

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 12AP-1055
	:	(C.P.C. No. 03CR-7014)
v.	:	
	:	(REGULAR CALENDAR)
Marcus D. White,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 30, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Marcus D. White, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} This is an appeal by defendant-appellant, Marcus D. White, from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to vacate and set aside a "void" judgment of conviction and sentence.

{¶ 2} On October 22, 2003, appellant was indicted on one count of aggravated murder, in violation of R.C. 2903.01, and one count of attempted murder, in violation of R.C. 2903.02 and 2923.02. The matter came for trial before a jury beginning May 20, 2005. The jury returned verdicts finding appellant not guilty of aggravated murder, but guilty of the lesser-included offense of murder, and not guilty of attempted murder, but guilty of the lesser-included offense of felonious assault. The trial court sentenced appellant by entry filed August 4, 2005.

{¶ 3} Appellant filed an appeal from his judgment of conviction and sentence, raising four assignments of error, including claims under his fourth assignment of error that the trial court erred in imposing a non-minimum prison term for felonious assault, and in ordering the sentence to be served consecutively to the sentence imposed for murder. In *State v. White*, 10th Dist. No. 05AP-1178, 2006-Ohio-4226 ("*White I*"), this court overruled appellant's assignments of error challenging the convictions as against the manifest weight of the evidence, but sustained appellant's fourth assignment of error and remanded the matter for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶ 4} On September 1, 2006, appellant filed with this court an application to reopen his appeal. In *State v. White*, 10th Dist. No. 05AP-1178 (Oct. 31, 2006) (memorandum decision) ("*White II*"), this court denied appellant's application to reopen.

{¶ 5} On October 20, 2006, the trial court conducted a new sentencing hearing, and the court sentenced appellant by entry filed October 24, 2006. Appellant filed an appeal from the trial court's judgment, asserting that the court erred in imposing consecutive sentences. This court overruled appellant's assignment of error and affirmed the judgment of the trial court. *State v. White*, 10th Dist. No. 07AP-743, 2008-Ohio-701 ("*White III*").

{¶ 6} On September 13, 2012, appellant filed a motion to vacate and set aside his judgment of conviction and sentence, asserting that the judgment was void. By decision and entry filed November 30, 2012, the trial court, treating the motion as a petition for post-conviction relief, denied the motion on the grounds that it was "untimely, barred by res judicata and * * * lacks merit."

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

THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT RULED THE DEFENDANT'S SENTENCE/JUDGMENT WAS BARRED BY THE DOCTRINE OF RES JUDICATA AND SIMPLY IGNORED IT'S DUTY AS SPECIFIED BY THE MANDATES OF THE OHIO SUPREME COURT.

{¶ 8} Under his single assignment of error, appellant argues that his judgment of conviction is void on the basis that, during his jury trial, the trial court, in instructing the

jury as to the offense of murder, erred in failing to give instructions on voluntary manslaughter (under R.C. 2903.03) and involuntary manslaughter (under R.C. 2903.04). Appellant also argues that the trial court, in considering his motion to vacate, erred in treating the motion as a petition for post-conviction relief.

{¶ 9} In general, "where a criminal defendant, subsequent to his direct appeal, files a motion seeking to vacate or correct his sentence on the basis that his constitutional rights have been violated, such a motion is deemed a petition for post-conviction relief." *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521, ¶ 8, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). Because a petition for post-conviction relief is a "collateral civil attack on a criminal judgment" and not an appeal of that judgment, such a petition " 'is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained' in the trial court record." *Rippey* at ¶ 9, quoting *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). Further, "R.C. 2953.21 affords a prisoner post-conviction relief 'only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.' " *Id.*, quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph four of the syllabus.

{¶ 10} As noted under the facts, the trial court, in addition to finding that appellant's petition was barred by res judicata, also found the petition to be untimely. 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." Pursuant to R.C. 2953.23(A)(1)(a), a trial court may 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.

{¶ 11} Appellant does not argue the existence of either of the requirements of R.C. 2953.23(A)(1)(a). Rather, he argues that the trial court should not have treated his motion to vacate as a petition for post-conviction relief, relying upon *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. However, the decision in *Boswell* involved the trial court's failure to include post-release control as mandated by statute. Under *Boswell*, because the defendant's sentence was void for failure to include statutory post-release control notification, the Supreme Court held that the defendant's motion to withdraw his plea "must accordingly be treated as a presentence motion." *Id.* at ¶ 13.

{¶ 12} In the instant case, the trial court found that the judgment of conviction was not void. In so holding, the court rejected appellant's argument that juries considering the elements of murder under R.C. 2903.02 must always be instructed on R.C. 2903.03 and 2903.04 in order to make a finding that the predicate felony offense of violence is not voluntary or involuntary manslaughter. We agree with the trial court's analysis. *See State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 81, quoting *State v. Shane*, 63 Ohio St.3d 630 (1992), paragraph one of the syllabus ("Before giving an instruction on voluntary manslaughter in a murder case, the trial court must determine 'whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction' "); *State v. Smith*, 1st Dist. No. C-080685 (July 1, 2009) (in conviction for murder and felony murder, trial court did not err in failing to instruct jury on offenses of voluntary manslaughter and involuntary manslaughter where evidence did not warrant lesser-included instruction).

{¶ 13} In addressing appellant's motion to vacate, the trial court also addressed the merits of appellant's claim with respect to the particular facts and circumstances of his case, holding in relevant part:

As it relates to this specific case, manslaughter instructions were not warranted. First, the Defendant requested and was granted a self defense instruction as to Aggravated Murder in Count One of the indictment. The Defendant cannot have it both ways. Either he intentionally shot the victim in self defense or he acted in the heat of passion as a result of provocation. The two are mutually exclusive. Secondly, the

trial evidence warranted a self defense instruction and did not warrant any manslaughter instruction. Finally, the jury found the Defendant guilty of the lesser included offense in Count One of Murder [R.C.] 2903.02(B). They specifically found the predicate offense to be Felonious Assault. In essence, they made a specific finding that the predicate offense was "not a violation of Section 2903.02 or 2903.04 of the Revised Code."

{¶ 14} Again, we find no error with the trial court's analysis. Further, appellant's claim that he was entitled to instructions on voluntary and involuntary manslaughter was previously addressed and rejected by this court in addressing appellant's application to reopen. Specifically, in *White II*, this court held in relevant part:

Appellant raises in his seventh proposed assignment of error that the trial court violated his right to a fair trial when it refused to instruct the jury on the offenses of voluntary and involuntary manslaughter with regard to the death of his mother-in-law, Debra Green.

Here, appellant was charged with aggravated murder. * * * R.C. 2903.03 defines voluntary manslaughter and states that "[n]o person, while under the influence of sudden passion or in a sudden fit of rage * * * shall knowingly cause the death of another." "Before giving a voluntary-manslaughter instruction in a murder case, the trial court must determine 'whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.' "

In the present case, there exists no evidence in the record to require an instruction on voluntary manslaughter. At trial, appellant's contention was that he acted in self-defense out of fear that an unidentified person, Green, was running toward him with a metallic object in hand, which was actually her cell phone. Appellant claimed that Green's grandson told his friend to get his gun while making threats to kill appellant. Appellant never testified that he was enraged or lost his temper, but only that he feared for his life and was scared. A defendant's claim that he feared for his own safety does not constitute sudden passion or rage under the statute. * * * Because the evidence fails to demonstrate the requisite provocation, the trial court did not err in refusing appellant's instruction of voluntary manslaughter, and appellant's appellate counsel was not defective in failing to raise this issue as an assignment of error.

As to an instruction on involuntary manslaughter, involuntary manslaughter entails causing the death of another as a proximate result of committing or attempting to commit a felony or a misdemeanor.

In the instant case, appellant argues that the underlying offense to support the murder conviction should have been aggravated assault under R.C. 2903.12, rather than felonious assault. However, as with voluntary manslaughter, discussed above, aggravated assault under R.C. 2903.12(A) also requires that the defendant act "while under the influence of sudden passion or in a sudden fit of rage." As found above, appellant's acts occurred while scared and fearful, not while under any rage or sudden passion. * * * Therefore, the trial court did not err in refusing to give the requested jury instruction on involuntary manslaughter.

(Citations omitted.)

{¶ 15} A petition for post-conviction relief may be dismissed by the trial court "when the claims raised in the petition are barred by the doctrine of res judicata." *Rippey* at ¶ 10. Under this doctrine, "a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if defendant raised or could have raised the issue at trial or on direct appeal." *Id.*

{¶ 16} In the present case, the claims raised by appellant could have been raised on direct appeal and were, in fact, raised and rejected by this court in appellant's application to reopen his appeal. Here, the trial court did not err in concluding that appellant's petition was untimely and that it was barred under the doctrine of res judicata. Accordingly, appellant's assignment of error is without merit.

{¶ 17} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER & CONNOR, JJ., concur.
