

[Cite as *State v. Flugga*, 2010-Ohio-4237.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

COREY S. FLUGGA

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 09-CA-140

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 2008-CR-00448

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 7, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Corey S. Flugga appeals the November 17, 2009 Judgment Entry as well as the December 29, 2009 Findings of Fact and Conclusions of Law entered by the Licking County Court of Common Pleas, which denied his petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On July 7, 2008, the Licking County Grand Jury indicted Appellant on two counts of murder. The charges arose from an incident occurring on June 21, 2008, and involving Appellant's three year old stepson, Carson Hanson. Following a jury trial, Appellant was found guilty as charged and sentenced to an aggregate term of imprisonment of fifteen years to life. Appellant filed a timely notice of appeal to this Court. This court affirmed Appellant's conviction and sentence. *State of Ohio v. Corey S. Flugga* (October 19, 2009) Licking App. No. 2009-CA-5.

{¶3} On September 23, 2009, Appellant filed a petition for post-conviction relief. The trial court scheduled a non-oral hearing for November 17, 2009. The State filed a Motion to Dismiss on November 16, 2009. Via Judgment Entry dated November 17, 2009, the trial court denied Appellant's petition. Appellant subsequently filed a request for findings of fact and conclusions of law. The trial court issued its Findings of Fact and Conclusions of Law on December 29, 2009. The trial court found the first two claims asserted in Appellant's petition for post-conviction relief were barred by the doctrine of res judicata. Additionally, the trial court found the third claim asserted by Appellant was

¹ A Statement of the Facts underlying Appellant's conviction is not necessary to our disposition of this appeal.

based upon a statutory issue, not a constitutional one; therefore, the issue was not appropriate for post-conviction review.

{¶4} It is from the November 17, 2009 Judgment Entry, and December 29, 2009 Findings of Fact and Conclusions of Law Appellant appeals, raising the following assignments of error:

{¶5} “I. THE TRIAL COURT ERRED WHEN IT FAILED TO PROVIDE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO O.R.C. 2953.21(G).

{¶6} “II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO FILE A ‘MOTION TO DISMISS’ WITHOUT ALLOWING PETITIONER AN OPPORTUNITY TO RESPOND.

{¶7} “III. THE TRAIL [SIC] ERRED WHEN IT DENIED PETITIONER’S CLAIM THAT THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION ON THE BASIS OF RES JUDICATA.

{¶8} “IV. THE TRIAL COURT ERRED WHEN IT ALLOWED DEFENDANT TO BE TRIED AND SENTENCED UNDER AN UNCONSTITUTIONAL STATUTE AND BARRED POST-CONVICTION RELIEF UNDER AND DOCTRINE OF RES JUDICATA.

{¶9} “V. THE TRIAL COURT ERRED WHEN IT ALLOWED PETITIONER TO BE FOUND GUILTY OF TWO COUNTS OF MURDER FOR A SINGLE VICTIM AND THEN BARRED RELIEF UNDER THE DOCTRINE OF RES JUDICATA.

{¶10} “VI. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY AN ATTORNEY WHO REPEATEDLY FAILED TO

PROTECT DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT BARRED POST CONVICTION RELIEF UNDER RES JUDICATA.”

{¶11} On February 1, 2010, Appellant filed a Motion for Leave to Amend his Appellant's Brief on February 1, 2010. Therein, Appellant withdrew the first assignment of error, but added a seventh assignment of error, which reads:

{¶12} “VII. THE TRIAL COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT SUPPORT THE COURT’S DECISION TO DENY PETITIONER POST-CONVICTION RELIEF.”

I

{¶13} In his first assignment of error, Appellant asserts the trial court erred in failing to provide Findings of Fact and Conclusions of Law pursuant to R.C. 2953.21(G). Appellant has withdrawn this assignment of error. See, Motion for Leave to Amend filed February 1, 2010.

II

{¶14} In his second assignment of error, Appellant contends the trial court erred in allowing the State to file a motion to dismiss without providing him an opportunity to respond. While we agree with Appellant, the trial court did not give him an opportunity to respond, the issue we must determine is whether such error by the trial court was prejudicial.

{¶15} In its November 17, 2009 Judgment Entry, the trial court expressly denied Appellant's petition to vacate or set aside the judgment of conviction or sentence, based upon the doctrine of res judicata. The trial court made no ruling on the State's motion to dismiss. Further, the trial court's December 29, 2009 Findings of Fact and Conclusions

of Law reiterate and further support the trial court's decision the claims raised in Appellant's petition for post-conviction relief were barred by res judicata. As such, we find Appellant was not prejudiced by not having sufficient time to respond to the State's late filing of its motion to dismiss.

{¶16} Appellant's second assignment of error is overruled.

III

{¶17} In his third assignment of error, Appellant maintains the trial court erred in denying his petition for post-conviction relief as the trial court lacked subject matter jurisdiction. Appellant explains the indictment against him was so seriously flawed as to be constitutionally deficient; therefore, rise to the level of a structural error.

{¶18} Pursuant to the doctrine of res judicata, a final judgment of conviction bars a 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. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶19} Because this challenge could have been raised on direct appeal, it is waived. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, syllabus ("The failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's judgment void ab initio and subject to collateral attack in habeas corpus. It constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal.") See, also, *State v. Stewart*, Franklin App. No. 09AP-817, 2009-Ohio-6423 (claimed violation

of R.C. 2945.06 was known to and discoverable by appellant at the time of the trial court's original judgment and sentence, and could have been raised on direct appeal, so is barred under the doctrine of res judicata and is untimely under R.C. 2953.21).

{¶20} Appellant's third assignment of error is overruled.

IV

{¶21} In his fourth assignment of error, Appellant argues the trial court erred in allowing him to be tried and sentenced under an unconstitutional statute and thereby preventing him from obtaining post-conviction relief based upon the doctrine of res judicata.

{¶22} As discussed in assignment of error three, supra, a final judgment of conviction bars a 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 trial, which resulted in the judgment of conviction, or an appeal from that judgment.

{¶23} Because Appellant could have attacked the constitutionality of R.C. 2903.02(B) on direct appeal to this Court, we find he was barred from raising the issue in post-conviction proceedings. Accordingly, we find the trial court did not err in rejecting this claim.

{¶24} Appellant's fourth assignment of error is overruled.

V

{¶25} In his fifth assignment of error, Appellant submits the trial court erred in overruling his petition for post-conviction relief based upon a finding his claim the two counts of murder for which he was convicted should have been merged at sentencing.

{¶26} Again, any error in the sentence could have been raised on direct appeal; therefore, we find the trial court did not error in finding the issue to be barred by res judicata.

{¶27} Appellant's fifth assignment of error is overruled.

VI

{¶28} In his sixth assignment of error, Appellant raises a claim of ineffective assistance of counsel. Specifically, Appellant submits defense counsel was ineffective for failing to protect his constitutional rights, thereby preventing Appellant from seeking post-conviction relief.

{¶29} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶30} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶31} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶32} Appellant contends defense counsel was ineffective for failing to raise the issue of the trial court's subject matter jurisdiction, failing to challenge the constitutionality of the murder statutes under which he was convicted, and failing to object to his sentence. As set forth in Appellant's third, fourth, and fifth assignments of error, *supra*, Appellant could have raised these claims either at the trial level or on direct appeal. Because Appellant failed to do so, he is precluded from asserting these claims in post-conviction proceedings.

{¶33} Appellant's sixth assignment of error is overruled.

VII

{¶34} In his final assignment of error, Appellant contends the trial court's December 29, 2009 Findings of Fact and Conclusions of Law do not support the trial court's decision to deny his petition for post-conviction relief.

{¶35} Based upon the reasons set forth in our analysis of Appellant's first six assignments of error, we overrule Appellant's seventh assignment of error.

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

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

