

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-572
 : (C.P.C. No. 09CR-11-6952)
 James D. Mitchell, Jr., : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 21, 2013

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

James D. Mitchell, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, James D. Mitchell, appeals pro se from a judgment of the Franklin County Court of Common Pleas denying his motion to vacate and/or correct sentence. Appellant raises a single assignment of error, as follows:

The Court Erred To the Prejudice Of Appellant When It Misconstrued Appellant's Motion.

{¶ 2} For the following reasons, we affirm.

{¶ 3} A jury found appellant guilty of felonious assault, and the court labeled him a repeat violent offender. The court sentenced him to eight years in prison for the felonious assault conviction. Appellant appealed, raising numerous assignments of error, including challenges to the sufficiency and manifest weight of the evidence, as well as the trial court's rulings on evidentiary questions. We affirmed the trial court on all

assignments of error. *State v. Mitchell*, 10th Dist. No. 11AP-377, 2012-Ohio-466 ("*Mitchell I*").

{¶ 4} Subsequent to his direct appeal, on June 1, 2012, appellant filed a motion to vacate and/or correct sentence. The trial court denied the motion, concluding that it was a motion for postconviction relief, pursuant to R.C. 2953.21, and was not filed in a timely manner. Appellant now appeals the denial of his motion.

{¶ 5} R.C. 2953.21(J) provides that postconviction relief "is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case." In his brief, appellant argues that the trial court should not have construed his motion as a motion for postconviction relief because he is requesting the court to review the records "as counsel's deficient performance cause [sic] the trial's [sic] outcome to be unreasonable." (Appellant's brief, at 3.) We reject appellant's argument. This court has repeatedly recognized that motions "[seeking] to correct or vacate sentence should be construed as a motion for postconviction relief under R.C. 2953.21." *State v. Banks*, 10th Dist. No. 12AP-96, 2012-Ohio-3770, ¶ 6, citing *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079. *See also State v. Lariva*, 10th Dist. No. 08AP-413, 2008-Ohio-5499.

{¶ 6} In *Banks*, where no direct appeal was filed, this court further recognized that, pursuant to R.C. 2953.21(A), a motion for postconviction relief must be filed within 180 days after the expiration of the time for filing an appeal. *Banks* at ¶ 8. Here, where a direct appeal was filed, R.C. 2953.21(A)(2) requires that a motion for postconviction relief must be filed no later than 180 days after the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication. Accordingly, a trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless the petition demonstrates that an exception provided in R.C. 2953.23(A) applies. *Banks* at ¶ 9.

{¶ 7} Appellant's time for filing a petition for postconviction relief expired on or about December 21, 2011 (180 days from the date upon which appellant filed the transcript in his direct appeal, i.e., June 24, 2011). But appellant filed his motion on June 1, 2012—clearly beyond the statutory deadline for the filing of a postconviction petition in the absence of an exception. As in *Banks* and *State v. Mason*, 10th Dist. No. 12AP-120,

2012-Ohio-4510, appellant has neither argued nor established that either of the exceptions provided in R.C. 2953.23(A) applies so as to allow the trial court to consider his untimely petition. We therefore conclude that the trial court lacked jurisdiction to entertain his motion for postconviction relief.

{¶ 8} Moreover, " '[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.' " (Emphasis omitted.) *State v. Scudder*, 131 Ohio App.3d 470, 475 (10th Dist.1998), quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967). "It is well settled that constitutional issues may not be considered in a postconviction proceeding where they have already been, or could have been, litigated by the defendant on direct appeal." *Scudder* at 475. The argument appellant raises here, the ineffectiveness of his trial counsel, could have been raised on direct appeal. Since it was not, appellant's motion is similarly barred by the doctrine of *res judicata*. See *Lariva* at ¶ 21.

{¶ 9} The trial court correctly found that it lacked jurisdiction to entertain appellant's motion, which it properly construed as an untimely petition for postconviction relief. Moreover, appellant's claim is barred by the doctrine of *res judicata*. Accordingly, appellant's assignment of error is overruled, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.
