

[Cite as *State v. Boler*, 2018-Ohio-3722.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA2
	:	
vs.	:	
	:	
PHILLIP DIONTE BOLER,	:	DECISION & JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Phillip Dionte Boler, Marion, Ohio, pro se.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Robert P. Driscoll, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-10-18
ABELE, J.

{¶ 1} Phillip Dionte Boler-Bey, defendant below and appellant herein, appeals the Athens County Common Pleas Court denial of his motion for postconviction relief and assigns three errors for review:

FIRST ASSIGNMENT OF ERROR:

“DID THE MID-TRIAL AMENDMENT TO THE BILL OF PARTICULARS THAT INCLUDED A NEW THEORY OF CONDUCT CHANGE THE NAME AND IDENTITY OF R.C. 2911.01(A)(3), AGGRAVATED ROBBERY, AND R.C. 2903.02(B), MURDER, AS CHARGED IN THE INDICTMENT?”

SECOND ASSIGNMENT OF ERROR:

“COULD IT BE SAID THAT APPELLANT WAS CONVICTED OF COMPLICITY TO THE VERY OFFENSES FOR WHICH HE WAS INDICTED WHERE THE TRIAL COURT PERMITTED A MID-TRIAL AMENDMENT, TO THE BILL OF PARTICULARS, THAT INCLUDED A NEW THEORY OF CONDUCT FOUND SUBSEQUENTLY TO THE FILING OF THE INDICTMENT, CONTRARY TO R.C. 2941.03(E)?”

THIRD ASSIGNMENT OF ERROR:

“WAS APPELLANT’S MOTION FOR POST-CONVICTION RELIEF FROM JUDGMENT BARRED BY THE DOCTRINE OF RES JUDICATA WHERE HE RAISED ISSUES OF JURISDICTIONAL DEFECTS THAT RENDERED THE JUDGMENT OF CONVICTION VOID AB INITIO?”

{¶ 2} We first incorporate the statement of facts and prior procedural history as detailed in our decision in the direct appeal of this case. See *State v. Boler*, 4th Dist. Athens No. 09CA24, 2010-Ohio-3344. In our decision, we affirmed appellant’s convictions and sentence, finding: (1) no prosecutorial misconduct during closing argument, (2) the trial court did not abuse its discretion by allowing certain challenged evidence, and (3) the cumulative error doctrine did not apply. To supplement the facts and procedural history from *Boler I*, we add some relevant milestones and subsequent history.

{¶ 3} The record reflects that on February 20, 2009, an Athens County grand jury returned an

indictment that charged appellant with (1) one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a first-degree felony, and (2) one count of murder in violation of R.C. 2903.02(B), an unspecified felony with the predicate offense being aggravated robbery. Both counts contained firearm specifications. The state issued a Bill of Particulars on April 1, 2009, and amended it on June 17, 2009, to add that the underlying theft offense to the aggravated robbery was attempted theft and/or burglary or an attempted burglary of 7467 New Marshfield Road.

{¶ 4} On June 19, 2009, a jury found appellant guilty of complicity to aggravated robbery and complicity to murder, both with firearm specifications. On June 22, 2009, the trial court issued an entry to indicate that appellant was convicted of aggravated robbery [2911.01(A)(3)] and complicity to murder [2903.02(B)], but on July 1, 2009 the court issued a nunc pro tunc judgment to correct the June 22, 2009 judgment in which “the amount of money seized from Defendant during this investigation lists the wrong amount. Also, the previous entry stated that defendant was found guilty of Count One, Aggravated Robbery which should actually be Complicity to Aggravated Robbery. * * *” On September 22, 2009, the trial court issued another nunc pro tunc entry, this time to indicate once again that appellant was convicted of aggravated robbery and complicity to murder. On October 2, 2009, the trial court issued another nunc pro tunc entry to state that appellant was convicted of complicity to aggravated robbery and complicity to murder.

{¶ 5} On May 5, 2010, and again on May 21, 2010, appellant filed motions for disclosure of grand jury transcripts. On May 21, 2010, appellant also filed his first petition for postconviction relief and asked the trial court to dismiss the defective indictment “do [sic] to lack of Sufficient Subject Matter, and Court have [sic] no Jurisdiction to hear such indictment, since the indictment does not have the necessary ingredience [sic] to create the required elements to display the initial

charge.” On May 25, 2010, the trial court dismissed appellant’s motions for disclosure of grand jury transcripts and his petition for postconviction relief. Appellant did not appeal the decision.

{¶ 6} As noted above, on July 12, 2010 this court affirmed the trial court’s judgment of conviction. See *Boler*, 4th Dist. Athens App. No. 09CA24, 2010-Ohio-3344. On September 13, 2010, appellant filed a pro se App.R. 26(B) application to reopen the appeal. On November 1, 2010, appellant filed a motion for leave to file an amended application to reopen. On November 22, 2010, this court denied appellant’s application and concluded that “his motion does not show that a ‘genuine issue’ exists as to whether he was deprived the effective assistance of appellate counsel.”

{¶ 7} On August 26, 2011, appellant filed an App.R. 26(A) application for reconsideration and argued that the offenses should have merged, as did the convictions of a co-defendant. On December 22, 2011, this court denied appellant’s delayed application for reconsideration, finding appellate counsel not ineffective and finding that aggravated robbery and felony murder are not allied offenses of similar import under the test in effect when appellant filed his direct appeal.

{¶ 8} On January 11, 2012, appellant filed a second motion to reconsider, or in the alternative, to certify a conflict. On March 5, 2012, this court denied appellant’s application for reconsideration and denied the untimely motion to certify a conflict. On March 16, 2012, appellant again filed a motion to reconsider this court’s March 5, 2012 decision to deny appellant’s January 11, 2012 application to reconsider or to certify a conflict. On May 1, 2012, this court denied appellant’s application for reconsideration.

{¶ 9} On April 9, 2013, appellant filed a request for a re-sentencing hearing. On April 16, 2013, the trial court denied appellant’s request for resentencing, finding that the aggravated robbery related to Osbourne and that the individual murdered was Donnie Putnam, therefore as two victims

were involved, the crimes were committed separately or with a separate animus as to each.

{¶ 10} On May 2, 2013, appellant filed a second notice of appeal (13CA19) to appeal the trial court's April 16, 2013 decision that denied his motion for resentencing. On June 13, 2013, appellant filed a corrected notice of appeal, and on June 20, 2013, this court (13CA19) dismissed appellant's appeal because the trial court's April 16, 2013 entry is not a final appealable order. In this court's ruling, we also held: "Boler could have raised the issue concerning whether the trial court sentenced him on allied offenses of similar import in his sentencing on his direct appeal, but failed to do so. The doctrine of res judicata bars not only the re-litigation of previous claims, but also bars a litigant from raising any issue, claim or defense that could have been previously raised but was not. (citation omitted). The allied offenses argument was available to Boler on direct appeal. Having failed to raise the issue then, Boler is bared by the doctrine of res judicata from raising it at this time."

{¶ 11} On September 14, 2014, appellant filed a motion to vacate a void judgment (09CA24) and raised the same issue he raises here. On October 7, 2014, the magistrate's order denied appellant's motion to vacate a void judgment and stated "[t]his Court finds nothing in Boler's current motion that has not or could not have been raised in his direct appeal. The doctrine of res judicata bars the consideration of errors that could have been raised on direct appeal, but were not. (Citation omitted). Moreover, Boler has not demonstrated that any of these errors would have rendered the trial court's judgment void; therefore, they would also not render this Court's judgment void. Boler's motion to vacate a void judgment is hereby DENIED."

{¶ 12} On October 15, 2014 (09CA24), appellant filed a motion for a judgment on the pleadings. On October 29, 2014, the magistrate's order denied appellant's motion for judgment on the pleadings as moot because no pleadings were currently before the court. On November 25, 2014

(09CA24), appellant filed a second motion for judgment on the pleadings, arguing that his four-year-old motion for leave to file amended application on reopening from November 1, 2010 was still pending before the court. On January 23, 2015, this court denied appellant's motion, concluding that appellant's November 1, 2010 motion was untimely filed and implicitly denied by the Court, and thus, the motion was no longer pending.

{¶ 13} On July 17, 2017, appellant filed his second petition for postconviction relief, a motion to vacate a void judgment "due to fraud upon the court" in 09CR0091. On August 3, 2017, appellant filed a motion for judgment on the pleadings in the trial court, and on August 15, 2017, the court denied appellant's motion to vacate a void judgment due to fraud upon the court, construing it as "an untimely, as well as successive, R.C. 2953.21 petition for postconviction relief, and therefore denies the motion for want of jurisdiction." The trial court cited appellant's May 21, 2010 "motion to void judgment" as appellant's first motion for postconviction relief. Appellant did not appeal the trial court's decision the motions on May 25, 2010. The court dismissed appellant's July 17, 2017 motion for want of jurisdiction and concluded that the dismissal mooted appellant's August 3, 2017 motion for judgment on the pleadings. Appellant did not appeal that decision.

{¶ 14} On December 22, 2017, appellant filed his third motion for postconviction relief and reasserted the claims that the trial court denied on August 15, 2017. On January 2, 2018, the trial court denied appellant's motion for postconviction relief and noted that appellant's motion is "an untimely, as well as successive, R.C. 2953.21 petition for post-conviction relief, and is therefore denied for want of jurisdiction." The trial court cited appellant's May 21, 2010 "motion to void judgment" as appellant's first motion for postconviction relief, denied on May 25, 2010, and cited appellant's July 17, 2017 "motion to vacate a void judgment due to fraud upon the court" as

appellant's second petition, also denied August 15, 2017. The trial court correctly observed that appellant did not appeal either decision. The trial court held that (1) this is another untimely and successive postconviction petition, (2) the matter is barred by res judicata, (3) the mid-trial amendment to the bill of particulars is appropriate, (4) the amendment did not change the name of the offense or the identity of the crime, and (5) appellant's conviction for complicity, the offenses for which he was indicted, is proper. Thus, the trial court dismissed the December 22, 2017 motion for want of jurisdiction. Further, on January 18, 2018, the trial court denied appellant's January 16, 2018 "demand for a hearing on the merits" as moot. This appeal followed.

II.

{¶ 15} Postconviction relief is a civil collateral attack on a judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). A petition for postconviction relief allows a petitioner to present constitutional issues that would otherwise be unreviewable on direct appeal because the evidence supporting those issues is not contained in the record of the criminal conviction, but a postconviction relief petition does not provide a second opportunity to litigate the conviction. *State v. Jones*, 10th Dist. Franklin No. 16AP-803, 2017-Ohio 5529, ¶ 6.

{¶ 16} Postconviction relief is governed by R.C. 2953.21 which provides:

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child 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.

“[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for posconviction relief that is supported by competent and credible evidence.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Also, see *Calhoun* at 284 (postconviction relief “statute clearly calls for discretion in determining whether to grant a hearing”).

{¶ 17} For purposes of clarity, we first address appellant’s third assignment of error. Appellant asserts that his motion for postconviction relief should not be barred by res judicata “where he raised issues of jurisdictional defects that rendered the judgment of conviction void ab initio,” and contends a denial of “his rights.”

{¶ 18} We first point out that the version of R.C. 2953.21(A)(2) in effect prior to March 2015, the time window for appellant’s petition, limited the filing of a petition to no later than 180 days after the filing of the transcript. Appellant was ordered to file his transcript in his direct appeal on or before October 12, 2009, but a notification on the clerk of courts’ record indicates that a “Notice of Supplemental Transmission of Record” filed on October 13, 2009. Thus, appellant filed his latest petition for postconviction relief more than eight years after the notation of the supplemental transmission of record was filed. “[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[.]” (Emphasis added.) R.C. 2953.23(A). Here, neither section applies. Appellant does not (1) claim that he was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief [R.C. 2953.23(A)(1)(a)], (2) claim that subsequent to the deadline or his earlier

petition that the United States Supreme Court recognized a new federal or state right that applies retroactively [R.C. 2953.23(A)(1)(a)], (3) argue that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted, [R.C. 2953.23(A)(1)(b)], and (4) claim that he has submitted DNA evidence to show his “actual innocence” [R.C. 2953.23(A)(2)]. Thus, appellant untimely filed his petition for postconviction relief.

{¶ 19} In addition to being untimely, a trial court may also dismiss a petition when the claims are barred by the doctrine of res judicata. *See State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus. Res judicata is applicable in all postconviction relief proceedings. *Szefcyk* at 95. “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 at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *Id.* at syllabus. Thus, to avoid application of res judicata, a petitioner must assert a claim that was not raised, or could not have been raised, at the time of trial or on direct appeal, and support such claim with competent, relevant, and material evidence outside the record. Further, the Supreme Court of Ohio held that a trial court properly denies a R.C. 2953.21 petition for postconviction relief and issues proper findings of fact and conclusions of law when such findings are comprehensive and pertinent to the issues presented, the findings demonstrate the basis for the trial court’s decision, and the evidence supports the findings. *Calhoun*, 86 Ohio St.3d at 292.

{¶ 20} In the case sub judice, the issues appellant raised in his untimely, successive petition for postconviction relief could have been raised in his direct appeal, but were not. “The doctrine of *res judicata* bars not only the re-litigation of previous claims, but also bars a litigant from raising any

issue, claim or defense that could have been previously raised but was not. See *State v. Chafin*, 10th Dist. No. 06AP-1108, 2007-Ohio-1840, at paragraph 11.” *State v. Boler*, 4th Dist. Athens App. No. 13CA19, Decision and Judgment, June 20, 2013, p. 2. Conversely, the state is correct that the doctrine of res judicata bars the consideration of this matter because appellant has raised the issues on five previous occasions. Moreover, this court has denied appellant’s request multiple times to consider arguments regarding the amendment of the indictment and complicity. As we wrote in *Boler*, 4th Dist. Athens No. 09CA24, 2010-Ohio-3344:

This Court finds nothing in Boler’s current motion that has not or could not have been raised in his direct appeal. The doctrine of res judicata bars the consideration of errors that could have been raised on direct appeal, but were not. *State v. Beach*, 4th Dist. Gallia App. No. 11CA4, 2012-Ohio-1630. Moreover, Boler has not demonstrated that any of these errors would have rendered the trial court’s judgment void; therefore, they would also not render this Court’s judgment void. Boler’s motion to vacate a void judgment is hereby DENIED. *Id.* at p. 2.

The issues appellant raises in the case sub judice are the same issues raised in his September 14, 2014 motion. These matters are barred and the trial court properly dismissed the postconviction relief petition. Generally, the validity and sufficiency of an indictment must be raised on direct appeal. *Payne v. Jeffreys*, 109 Ohio St.3d 239, 2006-Ohio-2288, 846 N.E.2d 1248, ¶ 5. Even if a trial court’s amendment of an indictment is improper, at most the judgment may have been voidable and a defendant would be required to raise this issue on direct appeal.

{¶ 21} Consequently, we overrule appellant’s third assignment of error.

III.

{¶ 22} In his first assignment of error, appellant asserts that the mid-trial amendment to the bill of particulars included a new theory of conduct and changed the name and identity of R.C. 2911.01(A)(3), aggravated robbery and R.C. 2903.02(B) murder as charged in the indictment.

Appellant cites *State v. Vitale*, 96 Ohio App.3d 695, 645 N.E.2d 1277 (8th Dist.1994) and *State v. Wilkinson*, 178 Ohio App.3d 99, 2008-Ohio-4400, 896 N.E.2d 1027, for the proposition that a criminal defendant has an inalienable right to be tried on the same essential facts (conduct) on which the grand jury found probable cause (to return the indictment) and is constitutionally guaranteed that the essential facts (conduct) constituting the offense for which he is tried will be found in the indictment of the grand jury.

{¶ 23} The state responds that assuming, *arguendo*, appellant could appeal the trial court's decision, the amendment to the Bill of Particulars is appropriate and did not change the name or section under which appellant was indicted. Crim.R. 7(E) addresses a Bill of Particulars, and states: "When the defendant makes a written request * * * the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge[d] and of the conduct of the defendant alleged to constitute the offense. A bill of particulars *may be amended at any time* subject to such conditions as justice requires. (Emphasis added). Further, Crim.R. 7(D) provides: "The court may *at any time before, during, or after* a trial amend the indictment, information, complaint or bill of particulars * * * provided no change is made in the name or identity of the crime charged." (Emphasis added.)

{¶ 24} The state notes that the Bill of Particulars (1) was amended in a timely manner, and (2) only specified the predicate offense(s) for aggravated burglary, so made no change to the name or identity of the crime. The theft offense predicate-offense element of aggravated robbery was specified to name "attempted theft, burglary or attempted burglary." The burglary element was an element of the aggravated robbery charge, not an independent count. Moreover, the factual allegations in the original and amended Bills of Particulars did not change. Thus, neither the name or

identity of either crime charged was changed.

{¶ 25} Therefore, appellant's first proposed assignment of error has no merit.

IV.

{¶ 26} In appellant's second assignment of error, he argues: "Could it be said that Appellant was convicted of complicity to the very offenses for which he was indicted where the trial court permitted a mid-trial amendment, to the bill of particulars, that included a new theory of conduct found subsequently to the filing of the indictment, contrary to R.C. 2941.03(E)?" Seemingly, appellant argues that he was indicted for murder (in violation of R.C. 2903.02) but convicted of complicity to murder (in violation of R.C. 2923.03), and that he was indicted for aggravated robbery (in violation of R.C. 2911.01) but convicted of complicity to aggravated robbery (in violation of R.C. 2923.03). However, "[a] charge of complicity may be stated in terms of [R.C. 2923.03, the complicity statute], or in terms of the principal offense." R.C. 2923.03(F). Thus, "R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. *See State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407-408." *State v. Herring*, 94 Ohio St.3d 246, 251, 2002-Ohio-796, 762 N.E.2d 940. Because appellant was indicted for aggravated robbery and murder, and convicted of complicity to aggravated robbery and complicity to murder, which is permissible, appellant's argument fails and we overrule his second assignment of error.

{¶ 27} For all of the reasons above, we affirm the trial court's judgment to dismiss appellant's untimely, successive petition for postconviction relief.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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