

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

State of Ohio

Court of Appeals Nos. L-12-1348
L-12-1349

Appellee

Trial Court Nos. CR0199505885
CR0199407270

v.

Edmund Brooks

DECISION AND JUDGMENT

Appellant

Decided: February 7, 2014

* * * * *

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

Edmund Brooks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Edmund Brooks, appellant, appeals an October 30, 2012 judgment of the Lucas County Court of Common Pleas that denied appellant's September 1, 2012 motion to correct void sentence/resentencing and granted the state's motion for summary judgment. The trial court treated the September 1, 2012 motion as an R.C. 2953.21

petition for postconviction relief. The motion concerns appellant's conviction on multiple counts of rape, sexual penetration, and gross sexual imposition in 1995.

{¶ 2} Appellant's convictions are based upon guilty verdicts returned by a jury at trial in 1995. Appellant was convicted of four counts of rape of a person less than 13 years old in violation of R.C. 2907.02(A)(1)(b) and 2907.02(B); one count of rape in violation R.C. 2907.02(A)(2); four counts of felonious sexual penetration of a person less than 13 years old in violation of R.C. 2907.12(A)(1)(b) and 2907.12(B); one count of felonious sexual penetration in violation of R.C. 2907.12; four counts of gross sexual imposition of a person less than 13 years old in violation of R.C. 2907.05(A)(4); and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1).

{¶ 3} The trial court filed its judgment of conviction and sentence on June 19, 1995. The court sentenced appellant to eight consecutive sentences of life imprisonment, to sentences of 10-25 years and 5-25 years to be served concurrently to each other and consecutive to the sentences for life imprisonment, and to five sentences of one year to be served consecutively to each other and consecutive to the concurrent sentences.

{¶ 4} Appellant filed a direct appeal to this court. We affirmed the trial court judgment. *State v. Brooks*, 6th Dist. Lucas No. L-95-188 (Sept. 20, 1996). Appellant filed applications for postconviction relief on February 8, 1999, June 7, 2007, April 7, 2010, and this request of September 1, 2012. We affirmed the trial court's denial of the April 7, 2010 petition for postconviction relief in *State v. Brooks*, 6th Dist. Nos. L-10-1258 and L-10-1259, 2011-Ohio-5303.

{¶ 5} Appellant asserts one assignment of error on appeal:

I. The trial court in its October 30, 2012 judgment entry order, granted the Defendant/Appellee summary judgment/motion to dismiss, in error and contrary to Ohio law. See Ohio Civ.R. 56(C) and 12(B)(6).

{¶ 6} Appellant appears pro se and his legal analysis is less than clear. As best the court can determine, appellant objects on subject-matter jurisdiction grounds to the trial court's admission into evidence at trial of evidence of prior incidents involving sexual contact between appellant and the child victim in this case that occurred in the state of Illinois and prior to the offenses charged in the indictment.

{¶ 7} Prior to trial appellant filed a motion in limine to prohibit the state from introducing evidence at trial relative to (1) appellant's prior arrest for alleged criminal sexual assault in Illinois and (2) any alleged activity taking place in Illinois between appellant and the child victim in this case. The trial court granted the motion in part and prohibited the state from introducing any evidence at trial as to appellant's prior arrest in Illinois. The court overruled the motion to the extent it concerned evidence as to any incidents alleged to have taken place between appellant and the child in Illinois.

{¶ 8} Appellant states in the September 1, 2012 motion that the state used knowledge of the prior Illinois arrest and evidence of claimed incidents involving appellant and the child victim that occurred in Illinois to pursue charges against appellant greater in scope than originally contemplated. Evidence of incidents in Illinois were placed in evidence at trial in support of the expanded charges. Appellant claims that the

trial court lacked subject-matter jurisdiction to make such use of the claimed Illinois conduct.

{¶ 9} Each count of the indictment is limited to allegations of unlawful conduct by appellant occurring in Lucas County, Ohio. The indictment alleged unlawful conduct occurring as early as September 1989 and as late as February 22, 1994. The testimony at trial was that the child victim and her family moved to Ohio in 1989.

{¶ 10} The state argues that jurisdiction is lacking under R.C. 2953.23(A) to permit consideration of appellant's September 1, 2012 motion as a successive petition for postconviction relief. The state also argues that appellant's claim of lack of subject-matter jurisdiction is barred by res judicata. We agree on both grounds.

**Limitations on Successive Petitions for Postconviction Relief
Under R.C. 2953.23(A)**

{¶ 11} R.C. 2953.21(A)(2) requires that a petition for postconviction 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 this request more than 15 years after the statutory 180 day period set forth in R.C. 2953.21(A)(2). R.C. 2953.23 sets forth specific requirements to permit consideration of the September 1, 2012 motion as a successive petition for postconviction relief. R.C. 2953.23 provides:

(A) 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.

{¶ 12} This appeal does not involve a claim of actual innocence based upon DNA testing. To establish authority to consider appellant's application for postconviction relief as a successive petition, R.C. 2953.23(A)(1)(a) requires a showing of either of two alternative circumstances set forth in the statute:

When a petition for postconviction relief is a second or successive petition, R.C. 2953.23(A)(1)(a) prohibits a trial court from hearing said petition unless the petitioner either demonstrates (1) that he was "unavoidably prevented from discovering the facts upon which" he relies; or (2) that after the 180 day time limit for filing a petition for postconviction relief, "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 upon that right." See, also, *State v. Smith*, 9th Dist. Nos. 07CA009220, 07CA009252, 2008-Ohio-3589, at ¶ 5; *State v. Christian*, 7th Dist. No. 06MA167, 2007-Ohio-3336,

¶ 8. If this demonstration is made, the petitioner must then show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted[.]” R.C. 2953.23(A)(1)(b). *State v. Ayers*, 6th Dist. Erie No. E-07-2009, 2009-Ohio-393, ¶ 15.

{¶ 13} Neither of the alternative requirements exists in this case to permit consideration of the September 1, 2012 motion as a successive petition for postconviction relief under R.C. 2953.23(A)(1). Accordingly we conclude that the trial court lacked jurisdiction to consider the September 1, 2012 application for postconviction relief.

Res Judicata

{¶ 14} Appellant raised the same claim of lack of subject-matter jurisdiction based upon use of evidence of incidents between him and the child victim in Illinois in prior applications for postconviction relief that were filed on February 8, 1999, June 7, 2007, and April 7, 2010. In *Brooks*, 6th Dist. Lucas Nos. L-10-1258 and L-10-1259, 2011-Ohio-5303, we considered an appeal of the trial court’s denial of the April 7, 2010 application for postconviction relief. We ruled in the appeal that adverse judgments by the trial court on the issue in prior proceedings for postconviction relief barred appellant, under res judicata, from relitigating the issue in the April 7, 2010 motion for postconviction relief. *Id.* at ¶ 12. We hold res judicata also bars appellant from relitigating the subject-matter jurisdiction issue in yet another (September 1, 2012) application for postconviction relief.

{¶ 15} Accordingly, we find Assignment of Error No. I not well-taken.

{¶ 16} Justice having been afforded the party complaining, we affirm the judgment of the Lucas County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

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

Arlene Singer, J.

JUDGE

James D. Jensen, 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>
