2012. Though R.C. 2953.23(A) provides for certain exceptions where a trial court has jurisdiction to entertain an untimely petition for post-conviction relief, appellant has made no attempt to argue or establish that any of the exceptions applied to his petition.

{¶ 11} Moreover, appellant had new counsel on his direct appeal. Because the alleged violation of appellant's statutory speedy trial rights could have been raised on direct appeal by new counsel without resort to evidence outside the record, *res judicata* bars appellant from raising said issue in this post-conviction petition. *State v. Norton*, 10th Dist. No. 97APA05-677 (Jan. 13, 1998), discretionary appeal not allowed, 81 Ohio St.3d 1521 (1998) (*res judicata* bars allegation of speedy trial violation where issue could have been raised on direct appeal by new counsel without resort to evidence outside the record).

{¶ 12} For the foregoing reasons, we overrule appellant's asserted assignment of error.

IV. CONCLUSION

{¶ 13} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
