[Cite as *State v. Johnson*, 2016-Ohio-8575.]

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

STATE OF OHIO,	:	
	:	Case No. 16CA6
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
VANCE JOHNSON	:	
	:	
Defendant-Appellant.	:	**Released: 12/28/16**

APPEARANCES:

Vance Johnson, London, Ohio, Pro Se Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

McFarland, J.

{¶1} Vance Johnson appeals the decision of the Athens County Court of Common Pleas, entered March 31, 2016, denying his "Motion to Vacate a Void Sentence." On appeal, Appellant submits two assignments of error for our review: (1) Did the trial court err by failing to merge allied offenses of similar import; and (2) Did the trial court err by failing to make statutory findings required by R.C. 2929.14 before imposing consecutive sentences. Upon review of the record and relevant Ohio law, we construe Appellant's motion to vacate sentence to be an untimely petition for post-conviction relief. Furthermore, Appellant's arguments

are barred by the doctrine of res judicata. As such, we decline to consider the merits of Appellant's assignments of error. The appeal is hereby dismissed.

FACTS

{¶2} On April 8, 2013, Vance Johnson was indicted by the Athens County Grand Jury for one count of breaking and entering, a violation of R.C. 2911.13(A), a felony of the fifth degree, and one count of possessing criminal tools, a violation of R.C. 2923.24(A), also a felony of the fifth degree. These charges were assigned Athens County Common Pleas Court Case No. 13CR0145. Appellant was arraigned, entered not guilty pleas, and was released on a recognizance bond.

{¶3} While these cases were pending, Appellant was again indicted in Athens County for two counts of operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them, in violation of R.C. 4511.19(A)(1)(a). These counts were felonies of the third degree. Appellant was also indicted for one count of endangering children, R.C. 2919.22(C)(1), and one count of tampering with evidence, R.C. 2921.12(A)(1). These charges were assigned case number 13CR0292. Appellant was arraigned and pleaded not guilty; however, he was held on a cash/surety bond.[1]

[1] Appellant also had 4 community control violations pending at the time.

{¶4} On November 18, 2013, Appellant pleaded guilty to both indictments and his sentence was jointly recommended for the trial court's consideration.[2] The court sentencing occurred on December 4, 2013. In case number 13CR0145, Appellant was sentenced to one year on counts one and two, to be served consecutively to each other for a total of two years, and consecutively to 13CR0292. In 13CR0292, Appellant was sentenced to two years on counts one, three, and four, for a total of six years. He was also sentenced to 180 days in jail on count two, to be served concurrently. Appellant's total prison sentence was eight years in prison with credit for time served, a fine, a fifteen-year license suspension, and mandatory alcohol programming. In addition, on the four violations of community control, his community control was revoked and his underlying sentence in those cases was to be served concurrently to his eight-year prison sentence in 13CR0145 and 13CR0292. Appellant has not directly appealed his sentence in 13CR0145 and 13CR0292.

{¶5} On March 14, 2016, Appellant filed a motion to vacate a void sentence in 13CR0145 and 13CR0292. The State filed a response and on March 31, 2016, the trial court denied Appellant's motion. Appellant's motion was filed 2 years, 4

[2] The record contains Appellant's written "Plea of Guilty," journalized November 18, 2013. This document indicates Appellant's sentence was jointly recommended to the trial court for consideration.

months, and 14 days after the filing of the judgment entry of his original sentence, December 4, 2013.[3]

{¶6} This timely appeal of the denial of his motion to vacate a void sentence followed.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN AS A MATTER OF FACT AND LAW WHEN IT CONVICTED AND SENTENCED DEFENDANT ON ALLIED OFFENSES OF SIMILAR IMPORT.

II. THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW WHEN IT FAILED TO MAKE THE STATUTORY FINDINGS REQUIRED BY R.C. 2929.14(C)(4) BEFORE IMPOSING CONSECUTIVE SENTENCES MAKING APPELLANT'S SENTENCE CONTRARY TO LAW."

STANDARD OF REVIEW IN POST-CONVICTION PROCEEDINGS

{¶7} In some instances, "[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. Burkes*, 4th Dist. Scioto No. 13CA33582, 2014-Ohio-3311, ¶ 11, quoting *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. R.C. 2953.21 et seq., governing the proceedings upon a post-conviction petition, provides "the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case."

[3] A nunc pro tunc judgment entry of sentence was filed May 13, 2014 in order to state which count Appellant's license suspension was to be applied.

State v. Crum, 4th Dist. Lawrence No. 13CA13, 2014-Ohio-2361, ¶ 9; R.C. 2953.21(J); *State v. Ringer,* 1st Dist. Hamilton No. C–120606, 2013-Ohio-2442, ¶ 5. *State v. Smith*, 5th Dist. Fairfield No. 14CA18, 2014-Ohio 4657, ¶ 15. A motion to correct or vacate a sentence, despite its caption, meets the definition of a motion for post-conviction relief set forth in R.C. 2953.21(A)(1), if it was (1) filed subsequent to direct appeal, (2) claims a denial of constitutional rights, (3) seeks to render the judgment void, and (4) asks for vacation of the judgment and sentence. *Smith, supra,* citing *State v. Reynolds,* 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).[4] While Appellant's motion was brought herein pursuant to R.C. 2953.08(A)(4), we cast it as a petition for post-conviction relief.[5] Therefore, it is reviewable under the standards provided by the post-conviction statutes. *See State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12.

{¶8} Generally, a ruling on a post-conviction relief motion should not be reversed absent an abuse of a trial court's discretion. *State v. Williams,* 4th Dist. Lawrence No. 12CA22, 2013-Ohio-2989, ¶ 16. *See State v. Fisk,* 4th Dist. Washington No. 11CA4, 2011-Ohio-6116, at ¶ 6; *State v. Hicks*, 4th Dist.

[4] In *State v. Sanders,* 4th Dist. Pickaway No. 15CA21, 2016-Ohio-5508, at fn. 3, we recognized that: "[T]he precise language of *Reynolds* applies only to motions that raise constitutional violations. Since *Reynolds*, however, appellate courts have treated virtually every motion asking for re-sentencing as a petition for post-conviction relief, whether there is an alleged constitutional violation or not. *See e.g. State v. Turner–Frantz,* 7th Dist. Jefferson No. 14 JE 33, 2015-Ohio-2111, at ¶ 17 (motion for re-sentencing treated as though alleged violations were of statute and criminal rule); *State v. Gumm,* 8th Dist. Cuyahoga No. 101496, 2015-Ohio-1539, at ¶ 3 (referring to an earlier case where a motion for re-sentencing was treated as such a petition when the claim was for violation of a criminal rule). In *Sanders* we explained although the appeal did not involve a constitutional violation, our decision would have been the same whether we strictly applied *Reynolds,* or, like its progeny, expanded that ruling to include every conceivable motion for re-sentencing regardless of the movant's basis."

[5] R.C. 2953.08(A)(4) provides a direct appeal as of right if a sentence is contrary to law.

Highland No. 09CA15, 2010-Ohio-89, at ¶ 11. An abuse of discretion is more than an error of law or judgment; rather, it implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *Williams, supra*. *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *State v. Moreland*, 50 Ohio St.3d 58, 61, 552 N.E.2d 894 (1990).

LEGAL ANALYSIS

{¶9} For ease of analysis, we consider Appellant's two assignments of error jointly. R.C. 2953.21, petition for post-conviction relief, provides in pertinent part:

> "(A)(1)(a) 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.
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> * * *
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> (2) 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 * * *."

{¶10} Appellant first argues he was convicted of one count of breaking and entering and one count of possession of criminal tools, both felonies of the fifth degree. He points out the indictment filed in this case alleges that the offenses

listed in the two counts occurred on the same date and involved the same victim, and that nothing in the indictment and no evidence in the record demonstrates there was a separate animus or separate victim for the two offenses. Appellant argues the offenses constituted a single offense, were committed with a single animus, resulting in a single harm against a single victim and, as such, the offenses should have been merged as allied offenses of similar import for purposes of sentencing. Upon finding one or more counts to constitute two or more allied offenses of similar import, R.C. 2941.25(A) requires that the convictions be merged for the purposes of sentencing and that the defendant only be sentenced on one of the counts. *State v. Smith,* 4th Dist. Scioto No. 15CA3686, 2016-Ohio-5062, ¶ 112; *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 5.

{¶11} Secondly, Appellant argues, pursuant to R.C. 2929.14(C)(4), the record is clear that the trial court failed to make the required findings to impose consecutive sentences. As such, Appellant concludes the trial court's imposition of consecutive sentences was clearly and convincingly contrary to law. It is well-established by the Supreme Court of Ohio that "in order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry * * *." *State v. Fisher,* 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E. 2d 960, ¶ 7; *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16

N.E.3d 659, ¶ 37. A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *State v. Mitchell*, 4th Dist. Meigs No. 13CA13, 2015-Ohio-1132, ¶ 28; *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, at ¶ 17; *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 23.

{¶12} At the outset, Appellee has pointed out and we note that Appellant's motion to vacate a void sentence was filed over two years after the filing of his original judgment of conviction on December 4, 2013. The current version of the post-conviction statute, in effect when Appellant filed his motion on March 14, 2016, provides that his motion for post-conviction relief was to be filed no later than 365 days after the filing of the trial transcript, had Appellant pursued a direct appeal. As such, Appellant's post-conviction motion is barred as untimely.

{¶13} Furthermore, Appellant's issues as to allied offenses and the consecutive nature of his sentence could have been raised in a direct appeal. In *State v. Kelly*, 4th Dist. Scioto No. 14CA3637, 2014-Ohio-5840, ¶ 17, we observed that: "[R]es judicata applies to proceedings involving post-conviction relief." *State v. Shaffer*, 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, ¶ 16, quoting *State v. Burton*, 4th Dist. Gallia No. 13CA12, 2014-Ohio-2549, ¶ 17, citing *State v. Szecyk*, 77 Ohio St.3d 93, 95, 1996-Ohio-337, 671 N.E.2d 233. Under the doctrine of res judicata, a court may not consider issues that a defendant raised or could

have raised on direct appeal in post-conviction relief proceedings. *State v. Damron*, 4th Dist. Ross No. 10CA3158, 2010-Ohio-6459, ¶ 20; *State v. Nichols*, 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375 (1984). Post-conviction relief is available only for errors based upon facts and evidence outside the record, which would not be reviewable on direct appeal. *Damron, supra; State v. Rodriguez*, 65 Ohio App.3d 151, 153, 583 N.E.2d 347 (9th Dist.1989) (per curiam). In other words, a petitioner may not raise, for purposes of post-conviction relief, any error that was raised, or could have been raised but was not, on direct appeal. *State v. Franklin*, 4th Dist. Meigs No. 05CA9, 2006-Ohio-1198, at ¶ 10; *State v. Peeples*, 4th Dist. Pickaway No. 05CA25, 2006-Ohio-218, at ¶ 11. Recently, in *State v. Smith*, *supra*, the appellant argued that the offenses of which he was convicted were allied offenses of similar import and should have been merged. However, this court observed his argument could have been raised on direct appeal, and because it was not, his claim was barred by res judicata. *Id.* at 19. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶14} And, an error in the consecutive sentence nature of Appellant's sentence is an argument which could have been raised in a first appeal of right. In *Kelly, supra*, at ¶ 17 we cited *State v. Brown*, 7th Dist. Mahoning No. 13MA176, 2014-Ohio-4008, ¶ 14, wherein the appellate court observed:

> "[T]he issues raised in the post-conviction petition were sufficiency and manifest weight of the evidence, being found guilty of a lesser

> included offense, maximum and consecutive sentences, and ineffective assistance of counsel claims. All of these issues could have been raised in the direct appeal. *State v. Damron,* 4th Dist. No. 10CA3158, 2010-Ohio-6459, ¶ 2; *State v. Bradley,* 8th Dist. No. 88163, 2007-Ohio-2642, ¶ 10; *State v. Tillman,* 6th Dist. No. H-02-049, 2003-Ohio-4216, ¶ 11-12; *In re T.L.*, 8th Dist. No. 100328, 2014-Ohio-1840, ¶ 16 * * *."

{¶15} Finally, the jointly recommended nature of Appellant's consecutive sentence precludes its review. The Supreme Court of Ohio has recently re-emphasized that if a jointly recommended sentence includes non-mandatory consecutive sentences, and the trial judge fails to make the consecutive-sentence findings set out in R.C. 2929.14(E)(4), the sentence is nevertheless "authorized by law," and therefore is not appealable pursuant to R.C. 2953.08(D)(1). *State v. Sergent*, Ohio Sup. Ct. Slip Opinion No. 2016-Ohio-2696. As indicated earlier, Appellant's sentence was jointly recommended to the sentencing court.

{¶16} For the foregoing reasons, we find the trial court did not abuse its discretion in its decision denying Appellant's motion to vacate sentence. Appellant's petition for post-conviction relief was untimely and his arguments are barred by the doctrine of res judicata. Moreover, Appellant was given an agreed sentence. As such, we decline to consider the merits of Appellant's arguments and the appeal is dismissed.

APPEAL DISMISSED.

Harsha, J., dissenting:

{¶17} I respectfully dissent from the dismissal of this appeal, which is based on the majority's recasting of Johnson's motion to vacate his sentence as an untimely postconviction motion.

{¶18} " 'Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.' " *State v. Burkes*, 4th Dist. Scioto No. 13CA3582, 2014–Ohio–3311, ¶ 11, quoting *State v. Schlee*, 117 Ohio St.3d 153, 2008–Ohio–545, 882 N.E.2d 431, ¶ 12. In *State v. Reynolds*, 79 Ohio St.3d 158, 160, 773 N.E.2d 1131 (1997), the Supreme Court of Ohio held that a motion styled as a "Motion to Correct or Vacate Sentence" met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1) because it was "(1) filed subsequent to [the 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." (Emphasis added.) *See also Schlee* at ¶ 12.

{¶19} Johnson's postsentence motion did not raise any constitutional claim; it was instead limited to statutory claims based on R.C. 2941.25 and 2929.14(C)(4). Therefore, under the plain language of R.C. 2953.21(A)(1) as interpreted by the Supreme Court of Ohio, his motion could not be recast as a petition for postconviction relief. The majority's expansion of motions that can be

recast as petitions for postconviction relief is based on its citation of a footnote in *State v. Sanders*, 4th Dist. Pickaway No. 15CA21, 2016-Ohio-5508, fn. 3, but that discussion is dicta in which the court conceded that it had "some doubts" about the trial court's treatment of a motion as a petition for postconviction relief. *Id.* at ¶ 6.[6] Absent specific statutory authorization or guidance from the Supreme Court, I would refrain from so expanding the reach of petitions for postconviction relief beyond its legislative definition. Consequently, the majority errs in so holding and dismissing the appeal on the basis that the motion constituted an untimely petition for postconviction relief.

{¶20} Nevertheless, as the majority further observes, Johnson's nonconstitutional claims are barred by res judicata because he could have raised them in a timely appeal. *See State v. McManaway*, 4th Dist. Hocking No. 16CA8, 2016-Ohio-7470, ¶ 17, citing *State v. Knowles*, 10th Dist. Franklin No. 15AP-991, 2016-Ohio-2859, ¶ 14 (res judicata barred claim in postconviction motion challenging failure to merge allied offenses and imposition of consecutive sentences); *State v. Williams*, __ Ohio St.3d __, 2016-Ohio-7658, __ N.E.3d __, ¶ 26 ("Our decisions in *Mosely*, *Holdcroft*, and *Rogers* establish that when a trial court finds that convictions are not allied offenses of similar import, or when it fails to make any finding regarding whether the offenses are allied, imposing a

[6] I did not participate in the *Sanders* decision.

separate sentence for each offense is not contrary to law, and any error must be asserted in a timely appeal or it is barred by res judicata"). *State v. Wofford*, 5th Dist. Stark No. 2016CA00087, 2016-Ohio-4628, ¶ 21 (res judicata bars defendant's claim that the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences because he could have raised that on appeal).

{¶21} Finally, as the majority also notes, Johnson was precluded from contesting his sentence on appeal because he agreed to it. *State v. Sergent*, __ Ohio St.3d __, 2016-Ohio-2696, __ N.E.3d __, ¶ 43.

{¶22} Therefore, the trial court did not err in denying Johnson's motion to vacate his sentence. Consequently, I would overrule his assignments of error and affirm the judgment of the trial court. *See McManaway* at ¶ 19.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and costs be 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 Athens 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.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.