

[Cite as *State v. Timmons*, 2012-Ohio-2079.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-895
	:	(C.P.C. No. 04CR-1714)
John W. Timmons,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 10, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

*John W. Timmons*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, John W. Timmons, from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to vacate and correct sentences.

{¶ 2} On March 12, 2004, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11, and one count of intimidation of a crime victim or witness, in violation of R.C. 2921.04. The case was tried before a jury, and the jury returned verdicts finding appellant guilty of both counts. By entry filed July 26, 2004, the trial court sentenced appellant to seven years incarceration for felonious assault, and four years incarceration for intimidation of a crime victim or witness, with the sentences to be served consecutively. Following an appeal, this court affirmed appellant's convictions. *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶ 3} On April 14, 2011, appellant filed a motion for judicial release, which the trial court subsequently denied. On August 26, 2011, appellant filed a motion to vacate and correct sentences pursuant to R.C. 2941.25. On September 9, 2011, plaintiff-appellee, the state of Ohio, filed a memorandum contra appellant's motion. On September 21, 2011, the trial court filed a decision and entry denying appellant's motion to vacate or correct sentences.

{¶ 4} On appeal, appellant sets forth the following four assignments of error for this court's review:

#### FIRST ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court erred as a matter of law whereas, Appellant's sentence was contrary to law because the Trial Court failed to apply all Ohio Revised Code statutorily mandated sentencing provisions to the Appellant's conviction.

#### SECOND ASSIGNMENT OF ERROR FOR REVIEW

The trial court erred as a matter of law whereas, Appellant's convictions for Felonious Assault in violation of R.C. 2903.11, and Count Two, Intimidation of a Crime Victim or Witness, in violation of R.C. 2921.04, are Allied Offenses of similar import.

#### THIRD ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court abused its discretion, committed plain error and violated Appellant's right to due process under the 14th Amendment of the U.S. Constitution, and Sec. 16, Art. I of the Ohio Constitution, when at the sentencing it failed to apply all Ohio Revised Code statutorily mandated sentencing provisions, specifically whether Appellant's convictions were allied offenses of similar import under R.C. 2941.25.

#### FOURTH ASSIGNMENT OF ERROR FOR REVIEW

The Trial Court Abused its discretion, when it issued its ruling and ignored Appellant's motion requesting findings of facts and conclusions of law.

(Sic passim.)

{¶ 5} Appellant's assignments of error are somewhat interrelated and will be considered together. Under these assignments of error, appellant argues that: (1) the trial

court, in imposing sentence, erred by failing to merge the counts pursuant to the mandatory sentencing provision of R.C. 2941.25, in violation of double jeopardy protections; (2) the trial court abused its discretion and violated appellant's right to due process by denying his motion to correct sentence; and (3) the court abused its discretion in ignoring his request for findings of fact and conclusions of law.

{¶ 6} At the outset, we construe appellant's motion to vacate or correct sentences as a petition for post-conviction relief. *See State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997) (in construing definition of criteria under which post-conviction relief may be sought, "where 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 that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21"). *See also State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11 (treating defendant's motion to vacate or set aside sentence imposed pursuant to R.C. 2941.25 "as a petition for post-conviction relief since it was filed subsequent to his direct appeal, it is based on an alleged violation of his constitutional rights, he asserts that the judgment is void, and he requests that his sentence be vacated").

{¶ 7} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief "shall be filed no later than one hundred eighty 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 or adjudication." In the instant case, appellant was convicted on July 26, 2004, but did not file his motion to vacate until August 26, 2011, well beyond the statutory time requirements.

{¶ 8} A court may still entertain an untimely petition if the conditions of R.C. 2953.23(A) are met. *State v. Wolfel*, 10th Dist. No. 08AP-388, 2008-Ohio-4596, ¶ 10. Specifically, R.C. 2953.23(A)(1)(a) allows a trial court to entertain an untimely petition if: "(1) the petitioner was unavoidably prevented from discovering the facts on which the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and the petition asserts a claim based on that new right." *State v. Williams*, 8th Dist. No. 85180, 2005-Ohio-3023, ¶ 13. Further, "R.C. 2953.23(A)(1)(b) also requires that 'the petitioner show by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder

would have found the petitioner guilty of the offense of which the petitioner was convicted.' " *Id.* at ¶ 14.

{¶ 9} Appellant does not discuss the issue of timeliness in his appellate brief. While appellant's brief cites the Supreme Court of Ohio's recent decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, addressing whether two offenses are allied offenses of similar import pursuant to R.C. 2941.25, "that case does not assist defendant in meeting the timeliness requirement because R.C. 2953.23(A)(1)(a) requires a decision from the United States Supreme Court, not one from the Ohio Supreme Court." *State v. Rutledge*, 10th Dist. No. 11AP-853, 2012-Ohio-2036, ¶ 11. A trial court lacks jurisdiction to hear an untimely petition for post-conviction relief unless the petitioner meets the requirements in R.C. 2953.23(A). *State v. Aleshire*, 5th Dist. No. 2011-CA-99, 2012-Ohio-772, ¶ 20, citing *State v. Demastry*, 5th Dist. No. 05CA14, 2005-Ohio-4962, ¶ 15.

{¶ 10} A trial court may also dismiss a petition for post-conviction relief if it determines that the doctrine of res judicata is applicable. *Aleshire* at ¶ 21, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996). Res judicata precludes a defendant from raising an issue "in a motion for postconviction relief if he or she could have raised the issue on direct appeal." *Reynolds* at 161, citing *State v. Duling*, 21 Ohio St.2d 13 (1970). *See also State v. Lester*, 3d Dist. No. 2-11-20, 2012-Ohio-135, ¶ 13, citing *State v. Wilson*, 3d Dist. No. 1-08-60, 2009-Ohio-1735, ¶ 15 ("motions for post-conviction relief will be barred by the doctrine of res judicata if they raise on appeal an issue that could have been raised or was raised on direct appeal").

{¶ 11} In the present case, even assuming that appellant's petition had been timely, the trial court would have been barred from considering the claims under the doctrine of res judicata as appellant's arguments with respect to allied offenses and merger "under R.C. 2941.25 could have been resolved in defendant's direct appeal." *Rutledge* at ¶ 13. *See also Lester* at ¶ 14 ("the issue of allied offenses raised in post-conviction relief motions are barred by the doctrine of res judicata as the proper time to raise it is on the direct appeal").

{¶ 12} Appellant's contention that the trial court's 2004 sentence is void is not persuasive. *State v. Parson*, 2d Dist. No. 24641, 2012-Ohio-730, ¶ 9 (to the extent trial court may have erred at time of sentencing in finding that convictions for felonious assault and kidnapping were not allied offenses of similar import, defendant's "sentence

would be voidable, but in no way is the sentence illegal so as to render it void"). *See also State v. Cioffi*, 11th Dist. No. 2011-T-0072, 2012-Ohio-299, ¶ 13, citing *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6096, ¶ 15-16; ("Cioffi's argument that the trial court failed to comply with R.C. 2941.25, if meritorious, would only render the judgment voidable, in that it does not challenge the court's jurisdiction or authority to sentence, but, rather, the propriety of the sentences imposed"). Further, "[a]rguments challenging the imposition of a sentence that is voidable are barred by the doctrine of res judicata if not raised on direct appeal." *Britta* at ¶ 17. *See also Cioffi* at ¶ 14 ("Consistent with the proposition that the failure to merge sentences renders a judgment voidable, this court and others have held that such challenges, if not raised on direct appeal, are barred by the doctrine of res judicata. ").

{¶ 13} We also find unpersuasive appellant's argument that the Supreme Court of Ohio's recent decision in *Johnson* mandates a "change of law exception to res judicata" in the present case. *See Parson* at ¶ 11, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6 ("Defendant cannot rely on the Supreme Court's recent decision in *Johnson* because '[a] new judicial ruling may be applied only to cases that are pending on the announcement date. \* \* \* The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.' ").

{¶ 14} Finally, we find no merit to appellant's contention that the trial court erred in ignoring his request for findings of fact and conclusions of law. *See State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, ¶ 6 ("a trial court need not issue findings of fact and conclusions of law when it dismisses an untimely petition").

{¶ 15} Based upon the foregoing, appellant's first, second, third, and fourth assignments of error are without merit and are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

BRYANT and DORRIAN, JJ., concur.

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