

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-158 (C.P.C. No. 86CR-1701)
John R. Tucker,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 2, 2012

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*,
for appellee.

John R. Tucker, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} John R. Tucker, defendant-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion to impose a valid sentence.

{¶ 2} On June 2, 1986, appellant was indicted on two counts of aggravated murder with death penalty specifications and one count of first-degree felony aggravated robbery. Appellant waived his right to a jury trial, and the matter was tried before a three-judge panel. On April 24, 1987, appellant plead guilty to aggravated murder with two death penalty specifications and first-degree felony aggravated robbery. On May 11, 1987, appellant was sentenced to life imprisonment with parole eligibility after 30 years on the

aggravated murder charge and not less than ten years but no more than 25 years of imprisonment on the aggravated robbery charge, with the terms to be served concurrently.

{¶ 3} On April 23, 2005, appellant filed a motion to reduce sentence. On December 14, 2011, appellant filed a motion to impose a valid sentence, arguing that his sentence was void due to the trial court's failure to follow the requirements of Crim.R. 11 and R.C. 2945.06. On January 26, 2012, the trial court denied the motions. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

THE TRIAL COURT ABUSED IT[S] D[I]CRETION WHEN IT DEN[I]ED THE DEFENDANT-APPELLANT'S MOTION TO [IMPOSE] A VALID SENTENCE WHEN THE ORIGINAL ATTEMPTED SENTENCE BY THE COURT FAILED TO FOLLOW THE STATUTORY REQUIREMENTS OF R.C. 2945.06 AND CRIMINAL RULE 11(C)(3). FURTHER, THERE WAS NEVER A FINAL APPEALABLE ORDER THUS VIOLATING HIS CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS AND A FAIR TRIAL.

{¶ 4} Appellant argues in his assignment of error that the trial court erred when it denied his motion to impose a valid sentence. After construing the motion as a petition for post-conviction relief, the trial court denied it because (1) he did not file his petition within 180 days of the judgment, (2) he was not unavoidably prevented from discovering the facts upon which he must rely to present his claim for relief, and the United States Supreme Court did not recognize a new federal or state right that applied retroactively to him after the 180-day period expired, (3) he did not show by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found him guilty, and (4) res judicata bars his petition because he could have raised the issues on direct appeal.

{¶ 5} We must first address appellant's contention that his motion to impose a valid sentence was not a motion for post-conviction relief. Appellant contends the trial court should not have treated his motion to impose a valid sentence as a motion for post-conviction relief because his sentences were void due to the trial court's failure to comply with Crim.R. 11 and R.C. 2945.06. In support of his argument, appellant cites *State v.*

Boswell, 121 Ohio St.3d 575, 2009-Ohio-1577, and *State v. Green*, 81 Ohio St.3d 100 (1998).

{¶ 6} Appellant claims the original trial court did not comply with R.C. 2945.06 and Crim.R. 11, in that the three-judge panel accepted his guilty plea without taking any evidence, without deliberating or making a unanimous determination about the appropriateness of the charges, and without finding that the aggravated murder had been proven beyond a reasonable doubt. Appellant relies upon *Green* for the proposition that the judgment of a trial court that fails to follow the requirements of R.C. 2945.06 and Crim.R. 11(C) is void. Appellant then relies upon *Boswell* for the proposition that, when a trial court is confronted with an untimely or successive petition for post-conviction relief that challenges a void sentence, it must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant.

{¶ 7} However, *Kelley v. Wilson*, 103 Ohio St.3d 201, 2004-Ohio-4883, ¶ 14, called into doubt the holding in *Green*. In *Kelley*, like in *Green*, the defendant argued that the trial court did not comply with R.C. 2945.06 because it heard no testimony, failed to determine the appropriateness of the charges, and did not journalize any finding of guilt. The Supreme Court of Ohio held that "despite our language in [*Green*] that the specified errors [in failing to follow the requirements of R.C. 2945.06 and Crim.R. 11(C)] rendered the sentence 'void,' the judgment was voidable and properly challenged on direct appeal." The Supreme Court later acknowledged that *Kelley* called this portion of *Green* into doubt in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 11 (recognizing that the court has not always used "void" and "voidable" as properly and precisely as possible, citing the later clarification of *Green* in *Kelley*). See also *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, ¶ 11 (9th Dist.) (indicating the Supreme Court has recognized its own confusion between void and voidable sentences, citing *Green* and *Kelley*). Thus, the Supreme Court has made clear that a judgment rendered by a trial court that fails to comply with R.C. 2945.06 and Crim.R. 11(C) is voidable and not void. This court has recently found similarly. See *State v. Nelson*, 10th Dist. No. 11AP-720, 2012-Ohio-1918, ¶ 8-9 (concluding that the failure to comply with the requirements of R.C. 2945.06 constitutes an error in the court's exercise of jurisdiction that renders the judgment voidable).

{¶ 8} Accordingly, appellant's argument that his motion to impose a valid sentence should not be construed as a petition for post-conviction relief is without merit. We also note that this court has before analyzed a similar motion claiming violations of Crim.R. 11(C) and R.C. 2945.06 as a petition for post-conviction relief. *See, e.g., State v. Stewart*, 10th Dist. No. 09AP-817, 2009-Ohio-6423 (motion to vacate, set aside, and correct sentence, alleging trial counsel was ineffective for not objecting to the court's violations of Crim.R. 11(C)(3) and R.C. 2945.06, was construed by the trial court and analyzed by this court as a petition for post-conviction relief). Therefore, the trial court did not err when it found appellant's motion to be a petition for post-conviction relief.

{¶ 9} The appropriate standard of review used by an appellate court when reviewing a trial court's decision to dismiss a petition for post-conviction relief without an evidentiary hearing involves a mixed question of law and fact to determine whether the petition states substantive grounds for relief; thus, the trial court's decision on factual issues is reviewed using a manifest weight standard of review, whereas the trial court's decision on legal issues is reviewed de novo. *Id.* at ¶ 4, citing *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, ¶ 9.

{¶ 10} In the present case, the trial court found appellant did not timely file his petition. Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief must be filed no later than 180 days after the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence or, if no direct appeal is taken, 180 days after the expiration of the time to file an appeal. *See* App.R. 3(A) and 4(A). In the present case, appellant filed his petition more than 24 years after the expiration of the time to file an appeal. Thus, the petition was untimely.

{¶ 11} A trial court is not permitted to entertain a petition that is filed after the timeframe in R.C. 2953.21(A)(2) unless the conditions of R.C. 2953.23(A)(1) or (A)(2) are met. R.C. 2953.23(A). Pursuant to R.C. 2953.23(A), as relevant to this case, a court may not entertain a petition filed after the expiration of the period prescribed in R.C. 2953.21(A) unless both of the following are met:

- (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.

R.C. 2953.23(A)(1)(a) and (b).

{¶ 12} In the present case, appellant's claims are based upon Crim.R. 11(C)(3), which requires a panel of three judges to accept a plea of guilty to a charge of aggravated murder with specifications, and R.C. 2945.06, which provides that, in cases where a defendant pleads guilty to aggravated murder, a court composed of three judges must examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. Specifically, appellant asserts that the three-judge panel accepted his guilty plea without taking any evidence, without deliberating or making a unanimous determination about the appropriateness of the charges, and without finding that the aggravated murder had been proven beyond a reasonable doubt. However, these facts were known to and discoverable by appellant at the time of the trial court's original judgment and sentence, and appellant was not unavoidably prevented from discovering these facts and presenting them to the court in a timely manner. *See Stewart* at ¶ 9 (where the defendant's petition for post-conviction relief was based upon violations of Crim.R. 11(C)(3) and R.C. 2945.06, these facts were known to the defendant at time of judgment and sentencing). Furthermore, appellant also failed to claim that the United States Supreme Court recognized a new federal or state right that applies retroactively to him. As appellant failed to meet the conditions of R.C. 2953.23(A)(1)(a), the trial court was not permitted to entertain his petition for post-

conviction relief. Therefore, the trial court did not err when it found appellant's petition untimely.

{¶ 13} We also note that, because the evidence was known to appellant as of the time of the original judgment, appellant's claims could have been raised on direct appeal, and they are barred under the doctrine of res judicata. *See Stewart* at ¶ 10 (because the defendant's claims regarding violations of Crim.R. 11(C)(3) and R.C. 2945.06 could have been raised on direct appeal, appellant's petition for post-conviction relief was also barred under the doctrine of res judicata), citing *State v. Scudder*, 131 Ohio App.3d 470 (10th Dist.1998). *See also State v. Collier*, 8th Dist. No. 96075, 2011-Ohio-3988, ¶ 14 (res judicata barred untimely petition for post-conviction relief when it claimed a violation of R.C. 2945.06, which could have been raised on direct appeal), citing *Stewart*; *State v. Melton*, 8th Dist. No. 93299, 2010-Ohio-4476 (same), citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, syllabus, and *Stewart*. For these reasons, the trial court did not err in denying appellant's petition because it was untimely filed, and appellant's assignment of error is overruled.

{¶ 14} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
