[Cite as *State v. Vaughn*, 2019-Ohio-798.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107746

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANGELO VAUGHN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-492431-A

BEFORE: Jones, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: March 7, 2019

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant Angelo Vaughn ("Vaughn") appeals from the trial court's September 14, 2018 judgment denying his "motion for final appealable order." For the reasons that follow, we affirm.

{¶2} This case dates back to 2007, when Vaughn was charged and convicted of one count of attempted murder, two counts of aggravated robbery, and one count of felonious assault, along with notice of prior convictions and repeat violent offender ("RVO") specifications. At sentencing, the trial court merged the attempted murder and felonious assault convictions; the court sentenced on the attempted murder count, for which it imposed a prison sentence of ten years and an additional ten years on the accompanying RVO specification. The trial court also merged the two counts of aggravated robbery; the court imposed a prison sentence of ten years on the count it elected to proceed on, along with an additional ten-year sentence on the

accompanying RVO specification. The trial court ordered that all prison terms be served consecutively for a total term of imprisonment of 40 years.

{¶3} Vaughn filed a direct appeal. *State v. Vaughn*, 8th Dist. Cuyahoga No. 90136, 2008-Ohio-3027. In his direct appeal, Vaughn challenged the RVO specifications as being unconstitutional and he challenged his convictions as being unsupported by sufficient evidence and against the manifest weight of the evidence. In regard to the RVO specifications, this court, relying on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, found the following:

> The trial court's imposition of a maximum 10-year prison term on the attempted murder and aggravated robbery convictions, and the imposition of an additional 10-year prison term on each of the two RVO specifications are authorized by the sentencing statutes and are not contrary to law. We find no error.

Vaughn at ¶ 28.

{¶4} In regard to sufficiency of the evidence and weight of the evidence, this court addressed Vaughn's challenges on those grounds, finding that: (1) the "evidence is sufficient to support the jury verdict on attempted murder and aggravated robbery as a matter of law"; "appellant's convictions on the two RVO specifications is also supported by sufficient evidence" and (2) "[a]fter reviewing the entire record, including the victim's and other witnesses' testimony, we cannot say that the jury lost its way." *Id.* at ¶ 38, 39, 40. The Ohio Supreme Court declined jurisdiction over Vaughn's appeal. *State v. Vaughn*, 120 Ohio St.3d 1419, 2008-Ohio-6166, 897 N.E.2d 653.

{¶5} In September 2015, Vaughn filed a "motion to correct unlawful sentence," in which he contended that he should only have to serve one of the two ten-year sentences imposed for the RVO specifications. The trial court denied the motion; Vaughn filed an untimely appeal, which

was dismissed. *State v. Vaughn*, 8th Dist. Cuyahoga No. 104631, motion no. 497937 (July 7, 2016).

{¶6} In August 2016, Vaughn filed a "petition to vacate or set aside judgment of conviction or sentence," in which he contended that (1) he was "actually innocent" of the RVO specifications; (2) the imposition of separate sentences for the RVO specifications was "not authorized by law"; (3) his prison sentences were "unlawful"; and (4) the trial court erred by failing to merge the RVO specifications. The trial court denied the petition, and this court twice dismissed the appeal because Vaughn failed to file a brief. *State v. Vaughn*, 8th Dist. Cuyahoga No. 104987, motion no. 501750 (Nov. 14, 2016) and motion no. 503354 (Jan. 6, 2017) (second dismissal after first dismissal was reconsidered).

{¶7} In July 2017, Vaughn filed a "motion for final appealable order." In his motion, he asserted many of the same arguments he has previously asserted regarding his sentence on the RVO specifications. The trial court denied the motion on September 14, 2018.

{¶8} Vaughn now appeals, and assigns the following as error:

> I. The trial court abused its discretion when it failed to vacate the void sentence for Appellant's repeat violent offender specification convictions, as he does not meet the statutory definition of a repeat violent offender and is actually innocent of specification convictions.
>
> II. The trial court's imposition of separate sentences for repeat violent offender for multiple counts in the same indictment are not authorized by law.
>
> III. The trial court imposed an unlawful sentence when it used the same prior conviction to impose separate sentences for multiple separate repeat violent offender specifications resulting in a void judgment entry and sentence.
>
> IV. The trial court erred when it merged the repeat violent offender specifications and failed to state on the record or in the sentencing entry that the repeat violent offender specifications had to be served prior to and consecutive to the underlying offenses resulting in a void judgment entry and sentence.

{¶9} The motion that is the subject of this appeal was captioned as a "motion for final appealable order." Despite the caption, the filing was a petition for postconviction relief. In *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus, the Ohio Supreme 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 [his or her] constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.

{¶10} In light of the above, we will treat Vaughn's motion as a petition for postconviction relief. We review the denial of a motion for postconviction relief for an abuse of discretion. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999).

> [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; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.

State v. White, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 45. "The term 'abuse of discretion' connotes more than error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Id.* at ¶ 46, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); *State v. Keenan*, 81 Ohio St.3d 133, 137, 689 N.E.2d 929 (1998).

{¶11} We first note that the petition was untimely. A postconviction petition "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 * * *." R.C. 2953.21(A)(2). A convicted defendant may file only one postconviction petition within the prescribed 365-day window, and may not file an untimely or successive petition unless the defendant meets a high burden of demonstrating the "specific, limited circumstances" of R.C.

2953.23(A). *State v. Apanovitch*, Slip Opinion No. 2018-Ohio-4744, ¶ 22.

{¶12} Specifically, R.C. 2953.23(A) provides:

> (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 petition 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 or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.
>
> (2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

{¶13} Upon review, none of the above-quoted exceptions apply in this case. Vaughn does not rely on any new facts as the basis for relief; rather, his claims are based on the record as it existed during his direct appeal. He is not claiming that there was a new United States Supreme Court case recognizing a federal or state right that applies retroactively. And there

was no DNA testing providing new evidence of actual innocence. Thus, the trial court properly denied Vaughn's untimely motion.

{¶14} Moreover, Vaughn's claims were barred under the doctrine of res judicata. Under the doctrine, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997)*; State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus. According to *Szefcyk*, res judicata is applicable to all postconviction proceedings. *Id.* at 95. A trial court may dismiss a petition for postconviction relief without holding an evidentiary hearing when the claims raised in the petition are barred by the doctrine of res judicata. *Szefcyk* at syllabus.

{¶15} All of the claims Vaughn makes now either were, or could have been, raised in his direct appeal; they are all therefore barred under the doctrine of res judicata. On this record, the trial court did not abuse its discretion by denying Vaughn's motion. All of his assignments of error are overruled.

{¶16} Judgment 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.

LARRY A. JONES, SR., JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR