

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

State of Ohio

Court of Appeals No. L-13-1051

Appellee

Trial Court No. CR0201201745

v.

Nico Vasquez

**DECISION AND JUDGMENT**

Appellant

Decided: September 20, 2013

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal brought by appellant, Nico Vasquez, from the February 28, 2013 judgment of the trial court finding that it was premature to rule on his postconviction motions since appellant's direct appeal was still pending.

{¶ 2} In his single assignment of error, appellant contends that the trial court erred in not ruling on his postconviction motions since R.C. 2953.21(C) clearly grants the trial court jurisdiction to hear this motion despite a direct appeal pending.

### **Facts and Procedural History**

{¶ 3} According to the record before the court, on May 11, 2012, appellant was indicted by the Lucas County Grand Jury for violating R.C. 2941.145, aggravated robbery with a firearm specification; R.C. 2941.145, robbery; R.C. 2941.145, aggravated robbery with a firearm specification; R.C. 2941.145, felonious assault with a firearm specification; and R.C. 2941.145, felonious assault with a firearm specification.

{¶ 4} On August 20, 2012, appellant pled guilty to Count 3 (aggravated robbery with a firearm specification) and Count 4 (felonious assault with a firearm specification). The remaining counts were dismissed.

{¶ 5} On September 19, 2012, appellant was sentenced to a period of imprisonment of six years on each count, to be served consecutively. On October 18, 2012, appellant filed a notice of appeal.

{¶ 6} On February 26, 2013, while his direct appeal was pending, appellant filed a motion titled “Petition to Vacate or Set Aside Judgment of Conviction or Sentence.”

{¶ 7} On February 28, 2013, the trial court denied this motion, finding that since the direct appeal was pending, it was premature to proceed with a postconviction matter pursuant to R.C. 2953.21.

## **Discussion**

{¶ 8} The relevant Ohio Revised Code section applicable in this case is R.C. 2953.21(C) which states:

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

{¶ 9} Appellee, state of Ohio, concedes and we agree that R.C. 2953.21(C) specifically confers jurisdiction on the trial court to consider a postconviction petition that is timely filed even if a direct appeal is pending. Appellant's sole assignment of error is found well-taken.

## Conclusion

{¶ 10} The February 28, 2013 judgment of the Lucas County County Court of Common Pleas is reversed and remanded to enable the trial court to rule on appellant's postconviction motions. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Arlene Singer, P.J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
JUDGE

<p>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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
---