

[Cite as *State v. Avery*, 2004-Ohio-4165.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY**

STATE OF OHIO

CASE NUMBER 14-04-06

PLAINTIFF-APPELLEE

v.

O P I N I O N

EDWARD AVERY, SR.

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: August 9, 2004.

ATTORNEYS:

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For Appellee.

BRYANT, J.

{¶1} Appellant, Edward Avery, Sr. (“Avery”), appeals the judgment of the Common Pleas Court of Union County overruling his motion for review and modification of sentence.

{¶2} On March 21, 1997, Avery was indicted on counts of rape, aggravated robbery, aggravated burglary and kidnapping, which included a specification that the kidnapping was committed with a sexual motivation. After a jury trial, Avery was found guilty of rape, a felony of the first degree in violation of R.C. 2907.01(A)(2); robbery, a felony of the second degree in violation of R.C. 2911.02; aggravated burglary, a felony of the first degree in violation of R.C. 2911.11(B); and kidnapping, a felony of the first degree in violation of R.C. 2905.01.

{¶3} A presentence investigation was conducted prior to Avery’s sentencing. On August 7, 1997, Avery was sentenced to maximum sentences of ten years imprisonment for the counts of rape, aggravated burglary and kidnapping, to be served consecutively to each other, and eight years imprisonment for the count of robbery, to be served concurrently to the sentences for the other counts, for a total of thirty years of imprisonment. In addition, pursuant to R.C. 2950.09(B), the trial court adjudicated Avery a sexual predator.

{¶4} Avery appealed his conviction to this court, asserting four assignments of error. This court affirmed the conviction and sentence in a decision dated April 14, 1998. See *State v. Avery* (1998), 126 Ohio App.3d 36, 709 N.E.2d 875. Avery's motion for leave to file a delayed appeal to the Ohio Supreme Court was denied at 91 Ohio St.3d 1462, 743 N.E.2d 401.

{¶5} On January 12, 2004, Avery filed a request for review and modification of his sentence. The state filed a motion to dismiss and memorandum contra Avery's motion. The trial court overruled Avery's motion on January 30, 2004. It is from this judgment denying review and modification of sentence that Avery now appeals, asserting the following assignment of error.

The trial court erred in denying the motion and request to review and modify the sentence imposed, without an evidentiary hearing, which constitutes an abuse of discretion.

{¶6} In his sole assignment of error, Avery argues that the trial court abused its discretion by overruling his motion to review and modify sentence without an evidentiary hearing. In his very short argument addressing the assignment of error, Avery asserts that the trial court abused its discretion by not addressing the merits of the issues presented in his motion to review and modify the sentence. Further, Avery asserts that the trial court overruled the motion based upon passion or bias, which Avery contends is proven by a letter from the court

briefly relaying the facts of the case and indicating that a hearing would not be held regarding the motion.

{¶7} We begin by noting that Avery’s motion to review and modify sentence is not a motion that is specifically provided for under the law. This court recently addressed the issue of how to characterize a motion for sentence modification in *State v. Dingleline*, 3d Dist. No. 1-03-34, 2003-Ohio-5131, 2003 WL 22229407. In that case, Dingleline filed a pro se motion for sentence modification and clarification. *Id.* We held that while Dingleline did not caption his motion as such, his motion was, in fact, a petition for postconviction relief. *Id.*

{¶8} This interpretation was used by the Ohio Supreme Court in *State v. Reynolds*, 79 Ohio St.3d 158, syllabus, 1997-Ohio-304, 679 N.E.2d 1131, in which the court held that “[w]here 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.” In *Reynolds*, appellant filed a “Motion to Correct or Vacate Sentence” with the trial court, asserting that the state failed to prove beyond a reasonable doubt an element of the charge in which he was convicted. *Id.* at 159. Since Reynolds alleged that his sentence was illegal or otherwise constitutionally repugnant and should be vacated, the court held that the motion, despite its caption, met the definition of a

motion for postconviction relief set forth in R.C. 2953.21(A)(1). The Ohio Supreme Court in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶ 10, followed the same analysis of the *Reynolds* court in stating, “[o]ur decision in *Reynolds* set forth a means by which courts can classify such irregular motions.” We now apply these guidelines in the case sub judice.

{¶9} Subsequent to the affirmance of his conviction, Avery filed his motion to review or modify sentence with the trial court, seeking to have his sentence modified in order to comply with the mandate of Senate Bill #2 for consistent sentences. Avery’s motion to “review or modify sentence” closely resembles the motion filed by appellant in *Reynolds* to “correct or vacate sentence.” Avery’s motion was filed subsequent to his direct appeal, seeks to render the judgment void and asks for the sentence to be vacated and reassessed. The motion meets the definition of a motion for postconviction relief, pursuant to R.C. 2953.21, except that Avery does not appear to claim the denial of a constitutional right. Rather, Avery claims that the trial court erred in not holding an evidentiary hearing on his motion to review or modify sentence. Avery fails to set forth, and we have been unable to find, any authority that grants Avery the right to an evidentiary hearing under these circumstances.

{¶10} A person “may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set

aside the judgment or sentence or to grant other appropriate relief” by claiming a denial or infringement of rights under the Ohio Constitution or the United States Constitution or by establishing, by clear and convincing evidence, actual innocence of the offense through DNA testing. R.C. 2953.21(A)(1)(a). Avery’s motion to review and modify sentence did not include either of these claims.

{¶11} Even if we were to classify Avery’s motion as a petition for postconviction relief, we find that it is untimely and barred by res judicata. R.C. 2953.21(A)(2) provides:

Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section 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 or adjudication * * *. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

{¶12} R.C. 2953.23 provides a limited exception to the time requirement for filing a petition for postconviction relief provided in R.C. 2953.21.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petitioner asserts a claim based on that right.

(b) The petitioner shows 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 * * *.

(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of the felony offense * * *.

R.C. 2953.23.

{¶13} Avery filed his motion to review and modify sentence on January 12, 2004. Avery's trial transcripts were filed in the court of appeals for his direct appeal on November 3, 1997. Avery clearly filed his motion outside the one hundred eighty day time period prescribed in R.C. 2953.21. Avery also does not qualify for untimely postconviction relief under R.C. 2953.23. Avery failed to show that he was "unavoidably prevented" from discovering new evidence, that the United States Supreme Court recognized a new state or federal right, or that DNA testing proves his actual innocence of the felony with which he was convicted. Avery merely argues that the sentencing guidelines under Senate Bill

#2, which were already in effect at the time in which Avery was sentenced, require the trial court to continuously review his sentence for consistency with other sentences in the county.

{¶14} Since Avery failed to satisfy either the timeliness requirement of R.C. 2953.21 or the R.C. 2953.23 exceptions to the timeliness requirement, the trial court was not required to grant Avery an evidentiary hearing. The court is only required to consider a petition that is timely. R.C. 2953.21(C). R.C. 2953.21(C) also states that the court should determine if the petition contains substantive grounds for relief before granting a hearing.

In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

Since Avery's motion was untimely and did not present substantive grounds for relief, the trial court did not err by denying an evidentiary hearing on the motion.

{¶15} Further, Avery's motion was barred by *res judicata* because Avery could have raised, and did raise, the issue in his motion on direct appeal. The Ohio Supreme Court held that:

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 trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus, 226 N.E.2d 104.

{¶16} It is established that, pursuant to res judicata, a defendant cannot raise an issue in a motion for postconviction relief if he or she could have raised, or did raise, the issue on direct appeal. *Reynolds*, 79 Ohio St.3d at 161, citing *State v. Duling* (1970), 21 Ohio St.2d 13, 254 N.E.2d 670. Res judicata promotes the principle of finality of judgments by requiring the presentment of every possible ground for relief in the first action. *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, at ¶ 5, citing *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178.

{¶17} In his direct appeal, Avery asserted that the record did not support the maximum consecutive sentences he received and that the trial court did not consider each offense separately when weighing the seriousness and recidivism factors under the sentencing guidelines. *Avery*, 126 Ohio App.3d at 50. This court addressed the issue on its merits and determined that the trial court's findings with regard to the maximum sentences for the offenses were supported in the record as to all counts except the robbery conviction, which we found to be harmless error since the sentence for the robbery charge was to be served concurrent to the other

counts. *Id.* at 51-52. Therefore, since this court thoroughly addressed the issue regarding Avery's sentence, Avery is barred by *res judicata* from raising the issue again in a post-trial motion to review and modify the sentence.

{¶18} Furthermore, even if Avery's motion was not untimely nor barred by *res judicata*, we find no support in Avery's brief, or in statutory or case law, to support the proposition of law that Avery asserts. R.C. 2953.21 and R.C. 2953.23 impose strict limitations upon consideration of postconviction relief, in recognition of the valuable concept of finality of judgment. *State v. Johnson*, 2d Dist. No. 19426, 2003-Ohio-1378, at ¶ 10. Accepting Avery's argument that a court has a duty to continually review and reconsider sentences for the purpose of ensuring consistency among prison sentences would violate the concept of finality of judgments. After reviewing the sections of the Ohio Revised Code cited by Avery, we are unable to accept his proposed theory of sentence review and conclude that the trial court no longer retains jurisdiction to modify Avery's sentence in the circumstances.

{¶19} The trial court did not err in denying Avery's motion to review and modify sentence and Avery's assignment of error is overruled. Accordingly, the judgment of the Common Pleas Court of Union County is affirmed.

Judgment affirmed.

CUPP and ROGERS, JJ., concur.

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