[Cite as *State v. Fenwick*, 2013-Ohio-5901.]

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

State of Ohio	Court of Appeals No. E-13-002
Appellee	Trial Court No. 1997-CR-428
v.	
Russell Fenwick	**DECISION AND JUDGMENT**
Appellant	Decided: December 30, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, and
Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, for appellee.

Timothy Young, State Public Defender, and
Katherine A. Szudy, Assistant Public Defender, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Defendant-appellant, Russell Fenwick, appeals the December 17, 2012 judgment of the Erie County Court of Common Pleas which denied his postconviction

motion to vacate his sexual battery conviction. Because we find that appellant's postconviction motion was untimely and no clear constitutional error exists, we affirm.

{¶2} In April 1998, appellant was convicted of rape, attempted rape, gross sexual imposition, sexual battery, attempted sexual battery, and intimidation and adjudicated to be a sexual predator. For sentencing purposes, the trial court merged the counts of rape and gross sexual imposition and sexual battery and attempted sexual battery. Appellant was sentenced to a total of 24 years of imprisonment.

{¶3} On direct appeal, this court found that the trial court erroneously failed to vacate appellant's convictions for gross sexual imposition and attempted sexual battery after finding the offenses allied; we then vacated the convictions. *See State v. Fenwick*, 6th Dist. Erie No. E-98-031, 2000 WL 331388 (Mar. 31, 2000).

{¶4} Regarding the instant appeal, on October 19, 2012, appellant filed a motion to vacate his sexual battery conviction arguing the change in Ohio case law regarding the allied-offense analysis. On December 17, 2012, the trial court denied the motion in a one sentence order. This appeal followed with appellant raising the following assignment of error:

> The trial court erred when it overruled Russell Fenwick's October 19, 2012 motion to vacate his sexual-battery conviction.

{¶5} In his sole assignment of error, appellant argues that his sexual battery conviction is an allied offense with either his rape or attempted-rape conviction and that

the court erred in failing to vacate his conviction. Reviewing the record below, we cannot say exactly what the basis was for the trial court's denial of the motion to vacate. The state did, however, argue that appellant's motion was a petition for postconviction relief and that it was untimely under R.C. 2953.21. Appellant's appellate brief does not discuss whether the requirements of R.C. 2953.21 apply to his motion and whether the motion is barred as untimely under the statute.

{¶6} Upon review, we agree with the state that appellant's October 19, 2012 motion is properly categorized as a petition for postconviction relief under R.C. 2953.21. A motion filed by a criminal defendant after direct appeal or after the time for direct appeal has expired, that seeks to vacate or correct his sentence on constitutional grounds is to be treated as a petition for postconviction relief under R.C. 2953.21. *State v. Young*, 6th Dist. Erie No. E-08-041, 2009-Ohio-1118, ¶ 16; *see State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Appellant's motion meets those elements.

{¶7} There are specific time requirements for filing of petitions for postconviction relief. R.C. 2953.21(A)(2) states that "[i]f 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." Appellant filed his petition for postconviction relief on October 19, 2012, well after the expiration of the 180-day time period.

{¶8} The exceptions to the 180-day filing period provided in R.C. 2953.23(A)(1) and (2) do not apply. The exception under R.C. 2953.23(A)(1) requires an appellant to:

> (1) demonstrate either that he was unavoidably prevented from discovering the facts upon which he relied for his claim, or subsequent to the period prescribed in R.C. 2953.21(A)(2) the United States Supreme Court recognized a new state or federal right that applies retroactively to a person in petitioner's position and his or her petition asserts a claim based on that and right; and (2) show, 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." R.C. 2953.23(A)(1)(a) and (A)(1)(b). *State v. Padilla-Montano,* 6th Dist. Lucas No. L-05-1099, 2006-Ohio-115, ¶ 13. *Accord State v. Brooks,* 6th Dist. Lucas Nos. L-10-1258 and L-10-1259, 2011-Ohio-5303, ¶ 23.

{¶9} Appellant argues that the new "conduct of the accused" allied offense merger analysis recently adopted by the Supreme Court of Ohio establishes that the sexual battery was committed with the same animus as either the rape or attempted rape and, thus, the convictions must be merged. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

{¶10} Appellant was sentenced prior to the decision in *Johnson.* Ohio courts, including this one, have consistently held that the merger analysis in *Johnson* does not

apply retroactively. *See State v. Robinson*, 6th Dist. Huron No. H-12-025, 2013-Ohio-2941, ¶ 10; *State v. Bork*, 6th Dist. Lucas App. L-12-1221, 2013-Ohio-3947. Further, appellant has not argued that he was prevented from discovering the facts that formed the basis of his postconviction petition.

{¶11} Based on the foregoing, we find that appellant's postconviction claim was untimely and is barred by res judicata. Appellant's assignment of error is not well-taken.

{¶12} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE