[Cite as *State v. Brown*, 2015-Ohio-850.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Defendant- Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
JUHAN BROWN	:	Case No. 14CA83
	:	
	:	
Plaintiff- Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2010 CR 603 (H)
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 6, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JUHAN BROWN # 601-361 P.O. Box 8107 Mansfield, OH 44901	BAMBI S. COUCH-PAGE Richland County Prosecutor By Jill M. Cochran Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902

Baldwin, J.

{¶1} Defendant-appellant Juhan Brown appeals from the October 9, 2014 Judgment Entry of the Richland County Court of Common Pleas denying his Motion to Vacate Sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In early 2009, METRICH officers began receiving information that an individual from Detroit, Michigan, using the street name “Moe,” was selling crack cocaine from a house in Mansfield, Ohio. In February and April 2009, the METRICH officers, utilizing a confidential informant, made controlled drug purchases from appellant. The first buy took place inside a house at 21 East Arch Street; the second took place at 55 East Arch Street.

{¶3} In October 2009 METRICH officers arranged a third controlled drug buy from appellant, using a different confidential informant, this time again at 55 East Arch Street. Soon thereafter, METRICH officials obtained a search warrant for the premises at 55 East Arch Street. The warrant was executed on October 22, 2009 by METRICH and SWAT officers. A rented automobile parked nearby was also searched. Three baggies of a substance later tested as crack cocaine were discovered, with respective weights of 5.68 grams, 3.49 grams, and 3.24 grams. A digital scale was also found. In addition, U.S. currency totaling more than $900.00 was obtained from appellant's pants pockets.

{¶4} On November 11, 2009, appellant was indicted under case 09–CR–797H by the Richland County Grand Jury on two counts of trafficking between one and ten

grams of crack cocaine in the vicinity of a school zone and one count of possession of between ten and twenty-five grams of crack cocaine.

{¶5} On March 31, 2010, appellant filed a motion to suppress the evidence obtained pursuant to the search warrant. The matter proceeded to a hearing before the trial court on August 4, 2010. Appellant conceded via counsel that he had no protected interest in the 55 East Arch residence, and the trial court denied the suppression motion as to the house. Furthermore, items seized from the vehicle were found to have no relevance to the case.

{¶6} On September 3, 2010, appellant was re-indicted under case 2010–CR603H as follows:

{¶7} Count I: Trafficking in crack cocaine (between one and ten grams) in the vicinity of a school zone, R.C. 2925.03(A), a felony of the third degree.

{¶8} Count II: Trafficking in crack cocaine (between one and ten grams) in the vicinity of a school zone, R.C. 2925.03(A), a felony of the third degree.

{¶9} Count III: Possession of crack cocaine (between ten and twenty-five grams), R.C. 2925.11, a felony of the second degree, with a forfeiture specification for $940.00 in currency.

{¶10} Count IV: Trafficking in crack cocaine (between one and ten grams) in the vicinity of a school zone, R.C. 2925.03(A), a felony of the third degree.

{¶11} The case proceeded to a jury trial commencing on March 14, 2011. On March 18, 2011, the jury found appellant guilty on all four counts of the indictment, including the specifications of trafficking in the vicinity of a school zone and the forfeiture specification. On March 31, 2011, the trial court sentenced appellant to two years in

prison on each of the three trafficking counts, and five years on the possession count. The terms were ordered to be served consecutively, for a total sentence of eleven years in prison.

{¶12} Appellant then appealed his convictions and sentence. Pursuant to an Opinion filed on June 13, 2012 in *State v. Brown,* 5th Dist. Richland No. 11 CA 42, 2012 –Ohio-2672, this Court affirmed the judgment of the trial court.

{¶13} Subsequently, on July 15, 2013, appellant filed a "Motion for Dismissal of Convictions Based on Inapplicable Offenses and a Motion to Take Judicial Notice". Appellant, in his motion, argued that on or about May 17, 2013, he had received digital maps from his trial counsel and that such maps showed that none of his alleged offenses were committed within the vicinity of a school zone. Appellant argued that he could not, therefore, have been convicted of 3rd degree felony trafficking offenses. Appellant also argued that his conviction for possession of crack cocaine in an amount equal to or exceeding 10 grams and less than 25 grams was contrary to law based on a November 2009 drug analysis report prepared by Mansfield Police Forensic Science Laboratory that was attached to his motion. Finally, appellant argued that there was a conflict of interest because the charging detective's sole partner notarized the original complaint and that "same detective's signature attests to the items seized without him ever being present at the home during the search." Appellant attached a copy of the Return for Search Warrant form to his motion. Appellant asked the trial court to take judicial notice of the materials attached to his motion. Appellee filed a response on December 18, 2013.

{¶14} The trial court, pursuant to a December 27, 2013 Judgment Entry overruled and dismissed appellant's "Motion for Dismissal of Convictions Based on Inapplicable Offenses and Motion to Take Judicial Notice", which it treated as a petition for post conviction relief. Appellant then appealed. Pursuant to an Opinion filed on July 22, 2014 in *State v. Brown*, 5th Dist. Richland No. 14CA3, 2014-Ohio-3222, this Court affirmed the judgment of the trial court.

{¶15} Thereafter, on August 8, 2014, appellant filed a Motion to Vacate Sentence Pursuant to R.C. 2945.75(A)(2). Appellant, in his motion, argued that the verdict forms in his case were flawed. Appellee filed a response to the same on August 19, 2014.

{¶16} Pursuant to a Judgment Entry filed on October 9, 2014, the trial court denied appellant's motion. The trial court, in its Judgment Entry, indicated that appellant's motion, which it treated as a motion for post-conviction relief, was "untimely, without merit and barred by res judicata."

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

{¶18} THE TRIAL COURT HAD NO DISCRETION IN DECIDING WHETHER TO GRANT APPELLANT'S MOTION TO VACATE SENTENCE WHEN THE STRUCTURAL ERRORS PRESENT WERE MADE KNOWN BY FACTUAL DOCUMENTATION.

{¶19} THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION TO IMPOSE SENTENCE ON APPELLANT WHERE JURY VERDICT FORMS WERE IMPROPERLY DRAWN.

I, II

{¶20} Appellant, in his two assignments of error, argues that the trial court erred in denying his Motion to Vacate Sentence. We disagree.

{¶21} In the syllabus of *State v. Reynolds,* 79 Ohio St.3d 158, 1997–Ohio–304, 679 N.E.2d 1131 the Supreme Court of Ohio set forth the standard by which post conviction motions are to be reviewed in light of R.C. 2953.21: "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for post conviction relief as defined in R.C. 2953.21."

{¶22} The *Reynolds* court explained that despite its caption, a motion meets the definition of a petition for post conviction relief if it is (1) filed subsequent to a direct appeal; (2) claims a denial of constitutional rights; (3) seeks to render the judgment void; and (4) asks for vacation of the judgment and sentence. *Id.* at 160.

{¶23} Accordingly, in reviewing appellant's motion, we find it to be a petition for post conviction relief (PCR) as defined in R.C. 2953.21. The motion was filed subsequent to appellant's direct appeal, claimed a denial of his constitutional rights and sought to render the judgment void and also asked for vacation of the judgment and sentence.

{¶24} R.C. 2953.21(A)(2) states, in relevant part, that 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 …" Appellant filed a direct appeal of his

conviction and sentence. The trial transcript was filed in this Court on or about August 30, 2011. Thus, it is clear that appellant's August 8, 2014 petition for post-conviction relief, which was his second petition, was filed beyond the time requirement in R.C. 2953.21(A)(2). Accordingly, we must look to R.C. 2953.23(A)(1) to determine if the trial court could consider appellant's successive petition for post-conviction relief.

{¶25} R.C. 2953.23(A) states, in relevant part, as follows:

> 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 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:
>
> (1) Both of the following apply:
>
> (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.

(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 or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

* * *

{¶26} We find that appellant has failed to set forth any grounds under R.C. 2953.23 for the filing of an untimely petition. Accordingly, the trial court properly denied the petition on this basis.

{¶27} We also find that the issues raised by appellant are barred by the doctrine of res judicata. Appellant had a prior opportunity to litigate the claims relating to the verdict forms that he now sets forth in the instant appeal in his direct appeal. Such claims, therefore, are barred under the doctrine of res judicata. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). The *Perry* court explained the doctrine as follows: “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 paragraph 8 of the syllabus.

{¶28} Appellant's two assignments of error are, therefore, overruled.

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

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.