

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 107743
	:	
v.	:	
	:	
SAMUEL S. JONES,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 6, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-13-576773-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Samuel S. Jones, *pro se*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Samuel S. Jones (“Jones”) appeals the trial court’s denial of a motion to vacate the indictment in his case. We affirm the judgment of the trial court.

I. Background and Facts

{¶ 2} In 2013, Jones was ejected from a night club for fighting with a female patron. Jones retrieved a gun and returned to the club. A bouncer at the club was shot by Jones during the struggle to prevent Jones from reentering the club. Police officers chased Jones who suffered 13 bullet wounds and required hospitalization.

{¶ 3} On August 7, 2013, Jones was indicted by the Cuyahoga County Grand Jury on four counts of felonious assault with one-year and three-year firearm specifications, notices of prior convictions, and repeat violent offender specifications for each count as well as for having a weapon while under disability. On February 12, 2014, Jones moved to dismiss the indictment on the ground that he was never granted a preliminary hearing in the Cleveland Municipal Court. Jones argued that he was hospitalized from July 26, 2013, the day of the shooting, until August 23, 2013. According to Jones, he was charged with felonious assault and felonious assault of a police officer in Cleveland Municipal Court, *Cleveland v. Jones*, Cleveland M.C. No. 2013-CRA-022885 (July 30, 2013), by a complaint issued pursuant to Crim.R. 3. However, Jones never appeared before that court for an arraignment or preliminary hearing. After the grand jury indictment was issued on August 7, 2013, Jones was arraigned on August 27, 2013 in the Cuyahoga County Common Pleas Court.

{¶ 4} The state responded that Jones was placed under arrested by the Cleveland Police Department and admitted to MetroHealth Medical Center as a result of his gunshot injuries. An arrest warrant was filed. The scheduled municipal

court arraignments were continued due to Jones's hospitalization reportedly at the defendant's request. The municipal court docket indicated that the local case was nolle because of the county grand jury indictment. The state posited that the grand jury indictment rendered any defects in the municipal proceedings moot.

{¶ 5} On March 18, 2014, the trial court agreed:

The court finds the state's opposition to be well-taken. "The general rule is that a subsequent indictment by the grand jury renders any defects in the preliminary hearing moot." *State v. Washington*, 30 Ohio App.3d 98, 99, 506 N.E.2d 1203 (8th Dist.1986). Additionally, in this matter, it is worth noting that the preliminary hearing at issue in Cleveland Municipal Court was continued at this defendant's request as he was hospitalized and unable to be present. Before such a hearing could be held, the grand jury issued the indictment, which rendered the preliminary hearing proceeding moot.

Journal entry No. 83489544 (Mar. 18, 2014).

{¶ 6} On November 25, 2014, a jury found Jones guilty of two counts of felonious assault with one-year and three-year fire arm specifications. The trial court found Jones guilty of the firearms, prior convictions and repeat violent offender specifications, and of having a weapon while under disability. Jones was sentenced on January 7, 2015, to an 11-year prison term. This court affirmed Jones's convictions in *State v. Jones*, 2015-Ohio-4986, 53 N.E.3d 783 (8th Dist.). The appeal did not assert as error the denial of the motion to vacate at issue in this appeal.

{¶ 7} On September 20, 2016, Jones filed a "motion for petition to vacate void sentence." Jones argued that he was never arraigned before the municipal court so that the trial court lacked subject matter jurisdiction to render a valid

judicial determination. The state replied that the petition for postconviction relief was untimely filed under R.C. 2953.21(A)(2). The state also argued that Jones was unable to demonstrate that he met the exception to the limitation period under R.C. 2953.21(A)(1)(a)-(b) and, finally, that any defect in the preliminary hearing proceedings was rendered moot by the grand jury indictment. On September 29, 2016, the trial court denied the motion as “untimely” and ruled that the “doctrine of res judicata bars consideration” of the petition. Journal entry No. 95874678 (Sept. 29, 2016).

{¶ 8} On October 1, 2018, Jones moved to file a delayed appeal in the 2016 ruling pursuant to App.R. 5(A) and cited as grounds for the delay that he never received proper notice of the denial from the trial court. On October 25, 2018, this court allowed the appeal of the motion as a petition for postconviction relief:

Motion by appellant, pro se, for leave to file delayed appeal is granted. We note that because a petition for postconviction relief is civil in nature, there is no right to a delayed appeal under App.R. 5(A). However, because the appeal has been timely filed the appeal shall proceed as an appeal of right. This court has held that the notice provision in Civ.R. 58 and the tolling provision in App.R. 4(A) apply to petitions for postconviction relief because they are civil in nature. *State v. Tucker*, 8th Dist. No. 95556, 2011-Ohio-4092, ¶ 9; *State v. Harris*, 8th Dist. No. 94186, 2010-Ohio-3617, ¶ 7-8. *See also, State v. Williams*, 10th Dist. No. 06AP-842, 2006-Ohio-5415, ¶ 7-8. The trial court never directed the clerk of court to serve the appellant with notice of the judgment per Civ.R. 58, therefore, the time to file the appeal has been tolled and appellant’s appeal is timely filed. Notice issued.

Journal entry No. 521613 (Oct. 25, 2018).

II. Assignments of Error

{¶ 9} Jones proffers two assigned errors for our consideration:

- I. Whether the trial court had subject matter jurisdiction to convict appellant for the offenses involved.
- II. Whether the trial court erred in finding that appellant's claims were untimely and barred by the doctrine of res judicata.

III. Discussion

{¶ 10} We combine the assigned errors for ease of analysis. We find that they are wholly without merit.

A. Standard of Review

{¶ 11} A trial court's denial of a petition for postconviction relief is reviewed for an abuse of discretion. *State v. Powe*, 9th Dist. Summit No. 28729, 2018-Ohio-477, ¶ 11, citing *State v. Daniel*, 9th Dist. Summit No. 26670, 2013-Ohio-3510, ¶ 7. We consider whether the trial court's determination is "unreasonable arbitrary or unconscionable." *Id.*, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

1. Jurisdiction

{¶ 12} Jones argues that his sentence should be vacated for lack of jurisdiction because he never appeared before the municipal court. We disagree.

{¶ 13} "The state may commence a criminal proceeding by filing a complaint, an indictment, or information." *State v. Quinnie*, 8th Dist. Cuyahoga No. 105104, 2017-Ohio-2663, ¶ 9, citing *State ex rel. Kelley v. Junkin*, 8th Dist. Cuyahoga No. 91860, 2009-Ohio-2723, ¶ 13, citing Crim.R. 3 and 7.

{¶ 14} Further,

While minor criminal prosecutions may be initiated by a complaint as provided in Crim.R. 3, felonies, such as aggravated murder, may only

be initiated by indictment of the grand jury. *State v. Ervin*, 8th Dist. Cuyahoga No. 100366, 2014-Ohio-1631, ¶ 15, citing Section 10, Article I, Ohio Constitution (“no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury”) and Crim.R. 7(A) (“all * * * felonies shall be prosecuted by indictment”).

Id. at ¶ 9. Jones “was indicted by a grand jury as is required for felony charges.” *Id.* at ¶ 10.

{¶ 15} Crim.R. 5 prescribes the preliminary hearing procedure for felony cases:

Preliminary hearing in felony cases; procedure. (1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody. *The preliminary hearing shall not be held, however, if the defendant is indicted.*

(Emphasis added.) *Id.*

{¶ 16} “Notwithstanding any provisions to the contrary in Criminal Rule 5(B),” “a person against whom a charge of felony is pending” “shall be accorded a preliminary hearing within fifteen consecutive days after the persons arrest if the accused is not held in jail in lieu of bail on the pending charge.” R.C. 2945.71(C)(1). However, “it is well-settled that failure to hold a preliminary hearing within the time frame set by R.C. 2945.71(C)(1) does not affect a subsequent indictment and

conviction.” *State v. Chappell*, 7th Dist. Mahoning No. 12 MA 206, 2014-Ohio-3877, ¶ 9, citing *State v. Pugh*, 53 Ohio St.2d 153, 372 N.E.2d 1351 (1978), syllabus.

{¶ 17} R.C. 2945.72(H) specifies that “the time within which an accused must be brought * * * to preliminary hearing and trial, may be extended only by * * * [t]he period of any continuance granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion.” *Id.* “[O]nce a grand jury has issued an indictment, * * * a defendant has no right to a preliminary hearing.” *Chappell*, 7th Dist. Mahoning No. 12 MA 206, 2014-Ohio-3877, ¶ 9, citing *State ex rel. Haynes v. Powers*, 20 Ohio St.2d 46, 48, 254 N.E.2d 19 (1969). *See also State v. Washington*, 30 Ohio App.3d 98, 99, 506 N.E.2d 1203 (8th Dist.1986), relied on by the trial court in the instant case.

{¶ 18} Jones was hospitalized and the record reflects the continuances were granted at the defendant’s request. A continuance on the motion of the defendant as well as “any reasonable continuance granted other than upon the accused’s own motion,” tolls the statutory time period. *State v. Jenkins*, 8th Dist. Cuyahoga No. 95006, 2011-Ohio-837, ¶ 19, quoting R.C. 2945.72(H); citing *State v. Baker*, 92 Ohio App.3d 516, 636 N.E.2d 363 (8th Dist.1993); *State v. Martin*, 56 Ohio St.2d 289, 297, 384 N.E.2d 239 (1978).

{¶ 19} The trial court determined that the grand jury indictment rendered any irregularities in the municipal court moot pursuant to *State v. Washington*, 30 Ohio App.3d 98, 99, 506 N.E.2d 1203 (8th Dist.1986). We affirm the trial court’s judgment.

2. Res Judicata

{¶ 20} “The principles of res judicata may be applied to bar the further litigation of issues that were raised previously or could have been raised previously in an appeal.” *State v. Binford*, 8th Dist. Cuyahoga No. 105414, 2018-Ohio-3039, ¶ 6, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶ 21} Jones cites *States v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, for the premise that res judicata does not preclude review of a void sentence. “[V]oid sentences are typically those in which a court lacked subject-matter jurisdiction over the defendant.” *Id.* at ¶ 7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27.

{¶ 22} We previously observed that “the *Fischer* decision was limited to postrelease control, which is considered a part of the defendant’s sentence.” *State v. Goldsmith*, 8th Dist. Cuyahoga No. 95073, 2011-Ohio-840, ¶ 7, citing *Fischer*. “Res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Id.* at ¶ 8, quoting *Fischer* at paragraph three of the syllabus.

{¶ 23} We have already determined that the trial court had subject matter jurisdiction in this case. In addition, the 2014 motion to dismiss was based on the same facts and law proffered in the 2016 petition to vacate the sentence. Res judicata bars a postconviction claim of improper bindover by a municipal court “because it is not dependent on evidence outside the record and could have been raised in the trial court or on direct appeal.” *State v. Bridges*, 8th Dist. Cuyahoga

Nos. 102930 and 103090, 2015-Ohio-5428, ¶ 16. Jones did not attack the trial court's denial of his 2014 motion to dismiss in the 2015 direct appeal of his conviction.

{¶ 24} The trial court correctly determined that the doctrine of res judicata applied.

3. Timeliness

{¶ 25} Jones charges that the trial court incorrectly ruled that his petition was untimely and that he should have been granted a hearing on the issue. We address his concerns below.

{¶ 26} R.C. 2953.21, known as the Ohio Post-Conviction Remedy Act, was enacted in 1965 to afford prisoners a “clearly defined method by which they may raise claims of denial of federal rights.” *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905, quoting *Young v. Ragen*, 337 U.S. 235, 239, 69 S.Ct. 1073, 1074, 93 L.Ed. 1333, 1336 (1949). The proceeding is a “collateral civil attack on the judgment” and is “not an appeal of the conviction.” *Id.* at 281.

{¶ 27} Under R.C. 2953.21, a “person convicted of a criminal offense * * * and who claims that * * * the judgment [is] void or voidable” because the person’s constitutional rights have been denied or infringed may petition the court that rendered the judgment to vacate the judgment or grant other relief. R.C. 2953.21(A)(1).

{¶ 28} R.C. 2953.21(A)(2) requires timely filing of the petition within 365 days after the date on which the trial transcript is filed in the direct appeal of the

conviction.¹ Jones does not deny that his petition falls outside of the statutory limit. Instead, Jones offers that the time limit does not apply or is tolled because his petition relates to a void judgment which requires that the trial court ignore “procedural regularities” and “vacate the void sentence.” *State v. Pesci*, 8th Dist. Cuyahoga No. 94904, 2011-Ohio-1058, ¶ 11, fn. 2, quoting *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶ 19 (9th Dist.).

{¶ 29} As the statute expressly provides, the petition attacks “void” or “voidable” judgments. Thus, Jones is subject to the statute’s express requirement that, where a petitioner fails to meet the time limit, the petitioner must pass a two-pronged test to proceed. First, Jones must show that he was “unavoidably prevented from discovering the facts he relies on” or that “a new federal or state right applies retroactively” to his case. *Id.* at ¶ 13, citing R.C. 2953.23(A)(1)(a). The second prong requires that Jones demonstrate by “clear and convincing evidence that but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which he was convicted.” *Id.*, quoting R.C. 2953.23(A)(1)(b).

{¶ 30} Notwithstanding that this court has already determined that the judgment is not void, Jones had made no showing supporting either facet of the exceptions. This argument also fails.

¹ The time limit was 180 days prior to the March 2015 statutory amendment.

{¶ 31} Jones also argues that he was entitled to a hearing on the petition.

This assertion is also incorrect.

The trial court may deny the petitioner's postconviction petition 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. *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus.

Cody, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764, ¶ 29.

{¶ 32} The trial court correctly determined that the petition was untimely filed. No hearing was required.

IV. Conclusion

{¶ 33} 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 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.

ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, A.J., and
LARRY A. JONES, SR., J., CONCUR