

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1007
Timothy C. Garnett,	:	(C.P.C. No. 09CR-06-3239)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Timothy C. Garnett, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Timothy C. Garnett ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas denying his motion for relief from judgment. Because appellant's "motion" is untimely, and because his claims are barred by res judicata, we affirm the judgment of the trial court.

{¶ 2} On June 1, 2009, appellant was indicted on charges of carrying concealed weapon, improperly handling firearms in a motor vehicle, and having a weapon while under disability. The charges arose as a result of a traffic stop that occurred on January 31, 2009. Appellant's motions to suppress were denied and the matter proceeded to trial. Following a jury trial, appellant was found guilty on all three counts. A sentencing hearing was held on November 17, 2009. The trial court sentenced appellant

to a total sentence of four years in this case, to be served consecutively to a sentence imposed in an unrelated matter. On November 20, 2009, a judgment entry was filed journalizing the convictions and sentences.

{¶ 3} On December 9, 2009, appellant filed a timely direct appeal. Appellant raised two assignments of error, arguing the trial court erred in overruling both his motion to suppress evidence (the gun found in the vehicle), as well as his motion to suppress statements made to police. On December 2, 2010, this court issued a decision affirming appellant's convictions. *See State v. Garnett*, 10th Dist. No. 09AP-1149, 2010-Ohio-5865. Appellant's discretionary appeal to the Supreme Court of Ohio was not accepted for review. *See State v. Garnett*, 128 Ohio St.3d 1447, 2011-Ohio-1618. A subsequent motion for reconsideration was also denied. *State v. Garnett*, 128 Ohio St.3d 1504, 2011-Ohio-2420.

{¶ 4} On June 10, 2011, appellant filed a "motion for relief from judgment pursuant to Civil Rule 60(B)(5) and Crim.R. 57(B) and Crim.R. 52(B)." Appellant argued he should be granted relief from judgment because the trial court erred by: (1) failing to grant the Crim.R. 29 motion for acquittal; (2) denying his motion in limine regarding the admission of prior bad acts; (3) refusing to allow submission of the vehicle inventory slip into evidence; (4) permitting professional testimony from a police officer; (5) allowing improper jury instructions; (6) sentencing appellant on allied offenses of similar import; (7) sentencing appellant for a higher level felony than specified in the indictment; (8) accepting a jury verdict form that lacked required findings; and (9) denying appellant due process as a result of the ineffective assistance of counsel. Plaintiff-appellee, the State of Ohio ("the State"), filed a response recasting the motion as a post-conviction petition and requesting that the petition be denied. Appellant then filed a response. The trial court viewed appellant's motion as a petition for post-conviction relief and denied appellant's request for relief on September 29, 2011. Appellant now asserts ten assignments of error for our review:

[I.] Did Trial Court Abuse[] it[s] Discretion in recasting Appellant's Motion for Relief From Unjust Operation of Judgment pursuant to Civ.R. 60(B)(5) and Crim.R. 52(B) Plain Error violating appellant[']s 14th Amendment rights and O Const I Sec 1 Inalienable rights.

[II.] Did Trial Court[] Abuse it[]s Discretion in failing to grant defense[]s request for Acquittal under criminal rule 29, According to the manifest weight and sufficiency of the evidence violating appellant[]s 14th Amendment rights and O Const I Sec.1 Inalienable rights[.]

[III.] Did Trial Court Abuse[] it[s] discretion and commit Structural and Plain error when it denied defendant's motion in limine, which would have suppressed defendant's Prior Bad Acts and unwarranted statements and phone conversation that prejudiced, and inflamed the jury and violated Appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 guaranteeing equal protection and Due Process.

[IV.] Did Trial Court abuse[] it[s] discretion when it denied defense permission to submit the police inventory slip into the record as relevant evidence on behalf of the defense which caused the jury to err[]r and unreasonably and incompetently weigh[] evidence properly, violating the appellant's 14th Amendment Right and O Const Art 1 sec 2.

[V.] Did Trial Court commit Plain Error, Obvious Error, and Abuse of Discretion and Prejudice in allowing Officer Pruitt to give professional/expert testimony which caused the jury to err through the misrepresentation of the facts violating appellant's 14th amendment right and O Const. Art 1 Sec 2 both guaranteeing equal protection.

[VI.] Did Trial Court commit Plain Error in sentencing defendant on three separate charges of similar import that he could only be found guilty of only one and sentenced for only one in violation of Appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 both guaranteeing equal protection and Due Process.

[VII.] Did Trial Court commit Plain Error when it sentenced defendant on felony three weapon under disability even though jury verdict only found defendant guilty of weapon under disability without stating degree, which would only be the least degree of the offense without special findings cited under R.C. 2945.75 in violation of Appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 both guaranteeing equal protection and Due Process[.]

[VIII.] Did Jury verdict not render the necessary and required verdict findings namely venue, time and date to convict defendant of charges required by jury instructions which are grounds for relief by acquittal in violation of appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 guaranteeing equal protection and Due Process[.]

[IX.] Was there Ineffective Assistance of Trial Counsel and Abuse of Discretion by Trial Court In same matter that follows being a violation of Appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 both guaranteeing equal protection and Due Process.

[X.] Did Trial Court Abuse[] it[s] Discretion an[d] commit a structural error in allowing prosecution to give definitions on common usage words during jury instructions that needed no interpreted definition, thus misleading the jury and causing the jury to err, violating Appellant's 14th amendment rights, O Const. Art 1 Sec 1 and O Const. Art 1 Sec 2 both guaranteeing equal protection and Due Process.

{¶ 5} Collectively, appellant's ten assignments of error set forth various arguments in support of his assertion that the trial court erred in denying his motion for relief from judgment. In his first assignment of error, appellant challenges the trial court's decision to recast his motion as a petition for post-conviction relief. In his nine remaining assignments of error, appellant sets forth numerous errors which are virtually identical to those raised in his motion before the trial court.

{¶ 6} The State argues the trial court properly recast the motion as a post-conviction petition. The State further argues the trial court properly overruled appellant's petition without a hearing because: (1) the petition was untimely; (2) appellant cannot meet any exception that would permit an untimely filing; and (3) the claims for relief are all based on evidence in the record, and thus they are barred by res judicata.

{¶ 7} To the extent appellant intended for his motion to allow relief from judgment pursuant to Civ.R. 60(B)(5), his motion must fail. Civ.R. 60(B)(5) does not apply in these circumstances and courts may cast an irregular motion into whatever category is necessary to identify the criteria by which the motion should be judged. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12 and at the syllabus ("The trial court may recast an appellant's motion for relief from judgment as a petition for

postconviction relief when the motion has been unambiguously presented as a Civ.R. 60(B) motion."). *See also State v. Easley*, 10th Dist. No. 09AP-10, 2009-Ohio-3879, ¶ 7. Therefore, it was proper for the trial court to recast appellant's motion as a post-conviction petition pursuant to R.C. 2953.21 et seq.

{¶ 8} The right to seek post-conviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 9} Post-conviction petitions must also be timely. Under R.C. 2953.21(A)(2), petitions must 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[.]" Here, it appears the record was supplemented with appellant's trial transcript on January 19, 2010. Thus, appellant's post-conviction petition was due to be filed on or about July 18, 2010. As a result, his June 10, 2011 petition, which was filed nearly a year after the deadline, is untimely.

{¶ 10} When a post-conviction petition is untimely, the trial court lacks jurisdiction to consider it, unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). *See State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶ 8; *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8; *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶ 5; and *State v. Soulivong*, 10th Dist. No. 11AP-12, 2011-Ohio-3601, ¶ 11. "If a petition for post-conviction relief is untimely filed, a trial court has jurisdiction to entertain the petition only if the limited conditions of R.C. 2953.23(A) are satisfied." *State v. Easley*, 10th Dist. No. 04AP-290, 2004-Ohio-7200, ¶ 10. *See also State v. Martin*, 10th Dist. No. 06AP-798, 2007-Ohio-1844, ¶ 9 (the timeliness requirement of R.C. 2953.21 is jurisdictional, and as a

result, a trial court is without authority to adjudicate an untimely petition unless the petitioner complies with R.C. 2953.23(A)(1).

{¶ 11} Pursuant to R.C. 2953.23(A)(1), a court may not entertain an untimely petition unless the petitioner satisfies a two-pronged test by demonstrating that: (a) he was unavoidably prevented from discovering the facts upon which he relies to advance his petition, or that his claim is based upon a newly recognized federal or state right that applies retroactively to persons in his situation and the petition asserts a claim based upon that right; and (b) clear and convincing evidence demonstrates that no reasonable fact finder would have found him guilty in the absence of the alleged constitutional error or, if the claim challenges a sentence of death, in the absence of the constitutional error that occurred at the sentencing hearing.

{¶ 12} Alternatively, the trial court could also consider an untimely petition if the petitioner presented DNA evidence establishing his actual innocence by clear and convincing evidence. *See* R.C. 2953.23(A)(2).

{¶ 13} Because appellant has failed to demonstrate that he meets one of the exceptions to the timely filing requirement, we find the trial court properly denied his request for relief.

{¶ 14} Under the first exception, a trial court may consider an untimely petition if the petitioner shows he was unavoidably prevented from discovery of the facts upon which he must rely to present his claim for relief. *See* R.C. 2953.23(A)(1)(a). However, in the instant case, appellant cannot invoke this exception because there are no "new" facts at issue here. Instead, appellant has based his claims upon evidence which is already in existence in the record, not on any "new" evidence.

{¶ 15} With regard to the second alternative under the first prong of R.C. 2953.23(A)(1)(a), this exception is not applicable. Appellant has not argued, and furthermore, cannot demonstrate, that the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in his situation that would entitle him to relief.

{¶ 16} Finally, the exception for actual innocence established via DNA evidence is clearly not applicable here, as there is no DNA evidence at issue.

{¶ 17} Therefore, because appellant's petition was not timely filed, and because appellant has not met one of the exceptions which could overcome this jurisdictional bar, we find the trial court properly determined appellant's petition was untimely.

{¶ 18} We also find appellant's petition is barred by res judicata.

{¶ 19} Under the doctrine of res judicata, a "'[f]inal 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.'" *State v. Jackson*, 10th Dist. No. 01AP-808, 2002-Ohio-3330, ¶ 42 (emphasis sic), quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996); and *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "Res judicata is applicable in all postconviction relief proceedings." *Szefcyk* at 95.

{¶ 20} Here, all of appellant's claims for relief were based on evidence in the record and all of the arguments raised (with the exception of his first assignment of error addressing the trial court's decision to recast his motion as a post-conviction petition) could have been raised in his direct appeal without resorting to evidence outside of the record. As a result, res judicata applies to this post-conviction petition to bar him from raising an issue that was or could have been raised in his direct appeal. *See State v. Scudder*, 131 Ohio App.3d 470, 475 (10th Dist.1998) ("A petition for postconviction relief may be dismissed without a hearing, based upon the doctrine of res judicata, when the trial court finds that the petitioner could have raised the issues in his petition at trial or on direct appeal without resorting to evidence which is beyond the scope of the record."). *See also State v. Mason*, 10th Dist. No. 12AP-120, 2012-Ohio-4510, ¶ 10, quoting *Scudder* at 475 ("'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.'").

{¶ 21} Consequently, even if appellant's petition had been timely, we find res judicata bars appellant from raising these arguments now in a post-conviction petition.

{¶ 22} In conclusion, because appellant's petition was untimely and failed to meet any exception justifying the filing of an untimely petition, and because these claims are

also barred by res judicata, we find the trial court did not err in denying appellant's motion for relief. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
