

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 23AP-59
Plaintiff-Appellee,	:	(C.P.C. No. 07CR-88)
v.	:	
	:	(ACCELERATED CALENDAR)
[J.G.],	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 8, 2023

On brief: *[Janet Grubb*, First Assistant Prosecuting Attorney], and *Michael A. Walsh*, for appellee.

On brief: *J.G.*, pro se.

APPEAL from the Franklin County Court of Common Pleas

JAMISON, J.

{¶ 1} Defendant-appellant, J.G., appeals from a judgment of the Franklin County Court of Common Pleas, dismissing his motion to vacate void sentence, for lack of subject-matter jurisdiction. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant appeals from a dismissal of his motion to vacate void sentence, which the trial court construed as a successive motion for postconviction relief. The trial court dismissed the motion due to lack of jurisdiction and alternatively, *res judicata*.

{¶ 3} In 2007, the Franklin County Grand Jury indicted appellant on 6 counts of rape, 4 counts of gross sexual imposition, and 2 counts of disseminating matter harmful to juveniles. The charges alleged appellant sexually abused J.A.G. when she was less than 13 years old.

{¶ 4} Appellant pled not guilty to the charges and a jury trial ensued. On August 26, 2008, a jury returned a verdict finding appellant guilty of rape, in violation of R.C. 2907.02, a felony of the first degree, and two counts of gross sexual imposition, in violation of R.C. 2907.05, felonies of the third degree. The jury found appellant not guilty on the remaining charges.

{¶ 5} On October 2, 2008, the trial court held a sentencing hearing and imposed a prison term of 22 years. Appellant timely appealed to this court from the judgment of conviction and sentence. On appeal, appellant argued the trial court erred by admitting out-of-court statements made by J.A.G. at a victim's advocacy center. Appellant also argued the trial court committed plain error by admitting out-of-court statements of certain social workers.

{¶ 6} In *State v. J.G.*, 10th Dist. No. 08AP-921, 2009-Ohio-2857, we overruled appellant's assignments of error and affirmed the trial court decision. The Supreme Court of Ohio subsequently denied certification and we issued a memorandum decision denying appellant's pro se motion to reopen the appeal.

{¶ 7} On May 21, 2009, appellant filed his first motion for postconviction relief pursuant to R.C. 2953.23(A). The trial court denied the motion and appellant did not appeal. The next motion appellant filed was on August 18, 2010 captioned motion for resentencing. While that motion was pending with the trial court, appellant filed a petition seeking a writ of habeas corpus in federal court, alleging 13 separate grounds for relief. The federal court ultimately denied the writ and denied appellant's subsequent motions for reconsideration and to certify an appeal.

{¶ 8} On January 18, 2012, the trial court denied appellant's August 18, 2010 motion for resentencing. In 2012, appellant filed a nunc pro tunc motion on sentencing and a motion for new trial on account of newly discovered evidence. Both motions were denied. In a memorandum decision, this court denied appellant's motion for delayed appeal. *State v. [J.G.]*, 10th Dist. No. 13AP-358 (May 21, 2013) (memorandum decision).

{¶ 9} On November 30, 2022, appellant filed his second motion to vacate void sentence. Therein, appellant alleges the criminal proceedings brought against him violated the Double Jeopardy and Due Process Clauses of the United States and Ohio Constitution, and that his prison sentence constituted cruel and unusual punishment. Appellant also argued his conviction was not supported by sufficient evidence.

{¶ 10} On December 28, 2022, the trial court issued a decision and judgment entry dismissing the motion. More particularly, the trial court construed appellant's motion as an untimely filed motion for postconviction relief and dismissed the motion due to lack of subject-matter jurisdiction.

{¶ 11} Appellant timely appealed to this court from the December 28, 2022 judgment.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant assigns the following two assignments or error for our review:

[1.] Appellant was denied his Federal and State due process rights to notice as the offenses were not charged with sufficient specificity thereby violating Appellant's protection against Allied Offenses and Double Jeopardy as provided in R.C. 2941.25, thereby also violating the Fifth and Fourteenth Amendment Rights under the United States Constitution and Ohio Constitution, Article I, Section 10 and the sentences constitute cruel and unusual punishment under the Eight [sic] Amendment to the United States Constitution.

[2.] The Appellant's Right to Due Process of Law was violated because the conviction for Rape in Count Nine was based on insufficient evidence.

III. STANDARD OF REVIEW

{¶ 13} A trial court lacks subject-matter jurisdiction over an untimely or successive petition for postconviction relief unless the petition satisfies the criteria set forth under R.C. 2953.23(A). *State v. Conway*, 10th Dist. No. 17AP-90, 2019-Ohio-382. *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, ¶ 36 ("a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition"). Because "the question [of] whether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely petition for postconviction relief is a question of law," an appellate court applies a de novo standard of review to the trial court's determination. *Id.* at ¶ 24, quoting *State v. Kane*, 10th Dist. No. 16AP-781, 2017-Ohio-7838, ¶ 9.

IV. LEGAL ANALYSIS

{¶ 14} To the extent that appellant claims his sentence may be overturned at any time because it is a void sentence, the Supreme Court in *State v. Harper*, 160 Ohio St.3d

480, 2020-Ohio-2913, significantly limited the void sentence doctrine and realigned prior precedent. In *Harper*, the court held that “[w]hen a case is within a court’s subject-matter jurisdiction and the accused is properly before the court, any error in the exercise of that jurisdiction in imposing postrelease control renders the court’s judgment voidable, permitting the sentence to be set aside if the error has been successfully challenged on direct appeal.” *Id.* at ¶ 4.

{¶ 15} There is no question in this case that the trial court had jurisdiction to hear and determine appellant’s guilt of the charged offenses and to impose sentence accordingly. Because the trial court had jurisdiction, the October 3, 2008, judgment of conviction and sentence is merely voidable and not void.

{¶ 16} Moreover, “[t]he Ohio Rules of Criminal Procedure do not expressly provide for a motion to vacate a conviction; however, ‘[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.’ ” *State v. Stewart*, 10th Dist. No. 19AP-458, 2020-Ohio-4709, ¶ 9, quoting *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12. In this case, appellant’s motion to vacate meets the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1)(a), because it “(1) was filed subsequent to [appellant’s] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” *State v. Norman*, 10th Dist. No. 19AP-106, 2019-Ohio-4020, ¶ 11, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997).

{¶ 17} The postconviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). Appellant does not have a constitutional right of postconviction review and postconviction relief does not afford appellant any rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). A postconviction petition does not provide appellant a second opportunity to litigate his conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321.

{¶ 18} The trial court construed appellant’s motion to vacate as an untimely motion for postconviction relief. In our view, appellant’s motion to vacate is properly characterized as a successive motion for postconviction relief as appellant previously filed a motion for postconviction relief on May 21, 2009. For purposes of subject-matter jurisdiction, however, the question whether the motion is a successive motion for postconviction relief

or an untimely filed motion for postconviction relief is of no consequence as the jurisdictional requirements are the same.

{¶ 19} Under R.C. 2953.23(A), a court of common pleas may entertain a successive petition for postconviction relief only under the following circumstances:

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.

(Emphasis added.)

{¶ 20} “ ‘A trial court lacks subject-matter jurisdiction over an untimely or successive petition for postconviction relief unless the petition satisfies the criteria set forth under R.C. 2953.23(A).’ ” *State v. Jones*, 10th Dist. No. 18AP-578, 2019-Ohio-1014, ¶ 15, quoting *Conway* at ¶ 8, citing *Apanovitch* at ¶ 36 (“[A] petitioner’s failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition.”). Because “ ‘the question [of] whether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely [or successive] petition for postconviction relief is a question of law,” ’ an appellate court applies a de novo standard of review to the trial court’s determination.” *Conway* at ¶ 8,

quoting *Apanovitch* at ¶ 24, quoting *Kane* at ¶ 9. A petitioner “ ‘cannot circumvent the requirements of R.C. 2953.21 and attempt to obtain relief through the “back door” by styling his action as other than that which it is: a petition for postconviction relief.’ ” *State v. Stewart* at ¶ 12, quoting *Canter v. Voinovich*, 9th Dist. No. 97CA006665, 1997 Ohio App. LEXIS 4282 (Sept. 24, 1997).

{¶ 21} Here, appellant claims that insufficient evidence was admitted at trial to support the jury verdict, he questions the trial court’s handling of jury questions during deliberations, the failure to merge several counts in the indictment prior to conviction, and a double jeopardy violation occurred because the guilty verdicts on some counts are inconsistent with the not guilty verdicts on others.

{¶ 22} Appellant made no effort to establish he was unavoidably prevented from discovering the evidence upon which his petition relies as required under R.C. 2953.23(A). Moreover, as the trial court noted, given the claimed constitutional errors, any evidence underlying appellant’s constitutional claims would have been available to appellant at the time of his criminal trial and subsequent appeal. Additionally, appellant has not asserted that the United States Supreme Court has recognized a new right that is applicable to appellant’s situation.

{¶ 23} Based on the foregoing, the trial court did not err when it denied appellant’s motion to vacate a void sentence because the motion was not filed within 365 days of the filing of the transcript in appellant’s direct appeal. Further, appellant did not meet an exception set forth in R.C. 2953.23(A). Appellant’s two assignments of error are overruled.

V. CONCLUSION

{¶ 24} Having overruled appellant’s two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas denying appellant’s motion to vacate a void sentence.

Judgment affirmed.

BOGGS and LELAND, JJ., concur.
