

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1347

Appellee

Trial Court No. CR0198505098

v.

James R. Eubank

DECISION AND JUDGMENT

Appellant

Decided: April 17, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Louis E. Kountouris, Assistant Prosecuting Attorney, for appellee.

James R. Eubank, pro se.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas. Appellant, James Eubank, asserts the following assignment of error:

{¶ 2} "THE LOWER COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION AND THE DUE PROCESS RIGHTS AND EQUAL PROTECTION OF THE APPELLANT, SUCH RIGHTS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS UNDER U.S.C.A., ARTICLE I SECTION 10, OHIO CONSTITUTION, WHEN IT FAILED TO RECOGNIZE THAT APPELLANT'S SENTENCING JOURNAL DOES NOT HAVE AN AGGREGATE MAXIMUM SENTENCE DEMANDED BY R.C. 2929.11(A) AND Crim.R. 32(A)."

{¶ 3} In July 1985, appellant was found guilty of two counts of involuntary manslaughter in the commission of a felony and two counts of aggravated arson, all felonies of the first degree. See *State v. Eubank* (1987), 38 Ohio App.3d 141. Appellant was sentenced to a period of incarceration of not less than ten years nor more than 25 years on each of these convictions, with the sentences imposed for his aggravated arson convictions to be served concurrently to each other but to be served consecutively to the sentences imposed for the involuntary manslaughter convictions. *State v. Eubank*, 6th Dist. No. L-07-1302, 2008-Ohio-1296, ¶ 4 ("*Eubank I*"). Since the time of his original convictions, appellant filed a number of motions and petitions. See, e.g., *Eubank I* (petition for postconviction relief); *Eubank v. Anderson*, 119 Ohio St.3d 349, 2008-Ohio-4477 (motion for relief from judgment); *State v. Eubank* (June 26, 1998), 6th Dist. No. L-97-1284 (petition for postconviction relief).

{¶ 4} On July 15, 2008, appellant filed a motion in the trial court captioned "MOTION TO DISMISS DUE TO UNDUE DELAY IN SENTENCING PURSUANT

TO CRIM.R. 32(A) OF THE OHIO R. OF CRIMINAL PROCEDURE." In this motion, appellant asserted that, at the time of sentencing, the trial court failed to properly state an aggregate maximum sentence in its judgment entry and motion to convey. Appellant alleged that the trial court thereby lost jurisdiction over his sentence and the charges against him should be dismissed. According to appellant, he raised a new constitutional right in his motion pursuant to *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. The trial court held that the sentencing court did pronounce an aggregate maximum sentence in its original sentencing judgment entry and denied appellant's motion. This timely appeal followed.

{¶ 5} The question of the trial court's alleged failure to set forth an aggregate maximum sentence in its sentencing entry of July 25, 1985 was raised by appellant in a previous motion filed in the trial court and appealed to this court. See *Eubank I*, ¶ 1. In *Eubank I*, appellant also argued that the failure of the trial court to aggregate his sentence violated Crim.R. 32. Id. ¶ 3. Appellant titled this prior motion as a "Motion for a Final Appealable Order." Noting that motions to correct or vacate a sentence are treated as petitions for postconviction relief, Id. ¶ 5, we concluded that appellant's petition was untimely because it was filed more than 180 days after the date which the transcript of the trial court proceedings was filed in appellant's direct appeal. Id. ¶ 8. We therefore found that appellant was required to comply with R.C. 2953.23(A)(1)(a) and (A)(1)(b). Id. He failed to do so. Id. ¶ 9. As a result, we found that the trial court lacked the jurisdiction to consider the merits of appellant's motion. Id. ¶ 13.

{¶ 6} Clearly, appellant's current "motion" is a motion to correct or vacate his sentence. Thus, it is, in actuality, an untimely petition for postconviction relief. Consequently, appellant was required to demonstrate (1) that the "United States Supreme Court recognized a new federal or state right that applies retroactively to appellant; and (2) that, by clear and convincing evidence, 'but for constitutional error at trial, no reasonable factfinder would have found' appellant guilty of the offense for which he was convicted * * *.' R.C. 2953.23(A)(1)(a) and (A)(1)(b).

{¶ 7} Appellant fails to satisfy the statute. *State v. Simpkins*, supra, is not a decision of the United States Supreme Court. Therefore, the trial court lacked the jurisdiction to entertain appellant's petition.

{¶ 8} Moreover, and of greater importance, the issue raised by appellant in his petitions is barred by the doctrine of res judicata. This doctrine prevents repeated attacks on a final judgment and applies to all issues which were or might have been litigated. *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69. Under the doctrine of res judicata a defendant is prevented from presenting claims that could have or should have been brought in an original appeal or a first petition for postconviction relief. See *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 87. Appellant's petition for postconviction relief is a successive petition. His claim for relief is based upon the sentencing in his original trial. This question could have been raised in his direct appeal. Therefore, any issue related to his sentencing is barred by the doctrine of res judicata. Accordingly, appellant's sole assignment of error is found not well-taken.

{¶ 9} The judgment of the Lucas County Court of Common Pleas is affirmed, albeit on other grounds than cited therein. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
