

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

vs.

PETER D. ELDRIDGE,

Defendant-Appellant.

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Case No. 14CA3642

DECISION AND JUDGMENT
ENTRY

Released: 03/02/15

APPEARANCES:

Peter D. Eldridge, Chillicothe, Ohio, Pro Se Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay S. Willis,
Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

McFarland, A.J.

{¶ 1} Peter D. Eldridge appeals the June 23, 2014 corrected judgment entry of the Scioto County Court of Common Pleas. The procedural history of remand will be set forth fully below. In this appeal, Appellant contends he was denied effective assistance of counsel due to his trial counsel's purported failure to appropriately investigate his case in its entirety. Upon review, we conclude that Appellant's claim is not properly before this court, is untimely, and is also barred by the doctrine of res judicata. As such, we dismiss Appellant's appeal.

FACTS

{¶ 2} We recount the facts as previously set forth in *State v. Eldridge*, 4th Dist. Scioto No. 13CA3584, 2014-Ohio-2250 (*Eldridge II*). On July 20, 2011, Appellant pled no contest to three counts of aggravated trafficking in drugs with two of the counts alleging he committed the trafficking within the vicinity of a juvenile. Appellant stipulated there was sufficient evidence of guilt and the Scioto County Court of Common Pleas found him guilty of all three counts. Appellant filed a direct appeal of the trial court's denial of his motion to suppress, arguing 1) the affidavit submitted in support of the request for a search warrant was inadequate and failed to establish probable cause; and 2) law enforcement officers' execution of the search warrant was unreasonable because they violated the knock and announce rule contained within R.C. 2935.12(A). This Court issued a decision on August 10, 2012, which found the affidavit was sufficient to establish probable cause and the officers did not violate R.C. 2935.12(A), which governs forcible entry in making an arrest and execution of a search warrant. *State v. Eldridge*, 4th Dist. Scioto No. 11CA3441, 2012-Ohio-3747 (*Eldridge I*). Accordingly, we overruled Appellant's two assignments of error and affirmed the trial court's judgment entry denying his motion to suppress. *Id.*

{¶ 3} On September 10, 2013, Appellant filed a motion entitled “Defendant’s Motion for Resentencing Pursuant to Criminal Rule 47.” Appellant’s motion argued that he was entitled to be re-sentenced, based upon claimed constitutional violations, namely that the search warrant was not executed in a reasonable manner, and also that officers violated the knock and announce rule in conducting a search of his residence. The trial court treated Appellant’s motion as a petition for post-conviction relief and denied it as untimely filed and barred by the doctrine of res judicata.

{¶ 4} Appellant brought a subsequent appeal from the trial court’s October 22, 2013 entry, setting forth as his sole assignment of error that the fourth amendment to both the Ohio and United States Constitutions prohibited police officers from making a warrantless and nonconsensual entry into his home, which led to his arrest. Upon our consideration of his arguments and the record, we found that Appellant had not satisfied the exceptions to timely filing set forth in R.C. 2953.32(A) and thus, his petition was untimely filed. We further found that the claim raised in Appellant’s petition for post-conviction relief was also raised as part of his direct appeal and rejected by this Court. As such, his attempt to raise it a second time was barred by res judicata. However, by our decision dated May 21, 2014, we reversed the judgment of the trial court overruling the motion for

resentencing and vacated the court's entry. We found the petition for post-conviction relief should be dismissed for lack of jurisdiction, rather than denied. *See Eldridge II, supra*, at ¶¶ 9-11.

{¶ 5} On June 6, 2014, the trial court filed the following entry:

“This matter comes before the Court upon the reversal by the Fourth District Court of Appeals. The defendant, Peter D. Eldridge, filed a petition for post-conviction relief. This Court found the petition to be without merit and overruled the defendant's motion. Based upon the Court of Appeals decision, this Court finds the defendant's petition for post-conviction relief is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.”

{¶ 6} Subsequently, on June 23, 2014, the trial court filed another entry which states:

“This Court finds, due to clerical error and inadvertence, a judgment entry was incorrectly styled and filed in case 10-CR-097, State of Ohio v. Peter D. Eldridge.

It is the ORDER of this Court the judgment entry of June 6, 2013 filed in case number 10-CR-946 be stricken and properly filed under 11-CR-097.

IT IS SO ORDERED.”

{¶ 7} It is from the June 23, 2014 entry which Appellant now appeals.

ASSIGNMENT OF ERROR

“I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF

THE UNITED STATES AND BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION THROUGH COUNSEL’S FAILURE TO APPROPRIATELY INVESTIGATE THIS CASE IN IT’S [SIC] ENTIRETY.”

LEGAL ANALYSIS

{¶ 8} We interpret Appellant’s argument in his sole assignment of error that because his counsel allegedly (1) failed to investigate the confidential informant’s statements to law enforcement officers; (2) failed to challenge the search warrant’s execution pursuant to R.C. 2953.21; and, (3) failed to make a “good-faith estimate of a likely sentence,” Appellant was denied his right to effective assistance of counsel. Appellant contends his counsel did not attempt to learn the facts of his case and fully explain the charges in order to enable him to make an informed decision when he entered into a plea bargain.¹

{¶ 9} Appellee’s response is that Appellant has offered no credible evidence to support his claims and overcome the presumption that his trial counsel did anything but execute his duties in an ethical and competent manner. As such, Appellant has failed to demonstrate any prejudice to him by his counsel’s representation. Appellee further contends that Appellant’s claim is not properly before the court of appeals; is untimely without exception, and is barred by res judicata. As to these latter three arguments,

¹ Appellant, however, has not filed a motion to withdraw his plea based on ineffective assistance.

we agree with Appellee's reasoning. We therefore decline to consider the merits of his ineffective assistance claim.

{¶ 10} First, the judgment entry journalizing Appellant's no contest plea and sentence was filed on July 20, 2011. The entry was appealed before this court and the trial court's decision was upheld. *Eldridge I*. Appellant's current notice of appeal indicates he is appealing the judgment entry which dismissed the prior post-conviction petition for lack of jurisdiction pursuant to this court's decision. (See above in "Facts" the precise language of the June 6, 2014 and June 23, 2014 entries.) Appellant's assignment of error raises a constitutional issue with regard to his counsel's effectiveness. We agree with Appellee that this is the first time the issue of counsel has been raised and it is improperly raised in this court, "bypassing" the trial court.

{¶ 11} Second, as previously discussed in *Eldridge II*, Appellant's post-conviction motion for resentencing filed September 10, 2013 raised constitutional challenges to his convictions and sentences. The motion was filed subsequent to his initial, direct appeal and raised constitutional claims. As in *Eldridge II* at ¶ 7, we reiterate an appellant must file his petition for post-conviction relief within 180 days of the filing of the transcript in an appeal, or within 180 days of the expiration of the time for filing an appeal,

if he filed no appeal. R.C. 2953.21(A)(2). “The time limitation prescribed in R.C. 2953.21(A)(2) is jurisdictional, i.e., a trial court cannot entertain an untimely petition unless one of the exceptions set forth in R.C. [2953.23(A)] applies.” *Id.* See also, *State v. Davis*, 4th Dist. Washington No. 10CA25, 2011-Ohio-1706, ¶ 9; citing *State v. Smith*, 4th Dist. Washington No. 06CA65, 2007-Ohio-4730, ¶ 11. In *Eldridge II* at ¶ 8, we pointed out R.C. 2953.23(A)(1) and (A)(2) did not apply.² And, as in *Eldridge II* at ¶ 9, Appellant does not attempt to argue that he was unavoidably prevented from discovering any of the facts in support of his claim for ineffective assistance or that a new federal or state right has been recognized that applied to him retroactively. Again, Appellant has not demonstrated that he satisfies the exceptions to timely filing set forth in R.C. 2953.23(A). Thus, his argument

² R.C. 2953.23(A)(2) does not apply because DNA testing had not established Appellant’s actual innocence. R.C. 2953.23(A)(1) also did not apply. R.C. 2953.23 (A)(1) provides: “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.”

as to ineffective assistance is not only improperly before this court, but also untimely brought.

{¶ 12} Finally, the Supreme Court of Ohio has held that the doctrine of res judicata applies when determining whether post-conviction relief is warranted under R.C. 2953.21. *Eldridge II* at ¶ 10. See *State v. Szeftcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, at the syllabus (1996); *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375 (1984); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph eight of the syllabus (1967). As such, a petitioner may not raise, for purposes of post-conviction relief, any error that was raised, or could have been raised, on direct appeal. *State v. Sanders* at ¶ 7; citing *State v. Franklin*, 4th Dist. Meigs No. 05CA9, 2006-Ohio-1198, ¶ 10; *State v. Peebles*, 4th Dist. Pickaway No. 05CA25, 2006-Ohio-218, ¶ 11.

{¶ 13} In *State v. Osco*, 11th Dist. Portage No. 2014-P-0009, 2015-Ohio-44, ¶ 20, the appellate court noted that because the entire sentencing hearing was recorded and a transcript of the proceeding existed, Osco could have advanced his ineffective assistance claim on direct appeal. The appellate court found since Osco had a full opportunity to litigate his ineffective assistance claim, the doctrine of res judicata barred him from asserting the issue in a post-judgment motion or petition. *Id.*, at ¶ 22. This

is the exact situation which presents itself here. A review of these proceedings reveals the plea and sentencing hearing were recorded and a transcript provided. Appellant expressed no dissatisfaction with his counsel when given the opportunity to voice concerns. Appellant had a full opportunity to raise his ineffective assistance claim on direct appeal. The doctrine of res judicata bars him from asserting this issue now.

{¶ 14} For the foregoing reasons, we find Appellant's current appeal to be not properly before this court, untimely, and barred by res judicata. As such, this appeal is dismissed.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED. Costs are assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment and Opinion.

Harsha J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.