

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25477

Appellee

v.

SAMUEL HOFFMEYER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2005-09-3205 (B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

BELFANCE, Judge.

{¶1} Appellant, Samuel D. Hoffmeyer, has appealed from the judgment of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms the judgment.

I.

{¶2} Samuel D. Hoffmeyer was convicted by a jury of one count of felonious assault on March 2, 2007. A month later, he was sentenced by the trial court to five years in prison. This Court upheld Mr. Hoffmeyer's conviction. *State v. Hoffmeyer*, 9th Dist. No. 23712, 2008-Ohio-2311, at ¶36.

{¶3} While his appeal was pending, Mr. Hoffmeyer filed a petition for postconviction relief in the trial court. In this petition, Mr. Hoffmeyer argued that trial counsel was ineffective. The State opposed the petition. By entry dated April 18, 2008, the trial court denied the petition for postconviction relief. Mr. Hoffmeyer did not appeal this judgment.

{¶4} On September 8, 2009, Mr. Hoffmeyer, pro se, filed a motion to vacate his sentencing entry due to erroneous notification of post-release control. The trial court conducted a de novo sentencing hearing. On November 23, 2009, the trial court issued an entry in which it sentenced Mr. Hoffmeyer to five years in prison for his felonious assault conviction and properly informed him of post-release control.

{¶5} On February 11, 2010, Mr. Hoffmeyer filed a second petition for postconviction relief. He again argued that trial counsel was ineffective and the State again opposed the petition. On June 22, 2010, the trial court denied Mr. Hoffmeyer's petition. Mr. Hoffmeyer has appealed the entry of June 22, 2010.

II.

{¶6} On appeal, Mr. Hoffmeyer advances two arguments that are relevant to the trial court's denial of his second petition for postconviction relief. First, he contends that the trial court erred in denying his February 2010 petition for postconviction relief as an untimely, successive petition that did not meet the applicable statutory requirements. Second, Mr. Hoffmeyer asserts that trial counsel was ineffective due to a conflict of interest that adversely affected counsel's representation of Mr. Hoffmeyer.

Untimely, successive petition

{¶7} With respect to postconviction relief, R.C. 2953.21(A)(2) provides that if a direct appeal has been taken, the petition must be filed within 180 days following the date on which the trial transcript is filed with the court of appeals. If a direct appeal is not filed, the petition must be filed within 180 days following the expiration of the time for filing the appeal. R.C. 2953.21(A)(2). The trial court is not permitted to consider petitions filed outside of this period unless the conditions of R.C. 2953.23(A)(1) or (A)(2) are met. R.C. 2953.23(A).

{¶8} Mr. Hoffmeyer argues that because his original sentence of 2007 was void due to a post-release control error, there was no final, appealable order in his case until the trial court issued a new sentencing entry on November 23, 2009. He contends that because his original sentence was void, his appeal of the conviction and his previous petition for postconviction relief were both nullities. Thus, according to Mr. Hoffmeyer, his February 2010 petition is not successive or untimely because it was his “first” petition and it was filed within the time limits outlined in R.C. 2953.21(A)(2).

{¶9} The Supreme Court of Ohio recently held that an appeal subsequent to resentencing is limited to issues related to the resentencing hearing. *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, at paragraph two of the syllabus. Further, the Supreme Court determined that once an offender has had the benefit of an appeal on the merits prior to resentencing to correct an error in post-release control; the offender may not raise anew all claims of error in an appeal following resentencing. *Id.* at ¶¶32-33. See, also, *State v. Cook*, 9th Dist. No. 25276, 2010-Ohio-6524, at ¶¶3-4. Thus, the Court concluded, Fischer’s appeal on the merits prior to resentencing was not a nullity. *Fischer* at ¶32.

{¶10} Here, Mr. Hoffmeyer had a direct appeal on the merits of his conviction before he was resentenced. Contrary to Mr. Hoffmeyer’s contention, his direct appeal was not a nullity. See *Fischer* at ¶32. See, also, *State v. Hoffmeyer*, 9th Dist. No. 25151, 2011-Ohio-915, at ¶¶8-9 (applying *Fischer* to hold that Mr. Hoffmeyer’s initial appeal was not a nullity and the appeal after resentencing was limited to issues arising at the resentencing hearing). Likewise, there is no legal basis upon which to conclude that his first petition for postconviction relief was a nullity either; thus, his February 2010 petition was a second, successive petition.

{¶11} As Mr. Hoffmeyer's direct appeal was not a nullity, the 180-day time period during which he could file a petition for postconviction relief began to run on the date that the trial transcript was filed with the court of appeals during his first appeal in 2007. R.C. 2953.21(A)(2). The docket indicates that the transcript of Mr. Hoffmeyer's trial was filed with this Court in July 2007. Mr. Hoffmeyer had until the end of 2007 to file a timely petition for postconviction relief. The 2010 petition at issue in this appeal was filed well outside of this time period.

{¶12} In its entry denying the 2010 petition, the trial court recognized that Mr. Hoffmeyer did not claim that he met the statutory requirements of R.C. 2953.23(A), which would have allowed the trial court to consider his untimely, successive petition. See R.C. 2953.23(A). Thus, the trial court correctly determined that it lacked jurisdiction to consider the petition. *Id.* On appeal, Mr. Hoffmeyer confines his argument to the trial court's conclusion that his February 2010 petition was successive and untimely. He does not argue in the alternative that he presented evidence in the trial court that would meet the requirements of R.C. 2953.23(A), thereby allowing the trial court to consider his petition. Accordingly, we do not consider whether Mr. Hoffmeyer satisfied the jurisdictional requirements of R.C. 2953.23(A). See App.R. 12(A)(2); *State v. Winston*, 9th Dist. No. 24761, 2010-Ohio-1354, at ¶44.

Effectiveness of trial counsel

{¶13} In his second argument, Mr. Hoffmeyer does not mention postconviction relief or the trial court's entry of June 22, 2010. Instead, Mr. Hoffmeyer reasserts his arguments as to trial counsel's alleged ineffectiveness. This argument represents the merits of his February 2010 petition for postconviction relief. As we have determined above that the trial court correctly decided that the February 2010 petition was untimely and successive, we are prevented from

reaching the merits of the argument presented in the petition. Accordingly, Mr. Hoffmeyer's assigned error is not well taken and is overruled.

III.

{¶14} Mr. Hoffmeyer's assigned errors are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

SAMUEL D. HOFFMEYER, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.