[Cite as *State v. Salser*, 2016-Ohio-2852.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA9
vs.	:	
MICHAEL D. SALSER, SR.,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Michael D. Salser, Sr., #576-118, Chillicothe, Ohio, Pro Se.

Colleen S. Williams, Meigs County Prosecutor, and Jeremy L. Fisher, Meigs County Assistant Prosecuting Attorney, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-14-16
ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court judgment that overruled a motion by Michael D. Salser, Sr., defendant below and appellant herein, to vacate his previously imposed sentences. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN BY [sic] DENYING THE APPELLANT'S MOTION TO VACATE FOR RES JUDICATA."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADVISE HIS CLIENT THAT

THE OFFENSES IN COUNT ONE/TWO VIOLATED THE DOUBLE JEOPARDY CLAUSE AND WAS [sic] UNCONSTITUTIONAL."

{¶ 2} On July 27, 2009, appellant filed a "Waiver of Indictment" and the assistant prosecuting attorney of Meigs County filed a "Bill of Information" that charged him with (1) two counts of pandering sexually oriented material involving a minor in violation of R.C. 2907.322(A)(5), and (2) importuning in violation of R.C. 2907.07(B). Appellant later entered no contest pleas to the charges and the trial court sentenced him to serve eighteen months on each of the pandering charges and one year on the importuning charge. The court further ordered all sentences to be served consecutively for a total of four years imprisonment. No appeal was taken from that judgment.

{¶ 3} Nearly four years later, appellant filed a "Motion to Vacate Sentence" and argued that the sentences (1) violated his right to be free from Double Jeopardy, and (2) trial counsel was constitutionally ineffective for failing to advise him of that fact before he pled no contest to the charges against him. On July 3, 2014, the trial court concluded that appellant's claim(s) were barred by the doctrine of res judicata. This appeal followed.

{¶ 4} We jointly consider appellant's two assignments of error because they raise related issues. A motion to vacate sentence, which raises constitutional challenges to a previous sentence, should be treated as a motion for postconviction relief. See R.C. 2953.23; also see e.g. *State v. Rarden*, 12th Dist. Butler No. CA2013–07–125, 2014-Ohio-564, at ¶8; *State v. Williams*, 4th Dist. Lawrence No. 12CA22, 2013-Ohio-2989, at ¶5; *State v. Hackney*, 9th Dist. Summit No. 24254, 2008- Ohio-5976, at ¶5. Appellant claims that he was subjected to "Double Jeopardy," which is barred by the Fifth Amendment to the United States Constitution. This is a

constitutional argument. Thus, the trial court correctly treated appellant's motion as one for postconviction relief.

{¶ 5} First, we point out that appellant did not appeal his original conviction. R.C. 2953.21(A)(2) provides that "[i]f no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition [for postconviction relief] shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal." As we previously noted, appellant filed his petition beyond the one year time limit. Thus, courts do not have jurisdiction to entertain it. See e.g. *State v. Gilliam*, 4th Dist. Lawrence No. 04CA13, 2005-Ohio-2470, at ¶11; *State v. Fluharty*, 5th Dist. Stark No. 2002CA00269, 2003-Ohio-135, at ¶9.

{¶ 6} Moreover, even if we assume for purposes of argument that the court had jurisdiction to consider the petition, we would find no merit to appellant's claims. The doctrine of res judicata bars an appellant from raising in a petition for postconviction relief any error that could have been, but was not, raised on a first appeal of right. *State v. Shaffer*, 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, at ¶16; *State v. Slagle*, Highland No. 11CA22, 2012-Ohio-1936, at ¶24; *State v. Jackson*, 4th Dist. Athens No. 97CA22, 1998 WL 128997 (Mar. 11, 1998).

{¶ 7} Even if we assume for purposes of argument that appellant's conviction violated his "Double Jeopardy" rights, or that trial counsel was ineffective for failing to inform him of that fact before he entered a no contest plea to the charges, these issues could have been raised by appellant in a direct appeal of his conviction. They were not. Thus, the trial court correctly ruled that these issues are barred by the doctrine of res judicata.

{¶ 8} For this reason, we hereby overrule appellant's two assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.