

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 12AP-120
Plaintiff-Appellee,	:	(C.P.C. No. 10CR-4590)
v.	:	and
Michael E. Mason,	:	No. 12AP-121
Defendant-Appellant.	:	(C.P.C. No. 10CR-3411)
		(REGULAR CALENDAR)

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D E C I S I O N

Rendered on September 28, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*,  
for appellee.

*Michael E. Mason*, pro se.

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APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶1} Defendant-appellant, Michael E. Mason, appeals pro se from a judgment of the Franklin County Court of Common Pleas denying his motions "for relief of judgment" in two related criminal cases. For the following reasons, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

{¶2} On December 13, 2010, appellant entered guilty pleas to multiple criminal offenses in two separate cases, including multiple counts of theft, telecommunications fraud, and forgery. On December 21, 2010, the trial court entered judgments of conviction, adopted a joint sentencing recommendation, and sentenced appellant to a total of four years and eleven months for both cases. Appellant's offenses involved numerous victims, to whom appellant was ordered to pay restitution. Appellant did not appeal the convictions nor his sentencing.

{¶3} Nearly a year later, on November 2, 2011, appellant filed motions in the two cases asserting that the trial court's judgment was void based on "allie[d]-offense error." He argued that his convictions and sentences denied him his constitutional right to be free from multiple punishments based on the same conduct, in violation of the Double Jeopardy Clause of the United States Constitution. Appellant further argued that the alleged allied offenses should merge under the doctrine established in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, which the Supreme Court of Ohio decided on December 29, 2010, a week after appellant's sentence was journalized. Finally, appellant argued that the trial court erred in ordering him to pay restitution without first having conducted a restitution hearing.

{¶4} Appellant additionally asserted that his fraudulent activities affected trucking companies involved in interstate commerce and that only the federal district court had jurisdiction over those offenses. He contended that the trial court therefore lacked subject-matter jurisdiction in the criminal prosecutions. Appellant further argued that the trial court had erred in ordering him to pay restitution to these trucking companies.

{¶5} On January 27, 2012, the trial court denied appellant's motions. The court found them to be, in legal effect, motions for postconviction relief and untimely filed. The court observed that his postconviction relief motions were subject to a 210-day time limit and that appellant had filed his motion well after the jurisdictional deadline.

{¶6} Appellant timely appealed the denial of his motions to this court and we consolidated the two cases. Appellant alleges three errors in the trial court, which can be summarized as follows: (1) failure to properly apply R.C. 2941.25, the allied offenses statute; (2) failure to conduct a separate evidentiary hearing prior to making an order of restitution; and (3) deprivation of his right to effective assistance of counsel.

## II. ANALYSIS

{¶7} R.C. 2953.21(J) provides that postconviction relief "is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case." This court has repeatedly recognized that motions "[seeking] to correct or vacate sentence should be construed as a motion for postconviction relief under R.C. 2953.21." *State v. Banks*, 10th Dist. No. 12AP-96, 2012-Ohio-3770, ¶ 6, citing *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 6; *State v. Reynolds*, 79 Ohio

St.3d 158, 160 (1997); *State v. McAllister*, 10th Dist. No. 06AP-843, 2007-Ohio-1816, ¶ 6; and *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11.

{¶8} In *Banks*, this court further recognized that, pursuant to R.C. 2953.21(A), a motion for postconviction relief must be filed within 180 days after the expiration of the time for filing an appeal. *Banks* at ¶ 8. See also R.C. 2953.21(A)(2) ("If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."). Accordingly, a trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless the petition demonstrates that an exception provided in R.C. 2953.23(A) applies. *Banks* at ¶ 9.

{¶9} Appellant's time for filing a petition for postconviction relief expired on or about July 19, 2011 (180 days from the last date upon which appellant could, pursuant to App.R. 4(A), timely file a direct appeal, i.e., January 20, 2011). But appellant filed his motions on November 2, 2011—clearly beyond the statutory deadline for the filing of a postconviction petition in the absence of an exception. As in *Banks*, appellant has neither argued nor established that either of the exceptions provided in R.C. 2953.23(A) applies so as to allow the trial court to consider his untimely petition. As in *Banks*, we therefore conclude that the trial court lacked jurisdiction to entertain his petition for postconviction relief.

{¶10} Moreover, "[u]nder the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." (Emphasis omitted.) *State v. Scudder*, 131 Ohio App.3d 470, 476 (10th Dist.1998), quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967). "It is well settled that constitutional issues may not be considered in a postconviction proceeding where they have already been, or could have been, litigated by the defendant on direct appeal." *Id.* The three arguments appellant raises here, i.e., application of the allied offenses statute, the lack of a restitution hearing, and the effectiveness of his trial counsel could have been raised on direct

appeal. Since they were not, appellant's motions are similarly barred by the doctrine of res judicata. *Compare State v. Tucker*, 10th Dist. No. 12AP-158, 2012-Ohio-3477, ¶ 13.

### III. CONCLUSION

{¶11} The trial court correctly found that it lacked jurisdiction to entertain appellant's motions, which it properly construed as an untimely petition for postconviction relief. Moreover, appellant's claims are barred by the doctrine of res judicata. Accordingly, all three of appellant's assignments of error are overruled, and we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., and CONNOR, J., concur.

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