

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 108716
	:	
v.	:	
	:	
DUNCAN PARHAM,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 13, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-90-258463-A

Appearances:

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

Duncan Parham, *pro se*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Duncan Parham (“appellant”), brings the instant appeal challenging the trial court’s judgment denying his motion “to vacate a void judgment for lack of subject matter jurisdiction.” Specifically, appellant argues that the trial court was divested of jurisdiction over the criminal proceedings when it

constructively amended the indictment before trial. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} In January 1991, following a bench trial, appellant was convicted of aggravated murder in violation of R.C. 2903.01 with a three-year firearm specification. Appellant was sentenced to a prison term of three years on the firearm specification, to be served consecutively to a prison term of life on the aggravated murder conviction.

{¶ 3} Appellant filed a direct appeal challenging his conviction. *State v. Parham*, 8th Dist. Cuyahoga No. 61349, 1993 Ohio App. LEXIS 100 (Jan. 14, 1993) (“*Parham I*”). Appellant argued that the state failed to present sufficient evidence to establish prior calculation and design, his conviction was against the manifest weight of the evidence, his trial counsel provided ineffective assistance, and the trial court erred by not admitting the results of a trace metal detection test into evidence. Appellant did not raise any arguments pertaining to the trial court’s purported amendment of the indictment or the trial court’s lack of subject-matter jurisdiction on direct appeal. This court affirmed the trial court’s judgment.

{¶ 4} On February 20, 1998, appellant filed a “petition to vacate or set aside sentence.” Therein, appellant alleged that the trial court failed to comply with R.C. 2945.05, the jury waiver statute, and as a result, the trial court did not have jurisdiction to conduct a bench trial rather than a jury trial. Appellant did not argue

that the trial court lacked subject-matter jurisdiction because it purportedly amended the indictment before trial. The trial court denied appellant's petition.

{¶ 5} Appellant filed an appeal challenging the trial court's judgment. *State v. Parham*, 8th Dist. Cuyahoga No. 76987, 2000 Ohio App. LEXIS 3776 (Aug. 17, 2000) ("*Parham II*"). On appeal, this court affirmed the trial court's judgment denying appellant's petition.

{¶ 6} On April 23, 2019, appellant filed a motion to vacate the trial court's judgment for lack of subject-matter jurisdiction. Therein, appellant argued that his conviction and sentence were void ab initio because the trial court lacked subject-matter jurisdiction and failed to comply with Crim.R. 3, 4, and 34. On May 24, 2019, the trial court denied appellant's motion to vacate.

{¶ 7} It is from this judgment that appellant filed the instant appeal on June 24, 2019. He assigns one error for review:

I. The Court of Common Pleas did not have subject matter jurisdiction when it constructively amended the indictment.

II. Law and Analysis

{¶ 8} In his sole assignment of error, appellant argues that his conviction is void for lack of subject-matter jurisdiction. Specifically, appellant contends that the trial court was divested of subject-matter jurisdiction to preside over the bench trial when it "constructively" amended the indictment before trial commenced.

{¶ 9} The motion that is at issue in this appeal was captioned, "motion to vacate a void judgment for lack of subject matter jurisdiction." Notwithstanding its

caption, the motion is a petition for postconviction relief, because it was filed subsequently to appellant's direct appeal and appellant is seeking vacation or correction of the trial court's judgment on the basis that his constitutional rights have been violated. *See State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus.

{¶ 10} This court reviews a trial court's judgment denying a petition 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 abuses its discretion when its judgment is unreasonable, arbitrary, or unconscionable. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 46. "[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." *Id.* at ¶ 45, quoting *State v. Gondor*, 112 Ohio St.3d 77, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

{¶ 11} The record reflects that appellant's motion is untimely. When he filed his petition in April 2019, the 180-day statutory deadline for filing a timely petition for postconviction relief under former R.C. 2953.21(A)(2), which was in effect at the time of appellant's conviction, had long since passed. Appellant's petition is also untimely under the March 2015 amendment to R.C. 2953.21, which extended the statutory deadline for filing a timely petition for postconviction relief to 365 days. *See State v. Thomas*, 8th Dist. Cuyahoga No. 103784, 2016-Ohio-3327, ¶ 10.

{¶ 12} Furthermore, “[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. Vaughn*, 8th Dist. Cuyahoga No. 107746, 2019-Ohio-798, ¶ 11, quoting *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 22. The current motion is appellant’s second petition for postconviction relief. The first petition was filed in February 1998. Accordingly, appellant’s April 2019 petition was both untimely and successive.

{¶ 13} R.C. 2953.23(A), governing untimely and successive petitions for postconviction relief, provides, in relevant part:

(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.

{¶ 14} After reviewing the record, we find that appellant has failed to demonstrate that any of these exceptions apply in this case. Appellant's constructive amendment argument pertains to two criminal cases, Cuyahoga C.P. Nos. CR-90-257584-ZA and CR-90-258463-A.

{¶ 15} Appellant was indicted on September 19, 1990, in CR-90-257584-ZA, with murder, in violation of R.C. 2903.02. Subsequently, on October 11, 1990, appellant was indicted in CR-90-258463-A, with aggravated murder, in violation of R.C. 2903.01.

{¶ 16} Both cases were set for trial on January 7, 1991. *See* trial court's November 15, 1990 journal entries in both cases. On January 7, 1991, the scheduled trial date, the indictment in CR-90-257584-ZA was dismissed by the state, and with leave of the trial court. The trial court's January 7, 1990 journal entry provides, "[t]his day came the prosecuting attorney on behalf of the state of Ohio, and with leave of court, and on good cause shown, entered a nolle prosequi on the above indictment. [Prosecutor] recommends nolle because this case has been reindicted under [CR-90-258463-A]. Defendant is discharged on this case number only."

{¶ 17} After the indictment in CR-90-257584-ZA was dismissed, the parties proceeded on the indictment in CR-90-258463-A. Appellant waived his right to a jury trial and a bench trial commenced.

{¶ 18} In this appeal, appellant appears to argue that when the trial court dismissed the indictment in CR-90-257584-ZA, the trial court was divested of jurisdiction over CR-90-258463-A. Appellant's argument is misplaced.

{¶ 19} As an initial matter, appellant's argument is barred by res judicata. Appellant could have and should have raised his arguments pertaining to the constructive amendment of the indictment and the trial court's jurisdiction on direct appeal or in his first petition for postconviction relief. He failed to do so.

{¶ 20} Under the doctrine of res judicata,

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.

Vaughn, 8th Dist. Cuyahoga No. 107746, 2019-Ohio-798, at ¶ 14; see *State v. Mack*, 8th Dist. Cuyahoga No. 101261, 2018-Ohio-301, ¶ 15 (res judicata also prevents relief on successive petitions for postconviction relief that raise issues that were or could have been raised in the original petition).

{¶ 21} Generally, when a trial court lacks subject-matter jurisdiction over a case, any judgment entered by the court is void. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. Res judicata does not preclude challenges to void judgments. A void judgment can be challenged at any time. See *State v. Johnson*, 8th Dist. Cuyahoga No. 107617, 2019-Ohio-2332, ¶ 23, citing *State*

v. Bennett, 4th Dist. Scioto No. 15CA3682, 2015-Ohio-3832, ¶ 11, and *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, 931 N.E.2d 1157 (6th Dist.).

{¶ 22} In the instant matter, assuming, arguendo, that appellant's argument was not barred by res judicata, his subject-matter jurisdiction argument fails on the merits. The Ohio Supreme Court considered and rejected a similar argument in *State ex rel. Smith v. Hall*, 145 Ohio St.3d 473, 2016-Ohio-1052, 50 N.E.3d 524.

{¶ 23} In *Smith*, the defendant was indicted in September 2004 on one count of aggravated burglary and one count of rape. Subsequently, the defendant was reindicted in February 2005 on the same two counts and an additional count of possessing cocaine. The September 2004 and February 2005 indictments were issued in separate criminal cases. The trial court dismissed the September 2004 indictment. The matter proceeded to a jury trial on the February 2005 indictment, after which the defendant was convicted of aggravated burglary and rape. The defendant's convictions were affirmed on direct appeal. *State v. Smith*, 2d Dist. Montgomery No. 21058, 2006-Ohio-2365.

{¶ 24} In 2012, the defendant filed a motion for a new trial "on the basis that he was denied his right to have effective assistance of counsel, because he was convicted on an indictment that was dismissed." *State v. Smith*, 2d Dist. Montgomery No. 25733, 2014-Ohio-1119, ¶ 3. The trial court denied defendant's motion for a new trial, and the Second District affirmed the trial court's judgment. On appeal, the Second District explained, "[w]ithin his application for a new trial and on appeal Smith's entire argument is based upon the assertion that he was

convicted on an indictment that was dismissed. This was simply not the case. The [February] 2005 re-indictment was not dismissed and he was convicted on that indictment.” *Id.* at ¶ 6.

{¶ 25} In 2014, the defendant filed an original action seeking a writ of prohibition against the trial court judges that presided over his trial. The defendant argued again that he had been convicted and sentenced on a dismissed indictment. The Second District dismissed the prohibition action.

{¶ 26} The defendant challenged the Second District’s ruling in the Ohio Supreme Court. *State ex rel. Smith v. Hall*, 145 Ohio St.3d 473, 2016-Ohio-1052, 50 N.E.3d 524. The defendant asserted that he was entitled to a writ of prohibition because the trial court did not have subject-matter jurisdiction after the original September 2004 indictment was dismissed. The defendant argued that the “nolle indictment” caused his conviction and sentence to become “invalid and void.” *Id.* at ¶ 9.

{¶ 27} The Ohio Supreme Court rejected this argument, concluding, in relevant part, “[defendant’s] argument that he was convicted on a dismissed indictment is wrong because he was reindicted. [Defendant] was lawfully convicted and sentenced under the second indictment, and [the trial court] had the jurisdiction to try him under that indictment.” *Id.* at ¶ 10.

{¶ 28} In the instant matter, appellant’s subject-matter jurisdiction argument is based entirely on the assumption that CR-90-257584-ZA and CR-90-258463-A are the same criminal case, rather than separate and distinct cases in

which separate indictments were issued. Appellant’s assumption is misplaced and unsupported by the record. The record reflects that appellant was charged with murder in an indictment issued on September 19, 1990, in CR-90-257584-ZA. The record reflects that appellant was charged — in a separate and distinct criminal case — with aggravated murder in an indictment issued on October 11, 1990, in CR-90-258463-A.

{¶ 29} Appellant’s argument that the indictment was constructively amended, either by the trial court or the state, is also misplaced and unsupported by the record. The record reflects that the indictment in CR-90-257584-ZA was *dismissed, not amended*. The matter then proceeded to trial on the subsequently issued, separate, and distinct indictment in CR-90-258463-A.

{¶ 30} Like *Smith*, appellant suggests that if the indictment in CR-90-257584-ZA had been dismissed, rather than constructively amended, he would not be incarcerated. The record reflects that the indictment in CR-90-257584-ZA was dismissed, and that no amendment was made to either the indictment in CR-90-257584-ZA or the aggravated murder offenses charged in the indictment in CR-90-258463-A for which appellant was ultimately convicted.

{¶ 31} To the extent that appellant argues that the first time he became aware of the “constructive amendment” to the indictment was on January 1, 1991,¹ this argument is unsupported by the record. The record reflects that appellant was

¹ See appellant’s brief, filed August 22, 2019, at 1.

indicted in CR-90-258463-A on October 11, 1990, almost three months before CR-90-257584-ZA was dismissed. Furthermore, the trial court appointed the same attorneys to represent appellant in both criminal cases.

{¶ 32} Finally, appellant appears to argue that the indictment in CR-90-258463-A was never presented to the grand jury. Appellant appears to suggest that the indictment in CR-90-258463-A was not issued by the grand jury. He suggests that either the trial court or prosecutor forged the original indictment by changing the case number and the murder offense. Appellant fails to identify any evidence in the record supporting his challenge to the validity of the indictment in CR-90-258463-A. *See* App.R. 16(A)(7).

{¶ 33} For all of the foregoing reasons, appellant's sole assignment of error is overruled.

III. Conclusion

{¶ 34} After thoroughly reviewing the record, we affirm the trial court's judgment. Appellant's argument regarding the purported amendment of the indictment and the trial court's lack of subject-matter jurisdiction are barred by res judicata. Furthermore, appellant's subject-matter jurisdiction fails on the merits. The trial court's dismissal of the indictment in CR-90-257584-ZA did not constitute an amendment of the indictment in CR-90-258463-A nor divested the trial court of jurisdiction to preside over the bench trial.

{¶ 35} Judgment 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANITA LASTER MAYS, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR