

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140393
	:	TRIAL NO. B-0104351
Respondent-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
DANTE KEELING,	:	
Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 13, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Paula E. Adams*,
Assistant Prosecuting Attorney, for Respondent-Appellee,

Dante Keeling, pro se.

Please note: we have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Petitioner-appellant Dante Keeling appeals from the Hamilton County Common Pleas Court's judgment dismissing his petition under R.C. 2953.21 et seq. for relief from his 2001 convictions. We affirm the court's judgment.

{¶2} Keeling was convicted in 2001 of cocaine possession, aggravated robbery, robbery, and two counts of felonious assault. He unsuccessfully challenged his convictions on direct appeal, *State v. Keeling*, 1st Dist. Hamilton No. C-010610, 2002-Ohio-3299, and in postconviction motions filed in 2005, 2006, 2008, and 2014. See *State v. Keeling*, 1st Dist. Hamilton No. C-090667 (Dec. 29, 2010); *State v. Keeling*, 1st Dist. Hamilton No. C-060718 (June 13, 2007), *appeal not accepted*, 115 Ohio St.3d 1443, 2007-Ohio-5567, 875 N.E.2d 103.

{¶3} In his 2014 postconviction petition, Keeling sought relief from the trial court's imposition of consecutive prison terms for aggravated robbery and the two felonious assaults. He asserted that, under the test announced by the Ohio Supreme Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, those offenses are allied offenses of similar import subject to merger under R.C. 2941.25.¹ And he asserted that sentencing him for all three offenses violated the protections against multiple punishments for the same offense, secured under the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution.

{¶4} In this appeal from the dismissal of his petition, Keeling advances five assignments of error. The assignments of error essentially restate the petition's allegations and thus may fairly be read together to challenge the denial of the relief

¹ The Ohio Supreme Court has since "clarified" the *Johnson* test in *State v. Ruff*, Ohio St.3d , 2015-Ohio-995, N.E.3d . See *State ex rel. Walker v. Ohio*, Ohio St.3d , 2015-Ohio-1481, N.E.3d .

sought in the petition. Because the common pleas court had no jurisdiction to entertain the petition, we overrule the assignments of error.

No Jurisdiction to Entertain the Petition

{¶5} Keeling's 2014 postconviction petition was his fourth and was filed well after the time prescribed by R.C. 2953.21(A)(2) had expired. R.C. 2953.23 closely circumscribes a common pleas court's jurisdiction to entertain a late or successive postconviction claim. The petitioner must show either that he was unavoidably prevented from discovering the facts upon which his claim depends, or that his claim is predicated upon a new, retrospectively applicable federal or state right recognized by the United States Supreme Court since the time for filing his claim had expired. R.C. 2953.23(A)(1)(a). And he must show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b).

{¶6} R.C. 2953.23 did not confer upon the common pleas court jurisdiction to entertain Keeling's late and successive postconviction claims. He offered nothing in support of his double-jeopardy claim to satisfy the statute's jurisdictional requirements. His allied-offenses claim was based on the new judicial ruling in *Johnson*. But *Johnson* was decided by the Ohio Supreme Court, not the United States Supreme Court. And the decision does not apply retroactively to convictions that, like Keeling's, became final before the ruling was made. See *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199, ¶ 13-15. Moreover, the record does not, as it could not, demonstrate that but for the alleged sentencing errors, "no reasonable factfinder would have found [Keeling] guilty of the offense[s] of which [he] was convicted." See R.C. 2953.23(A)(1).

{¶7} Finally, a court always has jurisdiction to correct a void judgment. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. But the alleged sentencing errors, even if demonstrated, would not have rendered Keeling's convictions void. See *State v. Wurzelbacher*, 1st Dist. Hamilton No. C-130011, 2013-Ohio-4009, ¶ 8; *State v. Grant*, 1st Dist. Hamilton No. C-120695, 2013-Ohio-3421, ¶ 9-16 (holding that a judgment of conviction is void only to the extent that a sentence is unauthorized by statute or does not include a statutorily mandated term or if the trial court lacks subject-matter jurisdiction or the authority to act).

Constitutional Challenges

{¶8} Keeling concedes that his claims do not satisfy R.C. 2953.23's jurisdictional standard. But he insists here, as he insisted in his postconviction petition, that the court, in failing to grant the relief sought, violated various federal and state constitutional rights.

{¶9} *Retroactive application of Johnson*. Keeling contends that the common pleas court, in refusing to apply *Johnson* retroactively or to rule that his *Johnson*-based allied-offenses claims were not barred under the doctrine of res judicata, violated the Supremacy Clause of Article VI of the United States Constitution and denied him the rights to due process and equal protection secured by the Fourteenth Amendment. But the Ohio Supreme Court in *Ketterer* held that res judicata applies, and *Johnson* does not apply retroactively, to convictions that have become final before *Johnson* was decided. *Ketterer* at ¶ 13-15. An inferior court must follow the controlling authority of a higher court, leaving to the higher court the prerogative of overruling its own decision. See *Johnson v. Microsoft Corp.*, 156 Ohio App.3d 249, 2004-Ohio-761, 805 N.E.2d 179, ¶11 (1st Dist.), following *Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Thus, the common pleas court was not free to proceed, nor is this court free to decide, otherwise.

{¶10} *Constitutionality of R.C. 2953.23's jurisdictional standard.*

Keeling also asserts that the common pleas court erred in failing to declare R.C. 2953.23's jurisdictional standard unconstitutional, both on its face and as applied to him. Specifically, he challenges R.C. 2953.23(A)(1)(a) to the extent that it affords jurisdiction to entertain a late or successive postconviction claim based on a new, retrospectively applicable federal or state right recognized by the United States Supreme Court, but not a claim that, like his *Johnson*-based allied-offenses claim, is based on a new ruling by the Ohio Supreme Court. In that respect, Keeling insists, R.C. 2953.23 violates the federal constitutional right to due process and the due-course-of-law and access-to-courts guarantees of Article I, Section 16, of the Ohio Constitution.

{¶11} We reject at the outset Keeling's contention that the challenged jurisdictional restriction was unconstitutional as applied to him. Even if R.C. 2953.23 granted jurisdiction to entertain a late or successive postconviction claim based on a new ruling by the Ohio Supreme Court, Keeling could not clear the remaining jurisdictional hurdles. His *Johnson*-based allied-offenses claim was not based on a retrospectively applicable right. And he could not demonstrate that, but for the alleged sentencing error, "no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted."

{¶12} Nor was the challenged jurisdictional restriction unconstitutional on its face. Article I, Section 16, of the Ohio Constitution guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." The protections provided by the state's due-course-of-law

guarantee are equivalent to those afforded by the federal due-process guarantee. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 633 N.E.2d 504 (1994).

{¶13} A statute satisfies due process “if it bears a real and substantial relation to the public health, safety, morals or general welfare * * * and if it is not unreasonable or arbitrary.” *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274, 503 N.E.2d 717 (1986), quoting *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957), paragraph five of the syllabus. The determination whether a statute is unreasonable or arbitrary is where the due-process/due-course analysis and the access-to-courts analysis “tend[] to merge and overlap.” *Mayer v. Bristow*, 91 Ohio St.3d 3, 14, 740 N.E.2d 656 (2000). “[T]he principles of reasonableness, rationality, and access to courts apply interdependently to frame a single constitutional inquiry, which is whether the challenged procedure is properly tailored [to accomplish its goals] without unduly burdening the submission of legitimate claims.” *Id.*

{¶14} State collateral postconviction review is not a constitutional right. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *State v. Steffen*, 70 Ohio St.3d 399, 639 N.E.2d 67 (1994). The General Assembly enacted the postconviction statutes in 1965 in response to the United States Supreme Court’s order requiring states to provide prisoners with some “clearly defined method by which they may raise claims of denial of *federal* rights.” (Emphasis added.) *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999), quoting *Young v. Ragen*, 337 U.S. 235, 239, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949). Ohio’s postconviction statutes exceed that mandate, permitting claims of denial of both federal and state constitutional rights.

{¶15} The Supreme Court left the states “free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings.” *Slack v. McDaniel*, 529 U.S. 473, 489, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The General

Assembly has done so, by limiting the time for asserting a postconviction claim and by restricting the jurisdiction of a court to entertain late or successive claims.

{¶16} We have rejected constitutional challenges to R.C. 2953.21(A)(2)'s 180-day requirement and R.C. 2953.23(A)(1)(b)'s "clear and convincing evidence" jurisdictional requirement. *See State v. Sanders*, 1st Dist. Hamilton No. C-980154, 1999 Ohio App. LEXIS 1182, *10-14 (Mar. 26, 1999) (rejecting the argument that the time limit does not afford sufficient time to assess and advance all possible claims for relief); *State v. Bies*, 1st Dist. Hamilton No. C-020306, 2003-Ohio-442, ¶ 14-15, following *State v. McGuire*, 12th Dist. Preble No. CA2000-10-011, 2001 Ohio App. LEXIS 1826 (Apr. 23, 2001); *State v. Byrd*, 145 Ohio App.3d 318, 762 N.E.2d 1043 (1st Dist.2001) (holding that the "clear and convincing evidence" jurisdictional requirement does not deny due process or violate the access-to-courts or due-course-of-law guarantees).

{¶17} For the reasons articulated in those cases, we also reject Keeling's challenge to the constitutionality of R.C. 2953.23(A)(1)(a)'s requirement that a new, retrospectively applicable right be one recognized by the United States Supreme Court. The challenged jurisdictional restriction, like the other restrictions on the right to pursue late or successive postconviction relief, advances the state's interests in the finality of judgments, *see Steffen* at 412, and in not unduly burdening the judiciary with unlimited or repetitive collateral challenges. *See Byrd* at 328. And the restriction cannot be said to have been unreasonable or arbitrary, when access to the courts is otherwise afforded in a direct appeal, a timely postconviction petition, a properly constituted late or successive postconviction petition, state habeas corpus proceedings under R.C. 2725.01, and reopening proceedings under App.R. 26(B). *See Scott v. Houk*, 127 Ohio St.3d 317, 318, 2010-Ohio-5805, 939 N.E.2d 835 (citing *Steffen* at 407, 412, to

hold that the opportunities for review provided for death-penalty prisoners by the direct appeal, postconviction statutes, state habeas corpus, and reopening “more than satisfy defendants’ ‘constitutional rights to due process and fair trials’ while also protecting Ohio’s ‘inherent power to impose finality on its judgments’ ”); *accord Byrd* at 328; *McGuire* at *22-26.

{¶18} The party seeking to have a statute declared unconstitutional bears the burden of proving beyond a reasonable doubt that the statute and a constitutional provision are “clearly incompatible.” *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Keeling has failed to sustain that burden. *Accord State v. Hughes*, 10th Dist. Franklin No. 13AP-1006, 2014-Ohio-2914. R.C. 2953.23 satisfies the United States Supreme Court’s mandate requiring postconviction review of claims of denial of federal rights. And it advances the state’s interests in finality and judicial economy without unduly restricting that review.

Conclusion

{¶19} Because Keeling failed to satisfy R.C. 2953.21’s time requirements and R.C. 2953.23’s jurisdictional requirements, the common pleas court properly dismissed his postconviction petition,. We, therefore, overrule the assignments of error and affirm the judgment of the common pleas court.

Judgment affirmed.

HENDON, P.J., FISCHER and DEWINE, JJ.

Please note:

The court has recorded its own entry on the date of the release of this opinion.