

[Cite as *State v. Johnson*, 2018-Ohio-178.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105855

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN F. JOHNSON, SR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-594187-B

BEFORE: Kilbane, P.J., McCormack, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 18, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Marvin Johnson, Sr. (“Johnson”), pro se, appeals from the trial court’s denial of his petition to vacate or set aside judgment of conviction or sentence. For the reasons set forth below, we affirm.

{¶2} The facts relevant to this appeal have been set out in the companion case of *State v. Johnson*, 8th Dist. Cuyahoga No. 105560, and need not be repeated in their entirety herein. However, we note the following facts relevant to Johnson’s appeal. On December 15, 2015, Johnson pled no contest to drug trafficking, drug possession, and possessing criminal tools.¹ Johnson’s sentencing hearing was not held until May 2016. Johnson was sentenced to a total of six years in prison. The court stayed the execution of Johnson’s sentence because Johnson needed a heart ablation procedure. The court ordered Johnson to begin serving his sentence no later than August 1, 2016, at 9:00 a.m. or his sentence would be vacated and a new sentence would be imposed. Johnson was to remain on bond.

{¶3} In July 2016, Johnson requested appointed counsel. The court assigned Johnson appellate counsel, but then vacated its assignment since Johnson was not indigent and had retained counsel throughout the proceedings. Also in July 2016, a bond hearing was set because Johnson’s probation officer advised the court that Johnson tested positive for marijuana. The hearing was set for July 25, 2016, but Johnson failed to appear. The trial court then forfeited his bond and issued a capias for Johnson. Johnson

¹Each count carried a forfeiture specification.

was remanded in August 2016.

{¶4} In February 2017, the trial court resentenced Johnson. The court sentenced Johnson to a total of eight years in prison. The companion case is Johnson’s appeal from that order. *See Johnson*, 8th Dist. Cuyahoga No. 105560. After filing this appeal, Johnson filed a “petition to vacate or set aside judgment of conviction or sentence.” In his petition, Johnson argued that: his due process rights were violated, his cruel and unusual punishment rights were infringed, and his right to effective assistance of counsel was violated. The state opposed. The trial court issued an opinion denying Johnson’s motion. The court interpreted Johnson’s motion as a petition for postconviction relief and found that the motion was barred by res judicata because Johnson offered no evidence outside the record to support his claims.

{¶5} It is from this order that Johnson appeals, raising the following single assignment of error for review:

Assignment of Error

The trial court erred when it denied Johnson’s petition to vacate or set aside judgment or sentence.

{¶6} Johnson argues that the trial court erred when it denied his petition to vacate sentence or judgment of conviction on the basis of res judicata.

{¶7} R.C. 2953.21(A)(1) sets forth the criteria under which postconviction relief may be sought:

Any person who has been convicted of a criminal offense * * * and who

claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed the sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence[.]

{¶8} The Ohio Supreme Court has held that, despite what its caption reads, a motion filed subsequent to a defendant's direct appeal seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated is a petition for postconviction relief under R.C. 2953.21(A)(1). *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).

{¶9} As an initial matter, we find that any sentencing arguments Johnson raises in his petition are moot in light of our decision in the companion appeal, *Johnson*, 8th Dist. Cuyahoga No. 105560.² Therefore, our discussion is limited to Johnson's challenge to his conviction.

{¶10} Here, the trial court determined that Johnson's claims are barred by res judicata. We agree.

Under the doctrine of *res judicata*, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.

²In *Johnson*, we found, and the state conceded, that the trial court lacked authority to resentence Johnson to eight years in prison. As a result, we remanded the case for the limited purpose of executing the original six-year sentence. *Id.*

(Emphasis sic.) *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

{¶11} A petition for postconviction relief may be denied on the basis of res judicata, if the trial court “finds that the petitioner could have raised the issues in the petition at trial or on direct appeal without resorting to evidence beyond the scope of the record.” *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 16, citing *State v. Scudder*, 131 Ohio App.3d 470, 475, 722 N.E.2d 1054 (10th Dist.1998).

{¶12} Johnson raised multiple issues in his petition for postconviction relief that could have been raised on direct appeal because the issues do not rely on evidence outside of the record. He claims: (1) the trial court violated his due process rights for failing to appoint him appellate counsel, (2) the trial court violated his constitutional right to be free from cruel and unusual punishment, and (3) he was denied effective assistance of counsel from each of his trial attorneys. These are all arguments that Johnson could have raised in his direct appeal. As a result, Johnson is barred by res judicata from raising these arguments now.

{¶13} Accordingly, the sole assignment of error is overruled.

{¶14} Judgment is affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court

for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
ANITA LASTER MAYS, J., CONCUR