

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 1-15-08

v.

EDWIN L. COLEMAN,

OPINION

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR20070148

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Edwin L. Coleman, Appellant

Terri L. Kohlrieser for Appellee

SHAW, J.

{¶1} Defendant-appellant Edwin L. Coleman (“Coleman”) appeals the January 26, 2015, judgment of the Allen County Common Pleas Court denying Coleman’s “Motion to address Plain Error pursuant to Crim. R. 52(B)” after considering the “motion” as a petition for post-conviction relief.

{¶2} The facts relevant to this appeal are as follows. On April 12, 2007, Coleman was indicted for one count of Kidnapping in violation of R.C. 2905.01(A)(3), a felony of the first degree, and one count of Felonious Assault in violation of R.C. 2903.11(A)(1), a felony of the second degree. (Doc. No. 1).

{¶3} The case proceeded to a jury trial and Coleman was ultimately found guilty of both counts against him. (Doc. No. 134). On November 1, 2007, Coleman was sentenced to serve 10 years in prison for the Kidnapping conviction, and 8 years in prison for the Felonious Assault conviction. (*Id.*) The prison terms were ordered to run consecutively for an aggregate prison sentence of 18 years. (*Id.*)

{¶4} On November 26, 2007, Coleman appealed his conviction and sentence to this Court. (Doc. No. 152).¹ According to the record, Coleman’s appellate counsel filed an *Anders* brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and requested to withdraw. *State v. Coleman*, 3d Dist. Allen No. 1-

¹ Although Coleman had an attorney file a notice of appeal, Coleman also, *pro se*, filed a notice of appeal from the judgment of conviction. (Doc. No. 148).

07-82 (JE Mar. 18, 2009, unreported). Coleman was served with a copy of the *Anders* brief and was given the opportunity to file his own brief, which he did after requesting multiple extensions for time. (*Id.*) On March 18, 2009, this Court found no merit in the “arguable” issues raised by appellate counsel, and this Court also found no merit in Coleman’s *pro se* arguments. (*Id.*) This Court thus determined that there was “no arguable issue in [Coleman’s] appeal” and we declared the appeal “wholly frivolous.” (*Id.*)

{¶5} Over five years later, on April 17, 2014, Coleman filed a “Motion requesting mandatory hearing for final appealable order.” In that motion, Coleman, *pro se*, argued that he was entitled to a “mandatory merger hearing” pursuant to R.C. 2941.25. (Doc. No. 171). On April 21, 2014, the trial court filed a judgment entry overruling Coleman’s motion. (Doc. 172). In that entry, the trial court found that Coleman’s argument was barred by the doctrine of *res judicata*. (*Id.*)

{¶6} On June 20, 2014, Coleman filed a “Notice to Grant Unopposed Motion” where he claimed that his April 17, 2014, motion that had been ruled upon by the trial court was unopposed and thus it should have been granted by the trial court. (Doc. No. 180). On June 24, 2014, the trial court filed an entry finding that Coleman’s motion was not well-taken and it was overruled. (Doc. No. 181).

{¶7} On July 15, 2014, Coleman then filed a notice of appeal from the April 21, 2014, judgment entry. (Doc. No. 183). On July 30, 2014, this Court filed an entry dismissing Coleman’s appeal as untimely. (Doc. No. 188).

{¶8} On January 21, 2015, Coleman filed a “Motion to Address Plain Errors pursuant to Crim.R. 52(B).” (Doc. No. 191). In that motion, Coleman argued that he was “denied a right to a fair trial due to prosecutorial misconduct,” that he was “denied ineffective [sic] assistance of trial counsel,” and that he was “denied a right to a fair trial due to the abuse of discretion.” (*Id.*)

{¶9} On January 26, 2015, the trial court filed a judgment entry finding that although Coleman did not caption his motion as a petition for post-conviction relief, it was a petition for post-conviction relief. (Doc. No. 192). The court found that Coleman’s petition was untimely, and that it was further barred by the doctrine of *res judicata*. (*Id.*) In addition, the trial court proceeded to address Coleman’s argument for ineffective assistance of counsel and found that it was not supported by the record. (*Id.*) The trial court thus denied Coleman’s petition.

{¶10} It is from this judgment that Coleman appeals, asserting the following assignment of error for our review.

ASSIGNMENT OF ERROR
THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERTAINING THE MOTION TO ADDRESS PLAIN ERROR PURSUANT TO CRIM.R. 52(B) AS A POST-CONVICTION RELIEF [PETITION].

{¶11} In Coleman’s assignment of error, he argues that the trial court erred by finding that his “Motion to Address Plain Errors Pursuant to Crim.R.52 (B)” was a petition for post-conviction relief and then denying the petition as untimely and barred by *res judicata*.

{¶12} In *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304, the Ohio Supreme Court held that a motion that seeks to vacate or correct a sentence should be construed as a petition for post-conviction relief under R.C. 2953.21. The Ohio Supreme Court concluded in *Reynolds* that even if a motion was styled as something other than a petition for post-conviction relief, the motion was a petition for post-conviction relief if it was “(1) filed subsequent to [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.”² *Reynolds* at 160. In this case, Coleman did file a direct appeal, he is claiming a denial of his rights, and he is seeking to render his judgment void/asking for vacation of his judgment and sentence. Thus the trial court properly characterized Coleman’s motion as one for post-conviction relief.

² Coleman attempts to assert that based upon the Ohio Supreme Court’s decision in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, the trial court should have considered his motion as it was styled rather than converting it to a petition for post-conviction relief. However, despite Coleman’s reliance on *Bush*, *Bush* dealt with another matter entirely. In *Bush*, the Ohio Supreme Court found that a post-sentence motion to withdraw a guilty plea under Crim.R. 32.1, which is not governed by the post-conviction relief statutes, exists “independently” of post-conviction relief. *Bush* at ¶ 14. *Bush* thus deals with a unique statutory situation related to post-sentence guilty plea withdrawals and is not applicable in these circumstances.

{¶13} After properly categorizing Coleman’s motion as one for post-conviction relief, the trial court proceeded to find that the petition was filed untimely. Revised Code 2953.21(A)(2) governs the time limits within which a post-conviction action must be filed. At the time Coleman filed the petition that is subject to this appeal, the time limit for filing was 180 days. After Coleman filed the motion in this action, R.C. 2953.21(A)(2) was amended, effective March 23, 2015, to extend the time limit to 365 days. Regardless of whether we considered the 180 or 365 day time limit, Coleman’s petition was untimely. “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. Brown*, 2d Dist. Darke No. 1747, 2009-Ohio-3430, ¶ 17 (citation omitted). While exceptions to the time limits for post-conviction relief petitions exist as stated in R.C. 2953.23, none of them are applicable here and Coleman makes no argument that the exceptions are applicable here. Thus we cannot find that the trial court erred in finding Coleman’s petition was untimely.

{¶14} Although the trial court could have dismissed Coleman’s petition once it found the petition untimely, the trial court proceeded to find that Coleman’s arguments were also barred by the doctrine of *res judicata*. “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding

except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant * * * on an appeal from that judgment.*” (Emphasis added.) *State v. Perry*, 10 Ohio St.2d 175 (1967); *State v. Troglin*, 3d Dist. No. 14-09-04, 2009-Ohio-5276, ¶ 13.

{¶15} In this case Coleman did have a direct appeal where he either raised or could have raised the issues he is now attempting to argue. Thus his arguments are barred by the doctrine of *res judicata*, and we can find no error in the trial court’s determination of this issue. Accordingly, for all of these reasons Coleman’s assignment of error is overruled.

{¶16} For the foregoing reasons Coleman’s assignment of error is overruled and the judgment of the Allen County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr