

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

State of Ohio

Court of Appeals No. L-12-1218

Appellee

Trial Court No. CR0199702459

v.

Vincente Guevara

DECISION AND JUDGMENT

Appellant

Decided: March 1, 2013

* * * * *

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

Vincente Guevara, pro se.

* * * * *

SINGER, J.

{¶ 1} Defendant-appellant, Vincente Guevara, appeals from the denial of his petition for postconviction relief. He claims that his original convictions for felonious assault and aggravated robbery following a guilty plea in 1998, should have been merged as allied offenses of similar import, and that his trial counsel was ineffective for failing to

raise the issue prior to sentencing. Finding that the petition was properly denied, we affirm the judgment of the Lucas County Court of Common Pleas.

{¶ 2} Guevara was originally indicted by the Lucas County Grand Jury on July 31, 1997. He was charged with one count of aggravated murder in violation of R.C. 2903.01(A), an unclassified felony, which included a firearm specification under R.C. 2941.145, one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, and one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a first-degree felony. On July 10, 1998, after being provided with appointed counsel, Guevara pled guilty to the lesser charge of murder with a firearm specification in violation of R.C. 2903.02 and 2941.145, respectively, and to the remaining offenses of felonious assault and aggravated robbery as charged in the indictment.

{¶ 3} In a judgment entry journalized on July 27, 1998, Guevara was sentenced to consecutive prison terms of 15 years to life on the murder count, along with an additional three years on the firearm specification, seven years on the felonious assault charge, and nine years for aggravated robbery, for a total prison term of 34 years to life. Guevara did not directly appeal his conviction or sentence. Approximately eight years later, on March 22, 2006, Guevara filed a motion to withdraw his guilty plea, which the trial court denied on November 29, 2006. Guevara did not appeal that judgment.

{¶ 4} On March 12, 2012, Guevara filed his present motion for postconviction relief, entitled “Motion to Correct Illegal Sentence.” In his motion, Guevara asserted that

his sentence was unlawful and void “because Felonious Assault and Aggravated Robbery are Allied Offenses of similar import.” Concomitantly, Guevara sought a new sentencing hearing at which those offenses would be merged into a single count and a prison term of no more than seven years would be imposed on that count to run concurrently with the sentence imposed for murder. On July 11, 2012, the trial court denied Guevara’s motion, finding in part that the motion was an untimely petition for postconviction relief and that the asserted allied-offenses claim was barred by the doctrine of res judicata.

{¶ 5} Guevara now appeals that judgment, asserting two assignments of error:

1. The lower court committed prejudicial error and violated appellant’s 5th Amendment Const. Guarantee against Double Jeopardy when it disregarded the nondiscretionary statutory requirements of [R.C.] 2941.25.

2. Appellant was denied his 6th Amendment constitutional guarantee to effective assistance of counsel during such a critical stage as [the] plea and sentencing hearing.

{¶ 6} In his first assignment of error, Guevara contends that the trial court erred in failing to recognize that the imposition of multiple punishments for allied offenses of similar import renders the sentence void and subject to collateral attack at any time. In his second assignment of error, Guevara contends that his trial counsel was prejudicially ineffective for failing to request a merger of the felonious assault and aggravated robbery

counts at the plea or sentencing hearing. Since common legal principles are determinative of both assignments of error, we will consider them together.

{¶ 7} First, Guevara's motion was properly denied as an untimely petition for postconviction relief. Despite its caption, Guevara's motion was a petition for postconviction relief, since it was filed subsequent to the expiration of the time for direct appeal, asserted that a denial of his constitutional rights rendered the judgment void, and sought to vacate or modify his sentence. R.C. 2953.21. *See also State v. Lee*, 8th Dist. No. 97885, 2012-Ohio-3373, ¶ 6. Pursuant to R.C. 2953.21(A)(2), if no direct appeal is taken from the judgment of conviction, a petition for postconviction relief must be filed no later than 180 days after the expiration of the time for filing the appeal. In this case, Guevara was convicted and sentenced on July 27, 1998, and did not file his present petition until March 12, 2012, which is more than 13 years beyond the statutory time limit.

{¶ 8} A trial court has no jurisdiction to consider an untimely petition for postconviction relief unless the untimeliness is excused under R.C. 2953.23(A)(1). *See State v. Gonzales*, 6th Dist. No. WD-09-078, 2010-Ohio-4703, ¶ 15. Pursuant to R.C. 2953.23(A)(1)(a), an untimely petition may be entertained if the petitioner shows either (1) that he or she was unavoidably prevented from discovering the facts necessary to assert the claim for relief, or (2) that the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. Guevara has not argued that either of these exceptions is applicable in this case. Instead,

he argues that a failure to merge allied offenses of similar import, like a failure to impose postrelease control, results in a void sentence, which may be challenged even by an untimely petition for postconviction relief. However, the failure to merge allied offenses at sentencing does not render a sentence void. *See State v. Jackson*, 8th Dist. No. 97809, 2012-Ohio-4280, ¶ 14; *State v. Kelly*, 8th Dist. No. 97673, 2012-Ohio-2930, ¶ 5; *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 12; *State v. Parson*, 2d Dist. No. 24641, 2012-Ohio-730, ¶ 9; *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072, 2011-T-0073, 2012-Ohio-299, ¶ 13.

{¶ 9} Second, Guevara’s motion was properly denied on grounds that his claims for relief were barred by the doctrine of res judicata. In *State v. Rice*, 6th Dist. No. L-12-1127, 2012-Ohio-6250, ¶ 7, this court held that the failure to raise an allied-offenses claim on direct appeal precludes the issue from being litigated in a postconviction proceeding. The same holds true for Guevara’s claim of ineffective assistance of counsel. *See, e.g., State v. Lariva*, 10th Dist. No. 08AP-413, 2008-Ohio-5499, ¶ 21; *State v. Wyerick*, 3d Dist. No. 10-07-23, 2008-Ohio-2257, ¶ 12, 16-17.

{¶ 10} Third, Guevara’s claims fail on their merits in any event. As we explained in *Rice*, “even if we considered the issue of merger, we would be obliged to apply the law in place at the time of [petitioner’s] conviction and sentence.” *Rice* at ¶ 7. Contrary to Guevara’s assertions, felonious assault and aggravated robbery were not considered to be allied offenses of similar import at the time of his conviction and sentence. *State v. Preston*, 23 Ohio St.3d 64, 491 N.E.2d 685 (1996); *State v. Laser*, 6th Dist. No.

H-97-019, 1998 WL 172814, *3-4 (Apr. 10, 1998); *State v. Matthews*, 8th Dist. Nos. 68960, 70808, 1996 WL 684328, *5 (Nov. 27, 1996); *State v. Allen*, 115 Ohio App.3d 642, 644-645, 685 N.E.2d 1304 (7th Dist.1996); *State v. Ferguson*, 71 Ohio App.3d 342, 346-347, 594 N.E.2d 23 (12th Dist.1991).

{¶ 11} Accordingly, Guevara's assignments of error are not well-taken.

{¶ 12} The judgment of the Lucas County Court of Common Pleas is affirmed.

Costs of this appeal are assessed against appellant pursuant to App.R. 24(A).

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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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