

[Cite as *State v. Alexander*, 2011-Ohio-1380.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95995

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHERRON ALEXANDER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-445329

BEFORE: S. Gallagher, J., Kilbane, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 24, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Sherron Alexander appeals his conviction and sentence by the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm.

{¶ 2} On November 14, 2003, a Cuyahoga County grand jury indicted Alexander on three counts of drug trafficking, one of which carried a major drug offender specification (“MDO”); two counts of drug possession, one of which carried a MDO specification; and one count of possession of criminal tools. At a bench trial, Alexander was found guilty on all

counts. The trial court sentenced him to a total of ten years in prison: a mandatory ten years on Count 1 for trafficking, a mandatory ten years on Count 2 for drug possession, and ten months on all remaining counts, all to run concurrent. The court did not sentence him to additional time for the MDO specification, but it was required to sentence him to the maximum term on the two counts on which it determined Alexander was a major drug offender. See R.C. 2925.03(C)(4)(g).¹

{¶ 3} Alexander appealed, and this court affirmed his convictions. *State v. Alexander*, Cuyahoga App. No. 85688, 2005-Ohio-5200. One of the issues he raised was whether there was sufficient evidence that the amount of crack cocaine found in his possession exceeded 100 grams. This court found that there was, thereby affirming the trial court's determination that Alexander was a major drug offender pursuant to R.C. 2925.03.

{¶ 4} In 2009, Alexander filed a motion to void judgment, arguing that his sentence was unlawful. Specifically, he argued that the court erred by imposing consecutive sentences, by sentencing him to ten years instead of five for trafficking and possession, by

¹ R.C. 2925.03(C)(4)(g) provides: "If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code."

failing to consider a presentence investigation report, and by failing to follow the sentencing guidelines as they relate to powder cocaine as opposed to crack cocaine.

{¶ 5} Alexander also filed a motion for correction of sentencing error, arguing that the MDO specifications were unconstitutional; that his counsel was ineffective for failing to file a motion to suppress and not challenging the laboratory report; and that trafficking and possession are allied offenses. The state moved for summary judgment on all claims raised by Alexander in his two motions, arguing that his motions amounted to petitions for postconviction relief, and should be barred as untimely.

{¶ 6} On October 19, 2010, the trial court granted the state's motion, and Alexander appealed, citing three assignments of error for our review. We note, however, that Alexander raises an additional argument in his reply brief, which is that the trial court erred by converting his motions to petitions for postconviction relief. We address this issue first as we find that its resolution affects our analysis of the remaining three assigned errors.

{¶ 7} Alexander contends that his motions to void judgment and for correction of sentencing error do not meet the criteria of postconviction relief petitions. We disagree.

{¶ 8} R.C. 2953.21(A)(1) provides in relevant part: “Any person who has been convicted of a criminal offense and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed the

sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence* * *.”

{¶ 9} R.C. 2953.21(A)(2) provides: “[A] petition under division (A)(1) of this section 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 * * *.”

{¶ 10} In *State v. Briscoe*, Cuyahoga App. No. 83471, 2004-Ohio-4096, ¶ 10, this court found that motions for relief from judgment and for new trial met the definition of a motion for postconviction relief where the motions “1) were filed subsequent to appellant’s direct appeal; 2) claimed denials of constitutional rights; 3) sought to render the judgment void; and 4) asked for vacation of the judgment.” (Internal citations omitted.)

{¶ 11} Alexander seeks similar relief; he contends that the trial court committed plain error in converting his motions. He offers no basis for why his motions are not actually petitions for postconviction relief, except to argue the substantive merits of his motions.

{¶ 12} “A motion that is not filed pursuant to a specific rule of criminal procedure ‘must be categorized by a court in order for the court to know the criteria by which the motion should be judged.’” *State v. Elkins*, Franklin App. No. 10AP-6, 2010-Ohio-4605, ¶ 7, citing *State v. Bush*, 96 Ohio St.3d 235, 773 N.E.2d 522, 2002-Ohio-3993, ¶ 10. “Where a criminal defendant, subsequent to a direct appeal, files a motion seeking vacation or correction

of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” *Id.* at ¶ 8, citing *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131, syllabus.

{¶ 13} We find that the trial court properly construed Alexander’s motions as petitions for postconviction relief. Therefore, we must next consider whether Alexander’s petitions were timely filed. To do so, we must look to the substance of Alexander’s three assignments of error.²

{¶ 14} “R.C. 2953.23(A) provides that a trial court cannot entertain an untimely petition for postconviction relief unless: 1) the petitioner shows either that he was unavoidably prevented from discovering the facts upon which he relies in his petition, or that the United States Supreme Court has, since the expiration of the period for timely filing, recognized a new federal or state right that applies retroactively to the petitioner; and 2) the petitioner shows by clear and convincing evidence that a reasonable factfinder would not have found him guilty but for constitutional error at trial.” *State v. Sharif* (Sept. 27, 2001), Cuyahoga App. No. 79325.

² Alexander’s assignments of error are as follows:

“I. The trial court committed reversible error in failing to merge appellant’s conviction for trafficking in drugs and possession of drugs on violation of Ohio allied offense statute, R.C. 2941.25.”

“II. The trial court improperly sentenced appellant to ten years imprisonment for the major drug offender specification and such sentence should be vacated.”

“III. Trial court’s sentence is not supported by the record and the trial court’s failure to state its reasons rather than conclusion mandates a reversal pursuant to R.C. 2929.11-14.”

{¶ 15} In this appeal, Alexander challenges his sentence. He argues that the trial court failed to merge his trafficking and possession convictions as allied offenses; that he was improperly sentenced to ten years for MDO specifications; and that the trial court violated R.C. 2929.11-14. These arguments are not based on any new evidence or a new federal or state right that applies retroactively to Alexander. Alexander fails to offer any explanation as to what prevented him from filing his petition within the 180-day time period allowed under R.C. 2953.21(A)(2). He relies solely on his assertion that his motions were not postconviction relief petitions.

{¶ 16} Even if Alexander's motions were not untimely under R.C. 2953.21(A)(2), “[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph nine of the syllabus. “In other words, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal.” *State v. Kent*, Cuyahoga App. No. 94562, 2010-Ohio-6368, ¶ 6.

{¶ 17} Alexander had an opportunity to raise the same issues he raises here in his direct appeal in 2004. He did not. Instead, he waited four years to challenge his sentence, and the doctrine of res judicata prohibits our review.

{¶ 18} While his substantive arguments may have merit, Alexander did not timely file his petitions, and he fails here to establish that his petitions fall under an exception to R.C. 2953.23(A). The trial court lacked jurisdiction to consider Alexander's motions, and therefore, we find that the trial court did not err in denying them. See *Elkins* at ¶ 16. Alexander's assignment of error as it relates to the trial court's conversion of his motions to postconviction petitions is overruled.

{¶ 19} Consequently, our resolution of this issue renders Alexander's remaining assignments of error moot.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and
JAMES J. SWEENEY, J., CONCUR