

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2009-L-081
	:	and 2009-L-082
DAVID A. WOLF,	:	
Defendant-Appellant.	:	

Civill Appeals from the Lake County Court of Common Pleas, Case Nos. 90 CR 000475 and 90 CR 000504.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

David A. Wolf, pro se, PID# A234-276, Richland Correctional Institution, P.O. Box 8107, Mansfield, OH 44901 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David A. Wolf, appeals the Opinion and Judgment Entry of the Lake County Court of Common Pleas, denying his Motion for Relief from Judgment pursuant to Ohio Rules of Civil Procedure, Rule 60(B). For the following reasons, we affirm the decision of the court below.

{¶2} The present, consolidated appeals arise from the following criminal prosecutions initiated in the Lake County Court of Common Pleas.

{¶3} On October 15, 1990, in Common Pleas Case No. 90 CR 000475, Wolf was indicted on the following charges relating to the death of his wife: one count of Aggravated Murder in violation of R.C. 2903.01, one count of Murder in violation of R.C. 2903.02, and one count of Abuse of a Corpse in violation of R.C. 2927.01. Wolf's first trial commenced on May 14, 1991.

{¶4} On May 24, 1991, the jury returned guilty verdicts on all three counts.

{¶5} Wolf appealed to this court. In *State v. Wolf*, 1992 Ohio App. LEXIS 6185, Lake App. No. 91-L-096, this court affirmed the conviction for Abuse of a Corpse, but reversed and remanded for a retrial on the Murder and Aggravated Murder charges.

{¶6} Wolf's second trial commenced on February 7, 1994.

{¶7} On February 14, 1994, the jury found Wolf guilty of Murder.

{¶8} On February 16, 1994, the trial court sentenced Wolf to an indefinite term of incarceration of fifteen years to life, to be served consecutively with the prior sentence of three to five years for Abuse of a Corpse. In *State v. Wolf*, 11th Dist. No. 94-L-047, 1997 Ohio App. LEXIS 348, this court affirmed the conviction for Murder.

{¶9} On October 26, 1990, in Common Pleas Case No. 90 CR 000504, Wolf was indicted on the following charges relating to the sexual abuse of his twelve-year-old step-daughter: nine counts of Rape in violation of R.C. 2907.02, six counts of Kidnapping in violation of R.C. 2905.01, and one count of Child Endangering in violation of R.C. 2919.22.

{¶10} Wolf's trial commenced on August 17, 1993. At the close of the trial, the State dismissed one of the Rape charges.

{¶11} On August 23, 1993, the jury returned guilty verdicts on the remaining fifteen counts.

{¶12} On August 30, 1993, the trial court sentenced Wolf to six consecutive life sentences and two concurrent life sentences for the eight counts of Rape, and a concurrent six month sentence for Child Endangering. The six Kidnapping charges were merged into the Rape counts as allied offenses. In *State v. Wolf*, 11th Dist. No. 93-L-151, 1994 Ohio App. LEXIS 5993, this court affirmed Wolf's convictions and sentence.

{¶13} On May 20, 2009, in Case Nos. 90 CR 000475 and 90 CR 000504, Wolf filed identical Motions for Relief from Judgment pursuant to Ohio Rules of Civil Procedure, Rule 60(B). In these, Wolf argued his sentences were "void" on the grounds that the trial court failed to calculate the amount of jail time credit to which he is entitled in its Journal Entries, and failed to set and/or declare an actual parole eligibility date.

{¶14} On June 5, 2009, the trial court issued its Opinion and Judgment Entry, denying Wolf's Motions. The court construed the Motions as petitions for postconviction relief pursuant to R.C. 2953.21(A)(1). The court then held it was without jurisdiction to consider them, as they were untimely and none of the exceptions to the 180-day deadline for filing a postconviction petition were applicable. The court further held that consideration of Wolf's claims were barred by the doctrine of res judicata, inasmuch as his claims "were or could have been litigated on direct appeal and *** are based on

matters that are within the record.” See *State v. Guilford*, 5th Dist. No. 2009 CA 00107, 2010-Ohio-647, at ¶23, and the cases cited therein.

{¶15} On June 22, 2009, Wolf filed Notices of Appeal. On appeal, Wolf raises the following assignment of error: “The trial court imposed void sentences by failing to follow Ohio statutory law while imposing those consecutive sentences.”

{¶16} As an initial matter, the trial court properly characterized Wolf’s Motion as one for postconviction relief. In *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, the Ohio Supreme Court held that a motion seeking to correct and/or vacate a sentence constituted a motion for postconviction relief where it “(1) [was] filed subsequent to [the defendant’s] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” *Id.* at 160. The Supreme Court reaffirmed this holding in *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, at ¶12. Wolf’s Motion for Relief from Judgment shares these four characteristics of a petition for postconviction relief.

{¶17} A petition for postconviction 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.” R.C. 2953.21(A)(2). When a petition is untimely and no recognized exceptions to the 180-day deadline apply, a trial court is without jurisdiction to entertain the petition. R.C. 2953.23(A); *State v. Theisler*, 11th Dist. No. 2009-T-0003, 2009-Ohio-6862, at ¶31.

{¶18} In the present case, Wolf’s motion/petition is untimely and has not been alleged to meet one of the statutory exceptions in R.C. 2953.23(A)(1) or (2). Accordingly, it was properly denied by the trial court.

{¶19} Assuming, arguendo, the motion/petition was timely filed, Wolf has not alleged circumstances that would render the Judgment void, as opposed to voidable. See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶12 (“[u]nlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but in which the court’s judgment is invalid, irregular, or erroneous”) (citation omitted); also *McMeans v. Ohio Adult Parole Auth.*, 10th Dist. No. 98AP-42, 1998 Ohio App. LEXIS 5331, at *5-*9 (rejecting a similar argument regarding parole eligibility dates).

{¶20} The sole assignment of error is without merit.

{¶21} For the forgoing reasons, the Judgment of the Lake County Court of Common Pleas, denying Wolf’s Motion for Relief from Judgment, construed as a petition for postconviction relief, is affirmed. Costs to be taxed against appellant.

COLLEEN MARY O’TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.