

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 12AP-1080
Plaintiff-Appellee,	:	(C.P.C. No. 04CR-6666)
v.	:	
	:	(REGULAR CALENDAR)
Peter A. Thompkins,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 20, 2013

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*,
for appellee.

Peter A. Thompkins, pro se.

APPEAL from the Franklin County Court of Common Pleas

O'GRADY, J.

{¶ 1} Defendant-appellant, Peter A. Thompkins, appeals from the November 28, 2012 judgment of the Franklin County Court of Common Pleas that denied his February 29, 2012 petition for postconviction relief. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This is the fourth time appellant has appealed to this court following his convictions for attempted murder and two counts of felonious assault in 2005. On November 21, 2006, we affirmed appellant's convictions and sentence finding that he failed to establish he received ineffective assistance of counsel, the trial court properly did not merge appellant's attempted murder and felonious assault convictions for the purposes of sentencing, and the sentence imposed by the trial court did not violate appellant's double jeopardy rights. *State v. Thompkins*, 10th Dist. No. 06AP-310, 2006-

Ohio-6148 ("*Thompkins I*"), *discretionary appeal not allowed*, 114 Ohio St.3d 1425, 2007-Ohio-2904.

{¶ 3} On August 23, 2007, we affirmed the trial court's judgment denying appellant's November 2, 2006 petition for postconviction relief. *State v. Thompkins*, 10th Dist. No. 07AP-74, 2007-Ohio-4315 ("*Thompkins II*"). We lacked jurisdiction to address the merits of four out of appellant's five assignments of error because they were not based on the judgment at issue on appeal. In the sole assignment of error we considered, appellant argued the trial court erred in dismissing his petition without holding an evidentiary hearing. We overruled that assignment of error because appellant's petition, the documents attached thereto, and the record did not contain sufficient operative facts to establish substantive grounds for relief. Furthermore, res judicata barred appellant from raising speedy trial and sentencing claims that were raised or could have been raised at trial, during sentencing, or on direct appeal. Accordingly, we held that the trial court did not abuse its discretion in dismissing appellant's petition for postconviction relief without a hearing.

{¶ 4} On October 16, 2008, we affirmed the trial court's judgment denying appellant's April 24, 2008 petition for postconviction relief. *State v. Thompkins*, 10th Dist. No. 08AP-454, 2008-Ohio-5373 ("*Thompkins III*"). We determined that res judicata barred appellant's claims because he had either previously litigated them or could have previously litigated them. Additionally, appellant's petition was untimely pursuant to R.C. 2953.21(A)(2), and it was an impermissible successive petition pursuant to R.C. 2953.23(A). Therefore, the trial court did not err in denying it.

{¶ 5} On February 29, 2012, appellant filed the instant petition for postconviction relief. The trial court dismissed it on November 28, 2012, finding the petition was barred by res judicata and appellant's claims lacked merit. Appellant filed a timely appeal to this court.

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant designates the following two assignments of error for our review:

[I.] Trial court failed to follow statutory mandated law when sentencing appellant to two allied offenses without proceeding to R.C. 2941.25(B) violating appellant's rights to Due Process and Equal Protection under both United States and the Ohio

Constitution and the United States and the Ohio Constitutional Amendment 5 Double Jeopardy and Ohio Constitution Art. 1 Subsection 10 (as it applies).

[II.] The court's imposition of resjudicata [sic] violates an appellant's rights under "Due Process Clauses" of both the United States and the Ohio Constitutions when an appellant's sentence is sustained under an [sic] misinterpretation of law made by the court itself .

Because the assignments of error are interrelated, we will address them together.

III. DISCUSSION

{¶ 7} We review the trial court's ruling on appellant's petition for postconviction relief for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 60. An abuse of discretion exists when the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 8} We begin by noting, as we did in *Thompkins III*, that this appeal is based on an untimely petition for postconviction relief. *Thompkins III* at ¶ 14. Under R.C. 2953.21(A)(2), a petition shall be filed no later than 180 days after the date the trial transcript was filed in a direct appeal. The transcript was filed in appellant's direct appeal on May 10, 2006. *Id.* Therefore, appellant's February 29, 2012 petition was years late.

{¶ 9} Furthermore, appellant only raises sentencing issues in his petition. He does not contest his guilt. Therefore, the exception to the 180-day filing deadline that appears in R.C. 2953.23(A)(1) does not apply. *State v. Hughes*, 10th Dist. No. 12AP-165, 2012-Ohio-4513, ¶ 10, quoting *State v. Brown*, 12th Dist. No. CA2006-06-026, 2007-Ohio-128 ("While R.C. 2953.23(A)(1) creates an exception to the 180-day filing requirement, courts have held that a defendant does not qualify for such exception where 'the arguments in his postconviction relief petition address only sentencing issues, not issues relating to his guilt.' ").

{¶ 10} Additionally, appellant's claims regarding merger at sentencing and double jeopardy were raised and adjudicated in his 2006 direct appeal. *See Thompkins I*. Appellant was represented by counsel at trial and in that appeal. *Id.* Therefore, res judicata bars appellant from relitigating those issues now. *Thompkins III* at ¶ 12, citing

State v. Szefcyk, 77 Ohio St.3d 93 (1996)("Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal.").

{¶ 11} Finally, appellant's arguments attacking his sentence are based on his contention that the Supreme Court of Ohio's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, which guides the analysis of allied offenses under R.C. 2941.25, applies retroactively. Appellant is mistaken. *Johnson* was decided several years after appellant's convictions became final, and this and other courts have held that *Johnson* does not apply retroactively. See, e.g., *Hughes* at ¶ 16, citing *State v. Boyce*, 2d Dist. No. 11CA0095, 2012-Ohio-3713, and *State v. Hickman*, 5th Dist. No. 11-CA-54, 2012-Ohio-2182; see also *Volpe v. Trim*, 6th Cir. No. 11-4365, 2013 U.S. App. LEXIS 2158, at *29-30 (Jan. 31, 2013) (amended opinion) ("Ohio appellate courts * * * have consistently held that *Johnson* does not apply retroactively to cases where the defendant has already exhausted [his] appellate remedies."). Therefore, the trial court was correct that appellant's claims are both barred by res judicata and lack merit.

{¶ 12} Accordingly, we find that the trial court did not abuse its discretion in dismissing appellant's February 29, 2012 petition for postconviction relief. Thus, we overrule appellant's assignments of error.

IV. CONCLUSION

{¶ 13} For the foregoing reasons, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.
