

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 15AP-87
v.	:	(C.P.C. No. 09CR-588)
	:	
John W. Souza,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 25, 2015

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

John W. Souza, pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, John W. Souza ("appellant"), appeals pro se the December 29, 2014 judgment of the Franklin County Court of Common Pleas which denied his December 8, 2014 "Motion to Vacate a Void and or Voidable Sentence Pursuant to Criminal Rules 47 and 57 Request a Hearing" ("motion"). For the following reasons, we affirm.

{¶ 2} On January 19, 2010, appellant pled guilty to voluntary manslaughter, tampering with evidence, and domestic violence, all without specifications. On the same day, the parties jointly recommended ten years in prison on the voluntary manslaughter, five years on the tampering with evidence, and five years on the domestic violence, to be served consecutively for a total of twenty years in prison. The trial court accepted

appellant's pleas and the jointly recommended sentence and imposed 20 years in prison. Appellant did not appeal.

{¶ 3} On December 8, 2014, appellant filed his motion requesting the court to resentence him "in accordance with allied offenses of similar import, pursuant to R.C. 2945.25(A), and Equal Sentencing, which shall include Criminal Rule 52(B)." (Motion, 1.) In his memorandum supporting the motion, appellant argued that voluntary manslaughter and domestic violence are allied offenses of similar import, that the sentence is void, and that, pursuant to Crim.R. 47 and 57, the motion should be granted.

{¶ 4} On December 29, 2014, the trial court denied the motion. The court construed the motion as a petition for postconviction relief and found it to be untimely. Furthermore, the trial court noted the claim is barred by res judicata and lacks merit. Appellant timely appealed.

{¶ 5} Appellant asserts the following three assignments of error:

[I.] THE TRIAL COURT ERRORED [SIC] IN DENYING DEFENDANT-APPELLANT'S MOTION TO VACATE A VOID AND OR VOIDABLE SENTENCE, PURSUANT TO CRIMINAL RULES 47 AND 57, DISREGARDING THE REQUIREMENTS OF CRIMINAL RULES 47 AND 57.

[II.] THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPOSING MULTIPLE SENTENCES ON ALLIED OFFENSES OF SIMILAR IMPORT.

[III.] THE TRIAL COURT ERRORED [SIC] DISMISSING DEFENDANT-APPELLANT'S MOTION AND OR PETITION FOR POST CONVICTION RELIEF AS UNTIMELY AND BARRED BY RES JUDICATA.

For ease of discussion, we will address appellant's assignments of error out of order.

{¶ 6} In his first assignment of error, appellant argues that his sentence was void because the trial court did not comply with Crim.R. 47¹ and 57² in considering his motion.

¹ Crim.R. 47 states:

An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority, and may

Although difficult to discern, it appears that, here, appellant challenges the trial court's construing his motion as a petition for postconviction relief and finding such petition to be untimely.

{¶ 7} Pursuant to R.C. 2953.21(A)(1), an individual who has been convicted of a criminal offense may file a petition requesting that the court vacate or set aside the judgment or sentence based on a claim of denial or infringement of their rights that would render the judgment void or voidable under the Ohio or United States Constitution. We find the trial court properly construed appellant's motions as a petition for postconviction relief under R.C. 2953.21. See *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997) (construing motion to correct or vacate sentence as a petition for postconviction relief); *State v. Mason*, 10th Dist. No. 12AP-120, 2012-Ohio-4510 (citing multiple cases construing motions seeking to correct or vacate sentences as motions for post-conviction relief); *State v. Holland*, 5th Dist. No. 09-CA-120, 2010-Ohio-226, ¶ 13 ("[W]e find appellant's motion to amend sentence is a petition for postconviction relief as defined in R.C. 2953.21.").

also be supported by an affidavit. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

² Crim.R. 57 states:

(A) Rule of court

(1) The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.

(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Procedure not otherwise specified:

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

{¶ 8} With certain exceptions, a petition for postconviction relief must be filed within 180 days of the trial transcript being filed in the court of appeals in the direct appeal of the judgment of conviction or, if no direct appeal is taken, within 180 days of the end of the time for filing an appeal. R.C. 2953.21(A)(2). The statute provides that a court may entertain an untimely petition for postconviction relief where the petitioner shows that he was unavoidably prevented from discovery of the facts upon which he relies in presenting the claim or that the United States Supreme Court recognized a new federal or state right that applies retroactively and that he is asserting a claim based on that right. *State v. Jones*, 10th Dist. No. 14AP-234, 2014-Ohio-5758, ¶ 8, citing R.C. 2953.23(A)(1)(a). The petitioner must also show by clear and convincing evidence that, but for the alleged constitutional error, no reasonable fact finder would have found him guilty of the offense for which he was convicted. R.C. 2953.23(A)(1)(b).

{¶ 9} Appellant did not file an appeal of his January 19, 2010 plea and sentencing.³ Well over 180 days have passed since the end of the time for filing the appeal—almost 5 years. Furthermore, appellant did not address either of the exceptions to untimeliness in his motions. We find that the trial court did not err by denying appellant's motions as untimely. Therefore, appellant's petition for postconviction relief was untimely, and the trial court did not err in finding the same.

{¶ 10} Accordingly, we overrule appellant's first assignment of error.

{¶ 11} In his third assignment of error, appellant alleges the trial court erred in dismissing his petition for postconviction relief as untimely and barred by res judicata. To the extent the third assignment of error addresses the same issues raised in the first assignment of error, we find no error.

{¶ 12} To the extent the third assignment of error addresses whether the trial court erred in finding appellant's petition is barred by res judicata, we also find no error. "The postconviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment." *State v. Monroe*, 10th Dist. No. 13AP-598, 2015-Ohio-844, ¶ 37, citing *State v. Davis*, 10th Dist. No. 13AP-98, 2014-Ohio-90, ¶ 17, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999).

³ Filed January 21, 2010.

{¶ 13} Postconviction relief is a means by which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. *State v. Carter*, 10th Dist. No. 13AP-4, 2013-Ohio-4058, ¶ 15, citing *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). Postconviction review is not a constitutional right but, rather, is a narrow remedy which affords a petitioner no rights beyond those granted by statute. *Calhoun* at 281-82. A postconviction relief petition does not provide a petitioner a second opportunity to litigate his other conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 32; *Murphy*, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. "*Res judicata* is applicable in all postconviction relief proceedings." *Szefcyk* at 95. It also applies to any claim that could have been raised by a defendant in the trial court before a conviction or on direct appeal thereafter. *State v. Perry*, 10 Ohio St.2d 175 (1967).

{¶ 14} Appellant did not file an appeal; therefore, any claims he could have raised on direct appeal are now barred by *res judicata*, and the trial court did not err in finding the same.

{¶ 15} Appellant's petition was untimely. Furthermore, as appellant did not appeal his conviction, he is barred now from raising issues he could have raised in a direct appeal. Accordingly, we overrule appellant's third assignment of error.

{¶ 16} Finally, in his second assignment of error, appellant argues that the trial court committed plain error by not merging allied offenses of similar import. However, just as *res judicata* applies in all postconviction relief proceedings, it also applies to bar the raising of merger issues. *State v. Ayala*, 10th Dist. No. 12AP-1071, 2013-Ohio-1875, ¶ 13-14. "[T]he *res judicata* bar applies to any post-judgment proceeding other than the direct appeal challenging a conviction including motions to 'modify' a sentence. Since appellant could have raised merger issues at the time of sentencing or thereafter on direct appeal, those issues are barred." *Id.* at ¶ 13. A claim of error and failing to merge counts for sentencing purposes is not a "void sentence" issue. *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 12. Merger claims are non-jurisdictional and barred by *res judicata*. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479.

{¶ 17} Appellant failed to raise the issue of merger/allied offenses on direct appeal. Pursuant to res judicata, he is now barred from raising the same. Accordingly, we overrule appellant's second assignment of error.

{¶ 18} For the foregoing reasons, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and BRUNNER, JJ., concur.
