Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106670

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-567736-A

BEFORE: E.T. Gallagher, P.J., S. Gallagher, J., and Keough, J.

RELEASED AND JOURNALIZED: September 20, 2018

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EILEEN T. GALLAGHER, P.J.:

{¶1} Defendant-appellant, Eric Johnson, appeals the denial of his motion to file a successive petition for postconviction relief and claims the following sole assignment of error:

> The lower and appellate courts violated appellant's constitutional rights when they failed to follow the "plain error" rule of law and vacate the attempted felony murder conviction that has been declared void, unconstitutional in the Ohio Supreme Court making that statute void and no longer a law in Ohio. The 9 year and 3 years for the gun specification must be reversed and vacated from Johnson's sentence and he must be re-sentenced without those sentences.

{¶2} We find no merit to the appeal, and affirm trial court's judgment.

I. Facts and Procedural History

{¶3} In February 2013, Johnson was convicted, after a jury trial, of one count of kidnapping, two counts of aggravated robbery, two counts of felonious assault, and one count of attempted murder. All the counts included one- and three-year firearm specifications. The evidence adduced at trial demonstrated that Johnson shot the victim, James Keith, multiple times during the commission of a robbery.

{¶4} For sentencing purposes, the kidnapping charges merged with the aggravated robbery charges, and the felonious assault charges merged with the attempted murder charges. The state elected to have Johnson sentenced on the aggravated robbery and attempted murder convictions, and the court sentenced Johnson to an aggregate 21-year prison term. Johnson's convictions and sentence were affirmed on appeal. *See State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494.

{¶5} In December 2013, while the appeal was pending, Johnson filed a petition for postconviction relief, claiming he received ineffective assistance of counsel. Johnson also filed a supplemental petition for postconviction relief a month later, which the state moved to dismiss. The trial court denied Johnson's petition for postconviction relief without a hearing and granted the state's motion to dismiss his supplemental petition. This court affirmed the denial of Johnson's petitions for postconviction relief on grounds that the petitions were untimely, and Johnson failed to set forth sufficient operative facts to establish substantive grounds for relief. *See State v. Johnson*, 8th Dist. Cuyahoga No. 101993, 2015-Ohio-1649, ¶ 13, 24.

{¶6} In June 2017, Johnson filed a pro se motion to file a successive petition to vacate or set aside conviction, claiming he was unavoidably prevented from discovering that there was a change in the law affecting his convictions. He argued, citing *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, that his attempted murder conviction was not a cognizable crime in Ohio. In *Nolan*, the Ohio Supreme Court held that attempted felony murder is not a cognizable claim in Ohio because it is impossible to purposely or knowingly cause an unintended death. *Id*. at ¶ 10.

{¶7} In its response to Johnson's motion, the state argued that because Johnson was convicted of attempted murder rather than attempted felony murder, the law announced in *Nolan* did not apply to his conviction. The state further argued that Johnson's successive petition was untimely and barred by res judicata. The trial court

denied Johnson's motion for leave to file a successive petition to vacate his conviction. Johnson now appeals the trial court's judgment.

II. Law and Analysis

{¶8} In his sole assignment of error, Johnson argues his attempted murder conviction is void under *Nolan* and should be vacated.

{¶9} Under R.C. 2953.23(A), a trial court may entertain a successive petition if the petitioner initially demonstrates either (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner can satisfy one of those two conditions, he must also demonstrate that but for the constitutional error at trial no reasonable finder of fact would have found him guilty.   R.C. 2953.23(A)(1)(b).

{¶10} As previously stated, the court in *Nolan* held that attempted felony murder is not a cognizable claim in Ohio because it is impossible to purposely or knowingly cause an unintended death. *Id*. at ¶ 10.   Thus, an attempted felony murder conviction is void. *State v. Bozek*, 11th Dist. Portage No. 2015-P-0018, 2016-Ohio-1305, ¶ 21.

{¶11} However, felony murder is governed by R.C. 2903.02(B).   Johnson was not convicted of attempted felony murder in violation of R.C. 2903.02(B); he was convicted of attempted murder in violation of R.C. 2903.02(A).   Indeed, the evidence adduced at trial showed that he purposely attempted to cause the death of James Keith.   Therefore,

the Ohio Supreme Court's holding in *Nolan* has no application here, and Johnson has failed to demonstrate substantive grounds for relief.

{¶12} The sole assignment of error is overruled.

{¶13} The trial court's judgment is affirmed.

It is ordered that appellee recover from appellant 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.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., CONCURS (SEE SEPARATE CONCURRING OPINION; KATHLEEN ANN KEOUGH, J., CONCURS WITH MAJORITY OPINION AND CONCURS WITH SEPARATE CONCURRING OPINION

SEAN C. GALLAGHER, J., CONCURRING WITH SEPARATE CONCURRING OPINION:

{¶14} I concur with the majority, but write separately to emphasize that a recent Ohio Supreme Court decision is not a basis for a successive petition for postconviction relief. R.C. 2953.23(A)(1)(a). It is only a United States Supreme Court decision that satisfies the prerequisite under the statutory scheme. *State v. Reese*, 2d Dist. Montgomery No. 23410, 2009-Ohio-5874, ¶ 9; *State v. Hughes*, 10th Dist. Franklin No. 13AP-1006, 2014-Ohio-2914, ¶ 8; *State v. Kirklin*, 11th Dist. Portage No. 2013-P-0085, 2014-Ohio-4301, ¶ 10. Although this court has held that an Ohio Supreme Court decision satisfies the jurisdictional requirement of R.C. 2953.23(A)(1)(a) in *State v. Parker*, 2017-Ohio-7484, 96 N.E.3d 1183, ¶ 31 (8th Dist.), that case is pending for review before the Ohio Supreme Court. *State v. Parker*, 152 Ohio St.3d 1420, 2018-Ohio-923, 93 N.E.3d 1002.

{¶15} However, Johnson claims his conviction for attempted murder is void according to *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016. *See, e.g., State v. Bozek*, 11th Dist. Portage No. 2015-P-0018, 2016-Ohio-1305, ¶ 21; *State v. Brooks*, 2016-Ohio-489, 56 N.E.3d 357, ¶ 27 (8th Dist.). In this case, the jurisdictional limitations to successive petitions for postconviction relief are irrelevant; a void conviction can be collaterally attacked at any time. *See, e.g., State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234. On this point, I agree with the majority's resolution — *Nolan* does not apply to convictions for attempted murder, just attempted felony murder. With this clarification, I concur.