

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-120
STEVEN HOLLAND	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of
Common Pleas Court Case No. CR-88-
16846

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 25, 2010

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT
Prosecuting Attorney
20 South Second Street, 4th Fl.
Newark, Ohio 43055

For Defendant-Appellant:

STEVEN HOLLAND
Pro Se
North Central Corr. Inst.
P.O. Box 1812
Marion, Ohio 43301

Delaney, J.

{¶1} Appellant Steven Holland, pro se, appeals the decision of the Licking County Common Pleas Court denying his motion to amend sentence. Appellee is the State of Ohio.¹

{¶2} On or about March 31, 1988, Appellant was charged by indictment with one count of aggravated burglary in violation of R.C. 2911.11; one count of theft in violation of R.C. 2913.02, ; one count of vandalism in violation of R.C. 2905.05(A) and one count of public indecency in violation of R.C. 2907.09. The first, second and third counts carried enhancement specifications due to Appellant's prior felony convictions for aggravated burglary, theft and escape.

{¶3} On May 4, 1988, Appellant entered pleas of guilty to the charges of aggravated burglary, vandalism and public indecency. The charge of theft was dismissed by the State. Appellant, who was represented by counsel, signed a change of plea form.

{¶4} By judgment entry filed May 16, 1988, the trial court sentenced Appellant to twelve to twenty-five years in prison for aggravated burglary; two to five years in prison for vandalism, the sentences to run consecutive; and to thirty days in jail for public indecency, to run concurrently to the felony sentences.

{¶5} Appellant did not appeal his conviction or sentence.

¹ Appellee did not file a responsive brief.

{¶6} On September 23, 2009, Appellant filed a motion to amend his sentence in the trial court. Appellant contended that aggravated burglary and vandalism are allied offenses of similar import. Appellant argued that the vandalism count should have been merged with the aggravated burglary count for purposes of sentencing. In addition, Appellant argued the May 16, 1988, sentencing entry is silent as to how his sentence is to be served in relation to a prior conviction in Fairfield County (Case No. CR-9084) and requested the trial court to amend the May 16, 1988, sentencing entry to reflect that the sentences for both cases run concurrently.

{¶7} The trial court summarily overruled Appellant's motion by judgment entry filed September 24, 2009.

{¶8} Appellant filed a timely appeal, but failed to raise any Assignments of Error in the brief. However, in the interest of justice, this Court affirms the trial court's decision for the following reasons.

{¶9} Appellant argues that the offenses of aggravated burglary and vandalism are allied offenses of similar import and consecutive sentences are precluded, therefore his sentence is void.

{¶10} The trial court's May 16, 1988, sentencing entry contains the following: "[I]t is the sentence and judgment of the Court that Defendant is sentenced to the Orient Correctional Facility on the 1st Count of Aggravated Burglary with specification for an indeterminate sentence of not less than twelve (12) years nor more than twenty-five (25) years; 12 years of which is actual incarceration; as to the 3rd Count, the defendant is hereby sentenced to the Orient Correctional Facility for an indeterminate sentence of not less than two (2) nor more than five (5) years and this count shall run consecutive

with Count No. 1”. Accordingly, Appellant was on notice that the trial court did not consider the crimes allied offenses of similar import for sentencing purposes. As noted previously, no direct appeal was filed.

{¶11} Post-conviction efforts to vacate a criminal conviction or sentence on constitutional grounds are governed by R.C. 2953.21, which provides:

{¶12} “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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, * * * 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.”

{¶13} The caption of a pro se pleading does not definitively define the nature of the pleading. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304. In *Reynolds*, the Ohio Supreme Court found, despite its caption, the appellant's pleading met “the definition of a motion for post-conviction relief set forth in R.C. 2953.21(A)(1), because it is a motion that was (1) filed subsequent to Reynolds' 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.” Pursuant to *Reynolds*, we find Appellant's motion to amend sentence is a petition for post conviction relief as defined in R.C. 2953.21.

{¶14} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief “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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Supreme Court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶15} The record indicates Appellant did not file a direct appeal in this matter with a transcript. Therefore, under R.C. 2953.21(A)(2), Appellant was required to file his petition “ * * * no later than one hundred eighty days after the expiration of the time for filing the appeal.”

{¶16} Appellant was convicted on May 16, 1988. However, Appellant did not file his petition for post-conviction relief until September 23, 2009, which is well beyond the time period provided for in the statute. Because Appellant's petition was untimely filed, the trial court was required to entertain Appellant's petition only if he could meet the requirements of R.C. 2953.23(A). This statute provides, in pertinent part:

{¶17} * * * [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 both of the following apply:

{¶18} “(1) Either of the following applies:

{¶19} “(a) 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.

{¶20} “(b) 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.

{¶21} “(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder 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 fact finder would have found the petitioner eligible for the death sentence.”

{¶22} In his petition, Appellant did not provide a basis under R.C. 2953.21(A)(1)(a) or (b) which is a requirement to avoid the filing deadline.

{¶23} As such, Appellant has failed to meet his burden under R.C. 2953.23(A)(1) to file an untimely petition for post-conviction relief and the trial court therefore lacked jurisdiction to entertain the petition. See *State v. Kelly*, 6th Dist. No. L-05-1237, 2006-Ohio-1399, at ¶ 12; *State v. Smith*, 9th Dist. No. 05CA008772, 2006-Ohio-2045 at ¶ 9; *State v. Luther*, 9th Dist. No. 05CA008770, 2006-Ohio-2280 at ¶ 13.

{¶24} We find that the trial court's denial is proper because the court was not statutorily authorized to entertain the petition because of its untimeliness. *Id.*

{¶25} The judgment of the Licking County Common Pleas Court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concurs

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STEVEN HOLLAND	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-120
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN