

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 15-CA-5
DAVID E. DUNKLE	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 86-CR- 16341
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	April 20, 2015
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APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant David Dunkle appeals the January 5, 2015 judgment entry of the Licking County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

Facts & Procedural History

{¶2} A statement of facts underlying Dunkle's original conviction is unnecessary to our disposition of this appeal. In 1986, Dunkle was convicted of multiple counts of rape and sentenced to consecutive life sentences in the Licking County Court of Common Pleas.

{¶3} In 2005, Dunkle filed a pro se motion to file a delayed appeal. He argued the trial court and counsel failed to advise him of his right to appeal, pursuant to Criminal Rule 32. We denied the motion in *State v. Dunkle*, 5th Dist. Licking No. 05-CA-37.

{¶4} In October of 2010, Dunkle sought leave for a delayed appeal on the same grounds, which we denied in *State v. Dunkle*, 5th Dist. Licking No. 10-CA-110. Also in 2010, Dunkle filed a pro se "Motion to Suspend" his sentence with the trial court, which the trial court construed as a motion for judicial release and overruled. Dunkle sought reconsideration of that decision, which was denied. We dismissed Dunkle's appeal therefrom in *State v. Dunkle*, 5th Dist. Licking No. 11-CA-42, 2011-Ohio-6779. We found the trial court's decision was not a final appealable order and no authority exists for a motion to reconsider a judgment of the trial court in a criminal case. *Id.*

{¶5} On May 17, 2012, Dunkle filed a pro se "Complaint for Contempt of Court Order" with the trial court. In his motion, he argued the Parole Board breached his

original plea agreement. The trial court denied the motion. In *State v. Dunkle*, we found the trial court did not err in overruling his complaint. 5th Dist. Licking No. 13-CA-2, 2013-Ohio-2007.

{¶6} On September 4, 2012, Dunkle filed a Motion to Correct Sentence with the trial court and argued that, during his 1986 sentencing, the trial court failed to comply with Criminal Rule 32. Dunkle requested the trial court resentence him so that he could appeal his original sentence. The trial court considered Dunkle's motion to be a petition for post-conviction relief and denied the petition as untimely. We affirmed the trial court's judgment in *State v. Dunkle*, 5th Dist. Licking No. 12-CA-80, 2013-Ohio-2299.

{¶7} On July 11, 2013, Dunkle filed a complaint with the Court of Claims of Ohio alleging that the Ohio Department of Rehabilitation and Correction breached a plea agreement he entered into with the State of Ohio. The Court of Claims granted ODRC's motion to dismiss Dunkle's complaint. The Tenth District Court of Appeals affirmed the trial court's decision in *Dunkle v. Ohio Dept. of Rehabilitation and Correction*, 10th Dist. Franklin No. 13AP-923, 2014-Ohio-3046.

{¶8} On November 19, 2014, Dunkle filed a "Motion to Correct Sentence" with the trial court, arguing that his sentencing entry contained an error in several counts in that a statute section number was incorrect and the names of certain charges were worded incorrectly. In his motion, Dunkle acknowledged that the correct section number and wording were "lawfully correct" in other documents such as the indictment, plea of guilty, and initial entry upon plea of guilty. The trial court set the matter for a non-oral hearing on December 22, 2014. On January 5, 2015, the trial court issued a

judgment entry denying Dunkle's motion. The trial court considered Dunkle's motion to be a petition for post-conviction relief and denied the petition as untimely.

{¶9} Dunkle appeals the January 5, 2015 judgment entry of the Licking County Court of Common Pleas, arguing this Court should immediately void the judgment against him, vacate and reverse his sentence, and release him from prison due to the errors in the sentencing entry. Dunkle assigns the following as error:

{¶10} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING A PROPERLY FILED MOTION TO CORRECT SENTENCE AS UNTIMELY AND NOT WELL-TAKEN.

{¶11} "II. DUE PROCESS OF LAW ENTITLES ME TO IMMEDIATE RELIEF AND/OR IMMEDIATE RELEASE."

I. & II.

{¶12} The trial court considered Dunkle's "Motion to Correct Sentence" as a petition for post-conviction relief. Dunkle does not assign as error the trial court's decision to consider his motion as a petition for post-conviction relief. In denying the motion on January 5, 2015, the trial court, in its judgment entry, stated that it considered the motion to be untimely.

{¶13} R.C. 2953.21(A)(2) governs the time within a petition for post-conviction relief must be filed and provides 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.

{¶14} In this case, Dunkle pled guilty and was sentenced by the trial court in 1986. Dunkle filed his petition on November 19, 2014. Therefore, his petition is not within the one hundred and eighty days after the expiration of the time for filing his direct appeal and is not in compliance with the time frame as specified in R.C. 2953.21(A)(2).

{¶15} However, pursuant to R.C. 2953.23(A), the court may consider an untimely petition for post-conviction relief:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section * * * unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

a. Either the petitioner shows that the petitioner was unavoidably prevented from the 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 State 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 the right.

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 of * * *.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed * * * and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case * * * and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense * * *.

{¶16} In this case, Dunkle pled guilty to the offenses and makes no allegation in his motion that results of DNA testing establish, by clear and convincing evidence, actual innocence of those felony offenses. Dunkle argues that: there were errors in the sentencing entry with regards to wording, there were errors in the sentencing entry in that there is an incorrect statute section number in several counts, and that his sentences on the “complicity” offenses should not be greater than the sentences on the rape offenses. These matters were all contained in the trial court record and thus Dunkle cannot show that he was unavoidably prevented from the discovery of the facts upon which he relies on for relief or that this is newly-discovered evidence. Though Dunkle assigns as error that the trial court erred in considering his motion untimely, he does not set forth any argument in his brief as to the delay in filing, why he meets the exception requirements contained in R.C. 2953.23(A)(1) or (A)(2), or how the petition otherwise complies with R.C. 2953.23(A)(1) or (A)(2). As such, Dunkle has failed to

meet his burden under R.C. 2953.23(A)(1) or (A)(2) to file an untimely petition for post-conviction relief.

{¶17} Further, any errors as to these issues could have been raised on direct appeal and are therefore barred under the doctrine of res judicata. “Under the doctrine of res judicata, a final judgment of conviction bars the defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at the trial which resulted in that judgment of conviction or on appeal from that judgment.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Conversely, issues properly raised in a post-conviction petition are those that could not have been raised on direct appeal because the evidence supporting the issues is outside the record. *State v. Millanovich*, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975). Dunkle’s arguments do not raise any issues that are dependent upon evidence outside the record. The arguments Dunkle makes could have been raised and argued on direct appeal.

{¶18} Upon review, we find that Dunkle has not satisfied the R.C. 2953.23(A)(1)(a) requirement that he was unavoidably prevented from discovery of the facts upon which he relies to present his claims for post-conviction relief. Dunkle does not offer any evidence which was not already in the record before the trial court. Further, the issues raised by Dunkle could have been raised in a direct appeal and are therefore res judicata. Accordingly, the trial court did not err in denying Dunkle’s petition to correct sentence.

{¶19} Appellant's assignments of error are overruled and the January 5, 2015 judgment entry of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur