

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 09 CA 102
	:	
	:	
RONNIE EARL PEOPLES	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 75 CR 0888
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	June 22, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES J. MAYER
Richland County Prosecutor
38 South Park Street
Mansfield, Ohio 44902

RONNIE EARL PEOPLES #123137
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Edwards, P.J.

{¶1} Defendant-appellant, Ronnie Earl Peoples, appeals from the August 5, 2009, Judgment Entry of the Richland County Court of Common Pleas overruling his Petition for Post-Conviction Relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 1, 1975, appellant, Ronnie Earl Peoples, pleaded guilty to two counts of aggravated robbery in violation of R.C. 2911.01, felonies of the first degree. Pursuant to a Journal Entry filed on December 9, 1975, the trial court sentenced appellant to four to twenty-five years in prison on each count, to be served concurrently. The trial court also ordered that the sentences be served concurrently with the sentence that appellant was serving in another case.

{¶3} On February 24, 2003, appellant filed a Petition for Writ of Error Coram Nobis and/or Motion to Vacate, claiming he was denied his right to counsel at sentencing and that the uncounseled conviction was used to enhance his current sentence in Alabama. The petition was assigned to the Honorable James D. Henson, Judge of the Court of Common Pleas of Richland, County, Ohio. By Judgment Entry filed March 27, 2003, Judge Henson dismissed appellant's writ/motion.

{¶4} Appellant then filed an appeal. Appellant, in his appeal, argued, in part, that Judge Henson had erred in ruling on his petition because, in 1975, Judge Henson was employed with the Richland County Prosecutors' Office and was involved in prosecuting appellant regarding the aggravated robbery charges. Pursuant to an Opinion filed on October 16, 2003, in *State v. Peoples*, Richland App. No. 2003CA0046, 2003-Ohio-5803, this Court remanded the matter to the trial court for an evidentiary

hearing to determine whether or not appellant was denied his right to counsel at the time of his plea or sentencing. This Court, in our Opinion, noted that the issue of disqualification "lies with appellant and the Chief Justice of the Supreme Court of Ohio."

{¶5} On March 8, 2004, a hearing was held before Judge James DeWeese who had been assigned to rule on appellant's Petition for Writ of Error Coram Nobis and/or Motion to Vacate. Appellant's counsel was present at the hearing. As memorialized in a Judgment Entry filed on March 18, 2004, the Petition for Writ of Error Coram Nobis and/or Motion to Vacate was denied. Judge DeWeese, in his Entry, found that appellant had been represented by counsel at his plea and sentencing hearings in December of 1975.

{¶6} Appellant then appealed. Pursuant to an Opinion filed on October 6, 2004 in *State v. Peoples*, Richland App. No. 04 CA 034, 2004-Ohio-5550, this Court affirmed the judgment of the trial court.

{¶7} On February 9, 2009, appellant filed a Post-Conviction Petition. Appellant, in his Petition, alleged that his plea of guilty to two counts of aggravated robbery violated the Double Jeopardy Clause of the United States Constitution and R.C. 2941.25. Appellant filed the same Petition on July 6, 2009.

{¶8} As memorialized in a Judgment Entry filed on August 5, 2009, Judge Henson overruled appellant's Petition, holding that the petition was untimely filed and that it was barred by the doctrine of res judicata.

{¶9} Appellant now raises the following assignments of error on appeal:

{¶10} “I. WHETHER JUDGE JAMES HENSON SHOULD HAVE RECUSE (SIC) HIMSELF FROM RULING ON THE POST-CONVICTION SINCE HE WAS THE PROSECUTING ATTORNEY ON THE CASE?

{¶11} “II. WHETHER A GUILTY PLED (SIC) TO TWO COUNTS OF AGGRAVATED ROBBERY OF ONE BANK VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE U.S. CONSTITUTION AND ORC. §2941.25?”

I

{¶12} Appellant, in his first assignment of error, argues that Judge Henson should have recused himself and not ruled on appellant’s Post-Conviction Petition because he was the Prosecuting Attorney on appellant’s case in 1975.

{¶13} The Supreme Court of Ohio has exclusive jurisdiction over such matters pursuant to R.C. § 2701.03. The statute reads:

{¶14} “(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

{¶15} “(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

{¶16} “(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

{¶17} “(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

{¶18} “(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

{¶19} “(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

{¶20} “ * * *

{¶21} “(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another

judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.”

{¶22} R.C. 2701.03 provides the exclusive means by which a litigant can assert that a common pleas judge is biased or prejudiced. *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 663 N.E.2d 657. Thus, an appellate court clearly lacks any authority to pass upon the disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *State v. Ramos* (1993), 88 Ohio App.3d 394, 623 N.E.2d 1336.

{¶23} As this Court noted in our previous opinion in *State v. Peoples*, Richland App. No. 2003 CA 0046, 2003-Ohio-5803, “[t]he issue of disqualification lies with appellant and the Chief Justice of the Supreme Court of Ohio.” *Id* at paragraph 18.

{¶24} Appellant’s first assignment of error is, therefore, overruled.

II

{¶25} Appellant, in his second assignment of error, argues that his conviction for two counts of robbery of one bank robbery violates the Double Jeopardy Clause of the Ohio Constitution and R.C. 2941.25. Appellant specifically contends that the two counts were allied offenses of similar import.

{¶26} As an initial matter, we note the pertinent jurisdictional time requirements for a post-conviction petition are set forth in R.C. 2953.21(A)(2) as follows: “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 one hundred eighty 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 or adjudication * * *. If no appeal is taken, except as otherwise

provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶27} In the case sub judice, appellant did not file a direct appeal from his 1975 conviction. Appellant thus was required to file his petition no later than one hundred eighty days after the expiration of the time for filing the appeal. Appellant, however, did not do so. Appellant’s petition was, therefore, untimely.

{¶28} In order for a trial court to recognize an untimely or successive post-conviction petition pursuant to R.C. 2953.23(A)(1), both of the following requirements must apply:

{¶29} “(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.

{¶30} “(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 * * *.”

{¶31} A court has no jurisdiction to hear an untimely petition for post-conviction relief unless the movant meets the requirements in R.C. 2953.23(A).

{¶32} As noted by the trial court in its August 5, 2009 Judgment Entry, neither of the exceptions set forth above apply. Appellant’s claims “rely on facts that were available to [appellant] at the time of sentencing, and do not rely on a newly recognized

federal or state right.” Moreover, appellant did not present 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 * * *.” The trial court, therefore, properly held that appellant’s petition was untimely.

{¶33} As is stated above, appellant argues that his sentence on two counts of aggravated robbery for robbing two bank tellers within the same bank constitutes a violation of the Double Jeopardy Clause of the Ohio Constitution and Ohio’s allied offense statute. Appellant’s arguments regarding these issues were available to him on direct appeal and were also available in a timely post-conviction petition. Therefore, appellant’s arguments are barred under the doctrine of res judicata. As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104: “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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 180.

{¶34} Appellant's second assignment of error is, therefore, overruled.

{¶35} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES

JAE/r0322

