

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT         )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       25448

Appellee

v.

TAWAN R. CHILDS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 95 11 2881

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 2, 2011

---

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant, Tawan Childs, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} In 1995, the Summit County Juvenile Court relinquished its jurisdiction over Childs to the Summit County Court of Common Pleas, and a grand jury indicted him on the charge of aggravated murder with an attendant firearm specification. Following a jury trial, Childs was convicted of murder and the firearm specification. This Court affirmed his conviction on direct appeal. *State v. Childs* (“*Childs I*”) (Sept. 18, 1996), 9th Dist. No. 17653.

{¶3} On August 6, 1999, Childs filed a petition for post-conviction relief, citing *State v. Golphin* (1998), 81 Ohio St.3d 543, and challenging the bindover procedure the juvenile court employed in relinquishing jurisdiction to the common pleas court. The trial court denied his petition and Childs appealed. Once again, this Court affirmed the trial court’s judgment. *State v.*

*Childs* (“*Childs II*”) (Feb. 16, 2000), 9th Dist. No. 19757. Specifically, this Court determined that Childs’ petition was untimely and did not meet any of the exceptions under which a court may review untimely petitions. *Id.* at \*1-2.

{¶4} On July 3, 2001, Childs filed a “motion to dismiss indictment[] upon void prosecution, conviction, and sentence[,]” based upon the same argument he included in his untimely petition for post-conviction relief.<sup>1</sup> The trial court denied Childs’ motion on July 6, 2001.

{¶5} On April 1, 2009, the trial court issued an order, purporting to deny a “request for remedy” that challenged the court’s jurisdiction due to the bindover procedure employed by the juvenile court. Childs appealed from the court’s order, but this Court dismissed the appeal as no “request for remedy” filing ever appeared in the record and the trial court’s jurisdiction was never invoked. *State v. Childs* (“*Childs III*”), 9th Dist. No. 24735, 2009-Ohio-6282, at ¶7.

{¶6} On April 28, 2010, Childs filed a “revised motion to vacate void judgment[,]” citing *Golphin* and again challenging the juvenile court’s bindover procedure. The trial court ultimately denied the “revised motion” based on the theory that it was an untimely petition for post-conviction relief, or in the alternative, was barred by res judicata.

---

<sup>1</sup> Childs also filed three petitions for writs of habeas corpus in 1997, 1999, and 2000, respectively, in the last of which he made the same challenge to the bindover procedure employed by the juvenile court when it relinquished jurisdiction. All of the petitions were denied. See *State ex rel. Childs v. Lazaroff* (2001), 90 Ohio St.3d 519, 519-20 (recalling Childs’ successive petitions and affirming the denial of his last petition on the basis of res judicata).

{¶7} Childs now appeals and raises four assignments of error for our review. For ease of analysis, we consolidate the assignments of error.

## II

### Assignment of Error Number One

“THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT AND VIOLATED DUE PROCESS AND SEPARATIONS OF POWER DOCTRINE BY FAILING TO CORRECT VOID JUDGMENT BELOW WHEN DEFENDANT ALLEGED THAT ORIGINAL ADULT COURT CONVICTION AND JUDGMENT ARE VOID BECAUSE JUVENILE COURT RECORD FAILS TO SHOW THE COMPLETION OF THE FULL INVESTIGATION REQUIRED UNDER THEN-APPLICABLE BINDOVER PROCEDURES SINCE JUVENILE COURT FAILED TO CONDUCT MANDATORY PHYSICAL EXAMINATION.”

### Assignment of Error Number Two

“THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT WHEN IT CONFERRED LACK OF SUBJECT-MATTER JURISDICTION ON AGREEMENT OF PARTY VIOLATING DUE PROCESS AND PRINCIPLES OF SEPARATIONS OF POWERS.”

### Assignment of Error Number Three

“THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY DENYING MOTION TO VACATE A VOID JUDGMENT DUE TO LACK OF SUBJECT-MATTER JURISDICTION ON THE BASIS OF RES JUDICATA, SUCCESSIVE PETITION AND TIME-BAR WHEN SUCH AFFIRMATIVE DEFENSES WERE WAIVED, NEITHER PLEAD NOR PROVED BY STATE, THEREFORE EQUITABLE ESTOPPEL FORECLOSED SUCH DEFENSES.”

### Assignment of Error Number Four

“THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN ITS APPLICATION OF RES JUDICATA TO A VOID JUDGMENT WHEN IT DENIED RELIEF FAILING TO DISPOSE OF CASE ON MERITS WHICH VIOLATES DUE PROCESS AND EQUAL PROTECTION UNDER LAW.”

{¶8} In his assignments of error, Childs argues that the trial court erred by refusing to vacate his void judgment, which he claims is void due to the bindover procedure employed by the juvenile court in 1995. Specifically, Childs relies upon *Golphin* and argues that, because he

did not receive a physical examination as a part of the background investigation required for bindover, the bindover procedure was contrary to law and all of the proceedings that followed thereafter are void for lack of subject matter jurisdiction.

{¶9} Generally, this Court reviews a trial court’s denial of a post-conviction relief petition for an abuse of discretion. *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, at ¶11. When a trial court denies a petition solely on the basis of an issue of law, however, this Court’s review is de novo. *State v. Samuels*, 9th Dist. No. 24370, 2009-Ohio-1217, at ¶3. Whether a defendant’s post-conviction relief petition satisfied the procedural requirements set forth in R.C. 2953.21 and R.C. 2953.23 is an issue of law. *Id.* at ¶3-7. Consequently, a de novo standard of review applies. *Id.* at ¶3.

{¶10} Initially, Childs argues that the trial court erred by construing his motion as a petition for post-conviction relief. “Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his \*\*\* sentence on the basis that his \*\*\* constitutional rights have been violated, such a motion is a petition for post[-]conviction relief as defined in R.C. 2953.21.” *State v. Reynolds* (1997), 79 Ohio St.3d 158, syllabus. Here, Childs filed his motion after his direct appeal, sought to vacate his conviction as void, and presented a constitutional challenge in his motion. As such, the court did not err by construing the motion as a petition for post-conviction relief. See *State v. Brooks*, 9th Dist. No. 24510, 2009-Ohio-2341, at ¶6. See, also, *Childs II*, supra (where Childs raised the same argument in a petition for post-conviction relief).

{¶11} A trial court lacks jurisdiction to consider an untimely or successive petition for post-conviction relief unless both of the following items apply:

“(a) Either the petitioner shows that [he] was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or,

subsequent to the period prescribed in [R.C. 2953.21(A)(2)] 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 [him] guilty of the offense of which [he] was convicted[.]” R.C. 2953.23(A)(1)(a)-(b).

The petition here is both untimely and successive. Moreover, it rests upon the same argument that Childs first presented to the trial court in 1999 and to this Court in *Childs II*. See *Childs II*, at \*1-2 (rejecting Childs' untimely petition challenging bindover procedure as it failed to satisfy R.C. 2953.23(A)(1)(a)-(b)). Childs did not appeal from *Childs II*. Nor did he appeal from the trial court's July 6, 2001 denial of his motion to dismiss, which rejected Childs' same request for relief on the basis of res judicata. The record supports the trial court's conclusion that Childs is not entitled to relief here because he filed an untimely, successive petition that does not satisfy R.C. 2953.23(A)(1). The time within which Childs could have raised any defect in his bindover procedure has long since passed.

{¶12} To the extent Childs argues that he may raise his argument now, regardless of procedural formalities, because his judgment is void, we disagree with his argument. Childs largely relies upon this Court's post-release control case law to reach this conclusion. See, e.g., *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, at ¶19 (“[A] trial court, confronted with an untimely or successive petition for post[-]conviction relief that challenges a void sentence, must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant.”). Apart from the fact that much of this Court's post-release control precedent has been largely eviscerated by *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238, we are not convinced that R.C. 2953.23(A)'s requirements and res judicata are inapplicable here. The Ohio Supreme Court, in considering Childs' bindover argument via a petition for a writ of

habeas corpus, described his argument as “a potentially viable” one, but specifically denied his petition as successive based on principles of res judicata. *State ex rel. Childs*, 90 Ohio St.3d at 520. As such, we are unwilling to extend any pre-*Fischer* law and conclude that Childs’ petition was immune from procedural formalities and substantive rules of law, such as res judicata. Childs’ assignments of error are overruled.

### III

{¶13} Childs’ assignments of error 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.

---

BETH WHITMORE  
FOR THE COURT

MOORE, J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

TAWAN R. CHILDS, pro se Appellant.

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