[Cite as *State v. Singleton*, 2016-Ohio-611.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26763
	:	
v.	:	Trial Court Case No. 1997-CR-1015/1
	:	
BRYAN K. SINGLETON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 19th day of February, 2016.

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Bryan Singleton, appeals pro se from a trial court decision overruling Singleton's motion for resentencing. In support of his appeal, Singleton contends that he did not forfeit his argument that the trial court committed plain error. Singleton also contends that he made a facial showing of allied offenses on the record.

{¶ 2} We conclude that the trial court properly rejected Singleton's motion. The motion was properly construed as a petition for post-conviction relief, and was both untimely and barred by res judicata. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} In April 1997, Bryan Singleton shot and killed a Sunoco store manager during the course of a robbery. *See State v. Singleton*, 2d Dist. Montgomery No. 17003, 1999 WL 173357, *1 (Mar. 31, 1999). Singleton was subsequently indicted on four charges: Aggravated Murder with death penalty specifications; Aggravated Robbery; Aggravated Burglary; and Having a Weapon While Under a Disability. *Id.* A three-judge panel found Singleton guilty of all charges, other than the death penalty specification. *Id.* Singleton was subsequently sentenced to thirty years to life on the Aggravated Murder charge; three years on the gun specification; ten years each on the Aggravated Burglary and Aggravated Robbery charges; and one year for having a weapon under disability. He also received a six-year sentence on an unrelated charge of felonious assault, and was ordered to serve all the charges consecutively. *Id.*

{¶ 4} Singleton filed a direct appeal with our court, arguing only that the trial court erred in overruling his motion to suppress. *Id.* He did not raise any issues concerning merger of his convictions. We overruled the assignment of error, and affirmed the convictions. *Id.* at *4-9. The Supreme Court of Ohio then refused to allow further appeal. *See State v. Singleton*, 86 Ohio St.3d 1438, 713 N.E.2d 1049 (1999).

{¶ 5} In a petition for habeas corpus filed with the federal district court, Singleton again raised the suppression issue. He did not raise any other issues. After the district court rejected the petition, the Sixth Circuit Court of Appeals affirmed the decision. *Singleton v. Carter*, 74 Fed.Appx. 536, 537 (6th Cir.2003). In February 2004, the Supreme Court of the United States denied Singleton's petition for certiorari. *Singleton v. Carter*, 540 U.S. 1192, 124 S.Ct. 1442, 158 L.Ed.2d 103 (2004).

{¶ 6} In June 2005, Singleton filed a petition for post-conviction relief with the trial court, which dismissed the petition as having been untimely filed. *See State v. Singleton*, 2d Dist. Montgomery No. 21289, 2006-Ohio-4522, ¶ 6. We agreed with the trial court that the petition was untimely, and affirmed the dismissal. *Id.* at ¶ 2-3.

{¶ 7} Several years later, in September 2013, Singleton filed a motion for resentencing in the trial court, asking to be resentenced because his convictions were allied offenses and should have been merged under R.C. 2941.25. *State v. Singleton*, 2d Dist. Montgomery No. 25946, 2014-Ohio-630, ¶ 5. This motion was filed more than 14 years after we had affirmed Singleton's convictions on direct appeal.

{¶ 8} In the trial court, Singleton claimed that "the trial court's failure to merge the convictions at sentencing constituted plain error and violated his constitutional rights under the Double Jeopardy Clause of the Fifth Amendment to the United States

Constitution." *Id.* at ¶ 5. After construing the motion as a petition for post-conviction relief, the trial court held that it was untimely and was also barred on res judicata grounds. *Id.* On appeal, Singleton raised these assignments of error: (1) that the trial court erred in construing the motion as a post-conviction petition; and (2) that the trial court committed plain error in failing to merge the convictions as allied offenses. *Id.* at ¶ 7 and 15. We found both assignments of error without merit, found the untimely petition barred by res judicata, and affirmed the judgment of the trial court. *Id.* at ¶ 8-23. The Supreme Court of Ohio again refused Singleton's request for further appeal. *See State v. Singleton*, 139 Ohio St.3d 1407, 2014-Ohio-2245, 9 N.E.3d 1064.

{¶ 9} In May 2015, Singleton filed another motion for resentencing, asking the trial court to review the proceedings for plain error. However, the court rejected Singleton's motion. The court once again construed Singleton's motion as a petition for post-conviction relief and found that it was untimely. In addition, the court concluded that the petition was barred by res judicata. Finally, the court held that even if the motion were not barred by res judicata, Singleton had failed to demonstrate with reasonable probability that his convictions were for allied offenses. Singleton now appeals from the judgment of the trial court overruling his motion.

II. Alleged Trial Court Error

{¶ 10} Singleton's sole assignment of error states that:

> Because Defendant Failed to Object to His Sentences in the Trial Court, Did He Forfeit Appellate Review of the Argument That the Trial Court Committed Plain Error Pursuant to Crim.R. 52(B) for Failing to Hold a

Merger Hearing After Demonstrating There Was a Facial Showing of Allied Offenses on the Record Pursuant to the Supreme Court Holding in *State v. Rogers*, June 24 Decision 2015-Ohio-2459.

{¶ 11} Under this assignment of error, Singleton essentially appears to contend that the Supreme Court of Ohio has adopted a new "plain error" standard that would permit him to avoid the requirement of having timely brought his claim for relief. We disagree. Furthermore, we agree with the trial court that Singleton's petition was untimely and is barred by res judicata.

A. Untimeliness

{¶ 12} In Singleton's 2014 appeal, we stated that:

> It is well established that " '[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.' " *State v. Caldwell*, 2d Dist. Montgomery No. 24333, 2012-Ohio-1091, quoting *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. (Other citations omitted.) "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. Brown*, 2d Dist. Darke No. 1747, 2009-Ohio-3430, ¶ 16, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).

Singleton, 2d Dist. Montgomery No. 25946, 2014-Ohio-630, ¶ 9.

{¶ 13} We still agree with that position. As a result, Singleton's current motion is properly analyzed under the standards that apply to petitions for post-conviction relief. In this regard, R.C. 2953.21(A)(1)(a) provides that:

> Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 14} R.C. 2953.21(A)(2) further states that:

> Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five 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 * * *.

{¶ 15} The provision that courts may not entertain petitions filed after the expiration of the time allowed by R.C. 2953.21(A)(2) deprives common pleas courts of "jurisdiction to adjudicate the merits of an untimely petition, with but one narrow exception." *State v. Harden*, 2d Dist. Montgomery No. 20803, 2005-Ohio-5580, ¶ 9. *Accord State v. Reese*, 2d Dist. Montgomery No. 23410, 2009-Ohio-5874, ¶ 7. This narrow exception, which is set forth in R.C. 2953.23(A), "confers jurisdiction to adjudicate an untimely postconviction

petition when the petitioner shows that he was unavoidably prevented from discovering the facts upon which he must rely to present his claim for relief, or that a new federal or state right that applies retroactively to the petitioner was recognized by the United States Supreme Court subsequent to the period prescribed in R.C. 2953.21(A)(2), and the petition asserts a claim based upon that right." *Harden* at ¶ 9, citing R.C. 2953.23(A)(1)(a).

{¶ 16} Singleton's current motion is clearly untimely, since it was filed more than 14 years after we decided his direct appeal. It is also a third, or successive petition, since prior petitions or motions were filed in 2005 and 2013.

{¶ 17} In the trial court, Singleton failed to address how he had been unavoidably prevented from discovering the facts upon which his petition relied. Instead, Singleton argued that his motion should not be treated as a post-conviction petition. As was indicated, we disagree.

{¶ 18} On appeal, Singleton's stated excuse for unavoidable delay is that he was unaware of certain 2013 and 2015 legal decisions upon which he relies. However, " 'courts have consistently ruled that lack of knowledge or ignorance of the law does not provide sufficient cause for untimely filing.' " *State v. Wolff*, 7th Dist. Mahoning No. 10-MA-184, 2012-Ohio-5575, ¶ 16, quoting *State v. Gaston*, 8th Dist. No. 79626, 2007-Ohio-155, ¶ 9. (Other citation omitted.) " 'Simply being unaware of the law * * * does not equate with being unavoidably prevented from discovering the facts upon which the petition is based.' " *Id.*, quoting *State v. Sturbois*, 4th Dist. Athens No. 99CA16, 1999 WL 786318, *2 (Sept. 27, 1999). Furthermore, "facts do not equate to legal theories." *Id*.

{¶ 19} In the case before us, Singleton is relying on legal theories, not facts that are pertinent to his petition. Singleton would have been aware of any facts relating to his allied offense claims when he was sentenced in 1997. Again, his unawareness of the law is not an excuse.

{¶ 20} The only other exception to the time limit in R.C. 2953.21 is that the claim asserted is based on a new federal or state right that the United States Supreme Court has recognized and that applies retroactively. R.C. 2953.23(A)(1)(a). However, the decisions upon which Singleton relies are not decision of the United States Supreme Court. Instead, they are decisions of the Eighth District Court of Appeals and the Supreme Court of Ohio. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, and *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.), *reversed in part and affirmed in part*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860. We have stressed that in such circumstances, this alternate ground in R.C. 2953.23(A)(1)(a) does not apply. *Reese*, 2d Dist. Montgomery No. 23410, 2009-Ohio-5874, at ¶ 9.

{¶ 21} Accordingly, Singleton's petition for post-conviction relief is barred because it was untimely and neither of the grounds supporting an exception to the time limit exist. Nonetheless, even if the cases that Singleton cites could satisfy the requirements in R.C. 2953.23(A)(1)(a), the position Singleton espouses has been rejected by the Supreme Court of Ohio.

{¶ 22} In the original decision in the *Rogers* line of cases, a panel of the Eighth District Court of Appeals held, in the defendant's direct appeal, that the trial court did not err in failing to merge allied offenses for sentencing. *State v. Rogers*, 2013-Ohio-1027, 990 N.E.2d 1085 (8th Dist.) (*Rogers I*). In discussing this point, the panel noted that:

> Some panels of this court have held that plain error in sentencing occurs when a sentencing judge fails to inquire into the possibility of an allied offenses sentencing issue, regardless of whether the issue is raised by the defendant." * * * In other words, the panels have found the court's failure to inquire into allied offenses at sentencing to be a form of per se error that requires reversal regardless of any showing of actual error or prejudice in sentencing.

Rogers I at ¶ 6.

{¶ 23} The panel rejected this view, however, noting that courts had not found plain error "when there were no facts in the record to show that an error occurred." *Id.* at ¶ 7. The panel stated that:

> We therefore find no basis for the suggestion that it is plain error for the court to fail to inquire into the possibility of whether offenses are allied for purposes of sentencing. We continue to adhere to the basic proposition of appellate review that plain error can only exist if there is evidence making an error manifest on the record. We cannot envision a scenario where the absence of error on the record can ever suffice to show plain error.

Id. at ¶ 11. After concluding that the record failed to demonstrate plain error, the panel, with one judge dissenting in part, affirmed the decision of the trial court. *Id.* at ¶ 12-31.

{¶ 24} Subsequently, the Eighth District Court of Appeals granted en banc reconsideration in the case, to resolve an intra-district conflict. *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.), ¶ 2-4 (*Rogers II*). In *Rogers II*, the en banc court

observed that historically, Ohio courts had struggled with the language in R.C. 2941.25 and with deciding what conduct constituted separate offenses or allied offenses of similar import. *Id.* at ¶ 9. The en banc court further noted that "[s]tarting in 1975, the Supreme Court of Ohio issued a series of decisions that over the years were met with mixed reviews on how best to address the constitutional protections against multiple punishments." *Id*. The Court then commented that "[t]hese cases were followed by a series of decisions that changed the landscape of the merger analysis." *Id.* at ¶ 10.

{¶ 25} One of the decisions mentioned in this latter context was *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, which, in the en banc court's view, had held that "a trial court commits plain error when it fails to merge allied offenses of similar import." *Id.* The en banc court then commented that "[p]rior to *Underwood*, many trial courts simply imposed concurrent sentences where the merger analysis was too confusing or unworkable. *Underwood* made it clear that allied offenses of similar import must be merged at sentencing or the sentence is deemed contrary to law. *Underwood* also made clear that even a defendant's plea to multiple counts does not affect the court's duty to merge allied counts at sentencing. The duty is mandatory, not discretionary. *Underwood* at ¶ 26." *Rogers II* at ¶ 11.

{¶ 26} In the en banc court's opinion:

> *Underwood* placed the duty squarely on the trial court judge to address the merger question. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Likewise, the merger statute imposes the same duty. R.C. 2941.25. Ultimately, it is the trial judge who imposes the sentence in a case. While the judge cannot be an advocate for either

> position, the trial court must address the potential allied-offense issue when the charges facially present a question of merger. A defendant's conviction on multiple counts, regardless of how achieved, does not affect the court's duty to merge allied offenses of similar import at sentencing.

Rogers II, 2013-Ohio-3235, 994 N.E.2d 499, at ¶ 27.

{¶ 27} The en banc court went on to hold that "[I]f the facts necessary to determine whether offenses are allied offenses of similar import are not in the record and the trial court does not inquire, then plain error exists when the issue is raised on appeal." *Id.* at ¶ 46. The court also overruled its prior decisions to the extent they conflicted, remanded the case to the extent necessary to establish the underlying facts of the defendant's conduct in one of the cases so that the merger issue could be determined, and certified a conflict with the decision of the Sixth District Court of Appeals in *State v. Wallace*, 6th Dist. Wood No. WD-11-031, 2012-Ohio-2675. *Id.* at ¶ 63-66.

{¶ 28} A dissenting opinion disagreed, contending that the majority's decision "circumvents a conventional plain error analysis by taking the *Underwood* holding out of context and relieving the defendant of the onus of objecting and otherwise preserving any claimed error." *Rogers II* at ¶ 90 (Stewart, J., dissenting). Judge Stewart stated that:

> Consistent with established principles of appellate review, I would find that the defendant who pleads guilty to multiple offenses and fails to raise an allied offenses issue at sentencing forfeits the right to argue all but plain error on appeal. And since a plain error analysis is always predicated on there being an "obvious" error in failing to merge allied offenses, the claimed error must fail if the record contains no facts proving that a merger

error occurred.

Id. at ¶ 83. The dissent also criticized the majority for creating "a new form of structural error," *id.* at ¶ 103, by adopting "a standard that goes beyond the plain error rule and presumes that all offenses are potentially allied and the trial judge must, prior to sentencing, inquire into the possibility that sentences might be subject to merger, regardless of what facts are before the trial judge—in essence elevating plain error to a form of structural error." *Id.* at ¶ 107.

{¶ 29} After reading these opinions, it is clear that Singleton is premising his position on the en banc decision of the majority in *Rogers II*. However, when the Supreme Court of Ohio considered the certified case, it rejected the en banc majority decision in *Rogers II*. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860 (*Rogers III*). In this regard, the Supreme Court of Ohio stressed that "[w]e have never recognized the hybrid type of plain error applied by the en banc court in this case, forfeited error that is presumptively prejudicial and is reversible error per se. Rather, in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, we rejected the notion that there is any category of forfeited error that is not subject to the plain error rule's requirement of prejudicial effect on the outcome." *Id.* at ¶ 24.

{¶ 30} The Supreme Court of Ohio went on to stress that:

> Writing for our court, Chief Justice Thomas J. Moyer cautioned that "any unwarranted expansion of Crim.R. 52(B) ' "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.' " ' " *Perry* at ¶ 20, quoting *State*

> *v. Hill*, 92 Ohio St.3d 191, 199, 749 N.E.2d 274 (2001), quoting *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), quoting *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Chief Justice Moyer further explained that "our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court—where, in many cases, such errors can be easily corrected." *Id.* at ¶ 23.

Rogers III at ¶ 24.

{¶ 31} Based on its discussion, the Supreme Court of Ohio reversed the part of the en banc decision that had remanded the case for further hearing, and reinstated the defendant's sentences. *Id.* at ¶ 29. In doing so, the court observed that "the en banc court misapplied settled principles of appellate review * * *." *Id.*

{¶ 32} Accordingly, even if the requirement of a new federal or state right could be satisfied by a decision of the Supreme Court of Ohio, no such right was created. Singleton's position is simply without merit.

B. Res Judicata

{¶ 33} The trial court also concluded that Singleton's motion was barred by res judicata. As was indicated, we agree with the trial court.

{¶ 34} The Supreme Court of Ohio has stressed that "postconviction state collateral review * * * is not a constitutional right", and "postconviction review is a narrow remedy." (Citations omitted.) *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). Consequently, "*res judicata* serves to bar any claim that was or could have been

raised in the trial court or on direct appeal. To overcome the *res judicata* bar, the petitioner must produce new evidence that renders the judgment void or voidable, and show that he could not have appealed the claim based upon information contained in the original record." (Citations omitted.) (Emphasis sic.) *State v. Aldridge*, 120 Ohio App.3d 122, 151, 697 N.E.2d 228 (2d Dist.1997).

{¶ 35} Not only has Singleton provided no new evidence, he has availed himself of a direct appeal that was rejected, as well as two prior attempts to secure post-conviction relief in state court. Singleton asserts, however, that his current argument differs from the argument he previously raised. In this regard, Singleton states that his prior motion argued that the trial court erred by failing to merge the convictions for sentencing, while his current position is that the trial court committed plain error in failing to hold a mandatory hearing. However, res judicata bars claims that could have been raised as well as claims that were raised. Accordingly, we agree with the trial court that Singleton's motion for resentencing is barred by res judicata.

{¶ 36} As a final matter, the trial court appears to have addressed Singleton's argument on the merits, concluding that Singleton could not demonstrate plain error. The trial court need not have addressed this matter, based on its prior conclusions about the untimeliness of the motion and res judicata. For this reason, we decline to review the part of the trial court's decision that addresses plain error.

{¶ 37} Based on the preceding discussion, Singleton's sole assignment of error is overruled.

III. Conclusion

{¶ 38} Singleton's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, P.J. and FAIN, J., concur.

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