

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 1747
v.	:	T.C. NO. 03 CR 12895 04 CR 13015
JOSEPH A. BROWN	:	
Defendant-Appellant	:	(Criminal Appeal from Common Pleas Court)
	:	
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**OPINION**

Rendered on the 10<sup>th</sup> day of July, 2009.

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RICHARD M. HOWELL, Atty. Reg. No. 0002550, Prosecuting Attorney and R. KELLY ORMSBY, III, Atty. Reg. No. 0020615, First Assistant Prosecuting Attorney, Darke County Prosecutor's Office, Courthouse, Third Floor, Greenville, Ohio 45331  
Attorneys for Plaintiff-Appellee

JOSEPH A. BROWN, #467-404, P. O. Box 740, London, Ohio 45036  
Defendant-Appellant

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FROELICH, J.

{¶ 1} Defendant-appellant Joseph Brown appeals from a trial court judgment denying his "Motion to Vacate Voidable Sentence-Civil Rule 60(B)," which was, in effect, a petition for post-conviction relief. Brown presents several claims that the trial

court abused its discretion in ordering him to serve more than a minimum, concurrent sentence. Brown also argues that the trial court erred in denying his motion/petition and that the trial court failed to follow the mandates of the Supreme Court when it sentenced him to more than a minimum, concurrent sentence, resulting in a conflict between the Supreme Court and the trial court's interpretation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We conclude that Brown's three arguments challenging his sentence are barred by the doctrine of res judicata and that his petition was untimely. We also conclude that Article IV, Section 3(B)(4) of the Ohio Constitution applies to the certification of conflicting rulings among Ohio's appellate courts to the Ohio Supreme Court for a final determination, and not to an alleged misinterpretation by the trial court of a Supreme Court ruling.

I

{¶ 2} In 2003, Brown was charged in three separate indictments with one count each of assault on a police officer, illegal manufacturing of methamphetamine, and aggravated trafficking in methamphetamine. Reaching a plea agreement with the State, Brown pled guilty to the charges, and the State agreed not to pursue additional charges. The trial court sentenced Brown to a mandatory five-year prison term on the illegal manufacturing charge and one year on each of the other charges, to run concurrent with each other but consecutive to the five-year term, for a stated sentence of six years. Brown appealed, and for a lack of sufficient findings to justify consecutive sentences, we remanded the case for re-sentencing. *State v. Brown*, 160 Ohio App.3d 631, 2005-Ohio-1929. Brown was again sentenced to six years, and he appealed from that sentence. In accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856,

we reversed and remanded for re-sentencing. *State v. Brown*, Darke App. No. 1663, 2006-Ohio-3366. For the third time, the trial court imposed a six-year sentence, and Brown appealed. We affirmed that sentence in *State v. Brown*, Darke App. No. 1700, 2007-Ohio-4334.

{¶ 3} On August 22, 2008 Brown filed a “Motion to Vacate Voidable Sentence-Civil Rule 60(B)” under case numbers 03-CR-12895 (illegal manufacturing of methamphetamine) and 04-CR-13015 (aggravated trafficking in methamphetamine). The trial court denied the motion, and Brown appeals.

## II

{¶ 4} Brown’s first assignment of error:

{¶ 5} “THE TRIAL JUDGE ABUSED HIS DISCRETION BY NEGLECTING TO APPROPRIATELY CONSIDER THE FILED PETITION IN REFERENCE TO APPELLANT’S CLAIMS OF ERROR REGARDING AN UNCONSTITUTIONALLY ENHANCED SENTENCE AND DENIAL OF SEVERAL CONSTITUTIONAL RIGHTS.”

{¶ 6} Brown’s second assignment of error:

{¶ 7} “THE TRIAL JUDGE ABUSED HIS DISCRETION BY NEGLECTING TO CONSIDER AND GIVE DUE DEFERENCE TO THE CLAIM MADE IN REFERENCE TO APPELLANT NOT BEING GIVEN THE MINIMUM SENTENCE DESPITE BEING A FIRST TIME PRISON OFFENDER.”

{¶ 8} Brown’s third assignment of error:

{¶ 9} “THE TRIAL COURT ABUSED HIS DISCRETION BY NEGLECTING TO APPROPRIATELY CONSIDER AND GIVE DUE DEFERENCE TO THE FILED PETITION IN REFERENCE TO APPELLANT’S CLAIM OF ERROR INVOLVING

INEFFECTIVE ASSISTANCE OF COUNSEL, IN WHICH HE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.”

{¶ 10} In his first and second assignments of error, Brown argues that the trial court was obligated to order him to serve a minimum, concurrent sentence and that the court erred when it ordered a lengthier one. In his third assignment of error, Brown contends that his trial counsel was ineffective in that he failed to object to the trial court’s imposition of more than a minimum, concurrent sentence. The first two assignments of error were addressed in Brown’s third appeal, and the third assignment of error could have been raised at that time. Therefore, the three claims are barred by the doctrine of res judicata.

{¶ 11} In *State v. Wilson*, Montgomery App. No. 21741, 2007-Ohio-4610, we held that when a defendant’s sentence is affirmed by an appellate court, the doctrine of res judicata precludes the defendant from challenging his sentence in a petition for post-conviction relief. “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 180.

{¶ 12} We need not reach the merits of Brown’s first three assignments of error because the arguments presented therein are barred by the doctrine of res judicata. Brown’s first three assignments of error will be overruled.

## III

{¶ 13} Brown's fourth assignment of error:

{¶ 14} "THE TRIAL JUDGE ABUSED HIS DISCRETION BY FAILING TO FILE ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO EACH INDIVIDUAL AND PARTICULAR CLAIM OF ERROR WITHIN THE FILED PETITION."

{¶ 15} In his fourth assignment of error, Brown claims that the trial court erred in denying his "Motion to Vacate Voidable Sentence Civil Rule 60(B)." In the first paragraph of that motion, Brown informed the court in bold print that his motion should "not be misconstrued as a petition for Post-Conviction Relief." Brown now relies on post-conviction cases in arguing that the court made insufficient findings of fact and conclusions of law. For the following reasons, we will overrule Brown's fourth assignment of error.

{¶ 16} Criminal Rule 57(B) provides: "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." Criminal Rule 35 sets forth the procedure for petitions for post-conviction relief and "serves the same purpose as the Civ.R. 60(B) motion." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶11. Furthermore, "[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, paragraph one of the syllabus. Regardless of the title, Brown's

motion was, in effect, a petition for post-conviction relief. See, e.g., *State v. Dunn*, Montgomery App. No. 21766, 2007-Ohio-4890, ¶8.

{¶ 17} Revised Code 2953.21(A)(2) requires that a petition for post-conviction relief be filed no later than 180 days after the trial transcript is filed in the court of appeals. In his most recent appeal, the trial transcript was filed on November 2, 2006, but Brown did not file his petition for post-conviction relief until August 22, 2008, more than fifteen months after the 180-day filing deadline. Failure to file on time negates the jurisdiction of the trial court to consider the petition, unless the untimeliness is excused under R.C. §2953.23(A)(1)(a). *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851.

{¶ 18} Pursuant to R.C. §2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief if he was unavoidably prevented from discovering the facts upon which he relies to present his claim or if the United States Supreme Court recognizes a new right that petitioner alleges applies retroactively to his situation. If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder could have found him guilty. R.C. §2953.23(A)(1)(b).

{¶ 19} Brown maintains that *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531 and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, establish a new right that applies retroactively to his situation. Specifically, Brown insists that he was entitled to minimum, concurrent sentences. However, *Blakely* was decided two years prior to Brown's most recent sentencing, and *Foster* was decided by the Ohio Supreme Court rather than by the United States Supreme Court as required by

R.C. §2953.23(A)(1)(a). In any event, we have previously considered the applicability of *Foster* on Brown's sentence and reversed Brown's second sentence based on *Foster*; and we considered Brown's current *Foster* argument in his most recent appeal wherein we held his sentence was lawful. Accordingly, Brown fails to meet the first prong required by R.C. 2953.23(A)(1)(a) to justify the untimely filing of a petition for post-conviction relief. As a result, he cannot meet the second requirement.

{¶ 20} Brown's fourth assignment of error will be overruled.

#### IV

{¶ 21} Brown's fifth assignment of error:

{¶ 22} "THE TRIAL COURT ABUSED ITS DISCRETION IN REFERENCE TO NEGLECTING TO RECOGNIZE RECENT SUPREME COURT RULINGS THAT HOLD PRECEDENT, THEREFORE CREATING A CERTIFIED CONFLICT UNDER ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION."

{¶ 23} In his fifth assignment of error, Brown again challenges his sentence, insisting that the trial court failed to follow the holdings of the Ohio Supreme Court when it sentenced him to more than a minimum, concurrent sentence, resulting in a conflict between the Supreme Court and the trial court's interpretation of *Foster*, *supra* (and, apparently, this court's, since we affirmed his most recent appeal). Brown asks this court to certify the perceived conflict to the Ohio Supreme Court pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. That section provides: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme

court for review and final determination.” An application to certify a conflict only applies to a conflict between judgments in appellate districts. If an appellant believes a court’s decision is in conflict with or contrary to a Supreme Court decision, his remedy is to appeal. See, e.g., *Bae v. Dragoo and Associates, Inc.*, Franklin App. No. 03AP-254, 2004-Ohio-1297, ¶10.

{¶ 24} Brown’s fifth assignment of error will be overruled.

V

{¶ 25} All five of Brown’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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