

[Cite as *State v. Scott*, 2018-Ohio-4894.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106863

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM SCOTT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-03-432768-B

BEFORE: Kilbane, P.J., McCormack, J., and Stewart, J.

RELEASED AND JOURNALIZED: December 6, 2018

APPELLANT

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MARY EILEEN KILBANE, P.J.:

{¶1} Appellant, William Scott (“Scott”), pro se, appeals from the trial court’s judgment denying his petition for postconviction relief without a hearing. For the reasons set forth below, we affirm.

{¶2} The factual and procedural history has been recounted by this court in Scott’s direct appeal, *State v. Scott*, 8th Dist. Cuyahoga No. 83477, 2004-Ohio-4631, ¶ 2-7. For purposes of this appeal, we provide the following relevant procedural history.

{¶3} In January 2003, Scott was indicted for aggravated murder; aggravated murder while in the course of committing, or attempting to commit, aggravated robbery; aggravated robbery; attempted murder; and felonious assault. Each charge contained firearm specifications.

In August 2003, a jury found Scott guilty of all charges and the trial court sentenced Scott to life in prison without parole, plus 12 years.

{¶4} In September 2003, Scott appealed his convictions. In August 2004, while Scott's direct appeal was pending, he filed a petition for postconviction relief, which the trial court denied without a hearing.

{¶5} In September 2004, we affirmed Scott's convictions for aggravated murder, attempted murder, and felonious assault. *Scott*, 8th Dist. Cuyahoga No. 83477, 2004-Ohio-4631. We vacated Scott's convictions and sentences for aggravated murder while in the course of committing, or attempting to commit aggravated robbery, and for aggravated robbery. *Id.* The Ohio Supreme Court declined jurisdiction, and Scott was resentenced to life without parole, plus 12 years.

{¶6} In February 2017, Scott filed another petition for postconviction relief, which the trial court denied as untimely. It is from this judgment that Scott now appeals, raising the following six assignments of error for review.

Assignment of Error One

The trial court erred to the prejudice of [Scott] in abusing its discretion when it dismissed appellant's petition for postconviction relief without first setting forth its finding of facts and conclusion of law relative to the grounds for relief relied upon prior to jurisdictional defects in violation of [Scott's] right to due process of law and equal protection under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Assignment of Error Two

The trial court erred to the prejudice of [Scott] when it allowed perjured testimony of Detective Chojnowski in violation of [Scott's] absolute right to procedural due process of law and equal protection of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution.

Assignment of Error Three

[Scott] was deprived of the effective assistance of counsel during his original trial and subsequent appeal process in violation of the Fourth, Sixth and Fourteenth Amendments to the United States Constitution; [and] Sections 14 and 16, Article

I, Ohio Constitution.

Assignment of Error Four

[Scott] was denied of his due process rights and equal protection of law where the trial court's adjudication of the sentence of the sentence fails to conform to facts established to advance such sentence upon judgment, thereby rendering the attempted sentence inconsistent with R.C. 2929.11(B) and is contrary to law in violation of the Ohio and United States Constitutions.

Assignment of Error Five

Insufficient Evidence of aggravated murder.

Assignment of Error Six

[Scott's] substantial and substantive rights were violated when the trial court sentenced [Scott] disproportionately to a prison term consistent with his alleged codefendant, while both defendants were subsequently charged from the same indictment of the same offenses in violation of Equal Protection and Due Process clause of the United States Constitution's Sixth and Fourteenth Amendments.

{¶7} In the first assignment of error, Scott argues the trial court erred when it dismissed his petition for postconviction relief without setting forth its findings of fact and conclusion of law.

{¶8} A trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion. *State v. Gray*, 8th Dist. Cuyahoga No. 106589, 2018-Ohio-3678, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. The trial court does not abuse its discretion in dismissing a petition without a hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition. *Id.*, citing *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15.

{¶9} R.C. 2953.21(A) provides:

(2) 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 three hundred sixty-five 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. 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 three hundred sixty-five days after the expiration of the time for filing the appeal.

{¶10} The record reveals that in Scott's direct appeal, the trial transcripts were filed on December 15, 2003. Under R.C. 2953.21(A)(2), Scott's petition for postconviction relief should have been filed no later than December 15, 2004. Scott filed the instant petition on February 8, 2017, more than 13 years later.

{¶11} The record also reveals that following Scott's direct appeal, wherein we vacated two of his convictions, the trial court resentenced Scott on August 20, 2010. Scott did not appeal this sentence. Again, under R.C. 2953.21(A)(2), Scott's petition would have been due no later than September 20, 2011, one year after his time to appeal his sentence expired. Therefore, it is clear that under both circumstances, Scott's petition is untimely.

{¶12} Generally, the trial court has no jurisdiction to consider an untimely petition for postconviction relief. *State v. Alexander*, 8th Dist. Cuyahoga No. 105969, 2018-Ohio-1198, citing *State v. Schultz*, 8th Dist. Cuyahoga No. 85430, 2005-Ohio-6627, ¶ 11. The trial court may, however, entertain untimely petitions for postconviction relief if the petitioner demonstrates either (1) he was unavoidably prevented from discovering 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 petitioner's situation. R.C. 2953.23(A)(1)(a). *State v. McGrath*, 8th Dist. Cuyahoga No. 97207, 2012-Ohio-816. In addition, the petitioner must establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for

constitutional error at trial. R.C. 2953.23(A)(1)(b).

{¶13} Scott has satisfied none of the above conditions. In his petition, Scott attacked his sentence on several grounds; attacked the testimony of the complaining officer; attacked the search of his residence; and alleged ineffective assistance of counsel. As discussed more fully below, these claims are barred by the doctrine of res judicata.

{¶14} The doctrine of res judicata excludes subsequent actions or postconviction petitions involving the same legal theory of recovery as the previous action or petition as well as claims, which could have been presented in the first action or postconviction petition. *State v. Pettis*, 8th Dist. Cuyahoga No. 100851, 2014-Ohio-3147, citing *State v. Sawyer*, 8th Dist. Cuyahoga No. 91946, 2009-Ohio-2391, ¶ 19, citing *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982).

{¶15} Nonetheless, unless a defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider an untimely petition for postconviction relief. *State v. Bates*, 8th Dist. Cuyahoga No. 105766, 2017-Ohio-8408, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 99972, 2014-Ohio-1512, ¶ 8, citing *State v. Carter*, 2d Dist. Clark No. 03CA-11, 2003-Ohio-4838, ¶ 13, citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998). A trial court need not conduct an evidentiary hearing when it dismisses an untimely postconviction relief petition. *Id.*, citing *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 23.

{¶16} Because Scott's petition was untimely and he did not satisfy the conditions in R.C. 2953.23(A)(1), the trial court lacked jurisdiction to consider the petition. As a result, it was not necessary for the trial court to conduct an evidentiary hearing and issue finding of facts and conclusion of law. Therefore, the trial court's denial of Scott's petition was proper.

{¶17} Accordingly, the first assignment of error is overruled.

{¶18} Even if Scott's petition was timely, the issues raised in assignment of errors two through six are barred by the doctrine of res judicata. Within these errors, Scott argues that he was prejudiced by the perjured testimony of Detective Chojnowski; that he was deprived the effective assistance of counsel; that there was insufficient evidence of guilt; and his sentence was contrary to law.

{¶19} The usual formulation of res judicata in postconviction proceedings is that it bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. *State v. Montgomery*, 8th Dist. Cuyahoga No. 99452, 2013-Ohio-4193, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Res judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised. *Id.*, citing *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-3374, ¶ 9.

{¶20} Because Scott's present assertions that were raised or could have been raised in either his prior petition for postconviction relief or in his direct appeal, they would have been barred by the doctrine of res judicata if his petition had been timely filed. As a result, we find the trial court did not err in dismissing Scott's petition for postconviction relief.

{¶21} Accordingly, the second through sixth assignments of error are overruled.

{¶22} Judgment is affirmed.

It is ordered that appellee recover of 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
MELODY J. STEWART, J., CONCUR