[Cite as *State v. Swank*, 2013-Ohio-3703.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-177 (C.P.C. No. 01CR-3611)
Aaron Swank,	:	
Defendant-Appellant.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on August 27, 2013

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

Aaron Swank, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Aaron Swank is appealing from the trial court's failure to grant him relief from the sentence he received in 2003 following his convictions for involuntary manslaughter with a firearm specification, kidnapping, and felonious assault. He assigns three errors for our consideration:

> Assignment of Error Number One:
>
> The trial court erred to adjudicate Appellant's "Motion to Void Sentence" as being a "Petition for Post-Conviction Relief," pursuant to Ohio Rev. Code § 2953.21, because his claim was *independent* from the application of that statute.

> Assignment of Error Number Two:
>
> The trial court erred to apply the doctrine of *res judicata* because its application undermined *Agee v. Russell* (2001), 92 Ohio St. 3d 540, 751 N.E.2d 1043, and was totally unjust.
>
> Assignment of Error Number Three:
>
> The trial court erred and abused discretion when not allowing Appellant to defer court costs in accord with *State v. White* (2004), 103 Ohio St. 3d 580, 817 N.E.2d 393, and Ohio Rev. Code §§ 2947.23 and 2949.19, when the record established that Appellant is indigent.

{¶ 2} In August 2012, Swank filed a "Motion to Void Sentence." On October 9, 2012, he followed this with a motion to defer court costs.

{¶ 3} The first motion argues that the trial court judge who convicted Swank and sentenced him did not comply with R.C. 2941.25, the multiple counts statute.

{¶ 4} R.C. 2941.25 reads:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 5} The statute has been in effect since 1974 and had been in effect for over 25 years when Swank pursued a direct appeal of his conviction 10 years ago. The issue should have been raised during his direct appeal. Since it was not, it is now barred from consideration by the doctrine of res judicata ("a matter decided"). The trial court correctly ruled on this issue. The second assignment of error is overruled.

{¶ 6} We have consistently viewed motions such as Swank's motion to void sentence as a form of petition for post-conviction relief. Such petitions must be filed promptly after the transcript of the trial is prepared. Swank did not promptly file his

motion. The motion had and has no merit, so the allegation that failure to pursue the issues promptly should be excused is not persuasive.

{¶ 7} The first assignment of error is overruled.

{¶ 8} In 2004, the Supreme Court of Ohio decided *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, and indicated that the waiver of court costs is not mandatory for indigent defendants. Such costs are required by R.C. 2947.23. Swank is only a portion of the way through his 21-year prison sentence. We cannot determine if he will have the ability to pay the costs in the future, or even if he has the ability now. The trial court was not required to guess as to Swank's future or even present indigency and therefore could overrule his motion to defer collection of the judgment for court costs entered many years ago.

{¶ 9} The third assignment of error is overruled.

{¶ 10} All three assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and O'GRADY, J., concur.