

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Court of Appeals No. H-12-025

Appellee

Trial Court No. CRI 38523

v.

Lawrence D. Robinson

DECISION AND JUDGMENT

Appellant

Decided: July 5, 2013

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Lawrence Dean Robinson, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Lawrence Robinson, appeals from the judgment of the Huron County Court of Common Pleas, denying his motion for resentencing, in which he argued

that his prior convictions for felony murder and premeditated murder should have merged as allied offenses of similar import. We affirm.

A. Facts and Procedural Background

{¶ 2} On April 6, 1973, Robinson shot and killed Alice Wamack after robbing her at gunpoint. He was subsequently tried and convicted of one count of felony murder and one count of premeditated murder. He was sentenced to two consecutive life terms, but his convictions were overturned on appeal and the case was remanded for a new trial. Following retrial, Robinson was again convicted on both counts. On August 15, 1975, he was ordered to serve two consecutive life sentences.

{¶ 3} Robinson appealed his convictions, arguing, inter alia, that the trial court erred in sentencing him to consecutive life sentences. This court affirmed his convictions on December 3, 1976. Since then, Robinson has filed numerous petitions for postconviction relief and appeals with this court.

{¶ 4} On September 18, 2012, Robinson filed a motion for resentencing with the trial court. In his motion, he argued that the trial court's imposition of consecutive life sentences for felony murder and premeditated murder violated his constitutional rights under the double jeopardy clause. His argument was based on a retroactive application of the Ohio Supreme Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, which modified the allied offenses analysis under R.C. 2941.25. The trial court summarily denied Robinson's motion on October 5, 2012. Robinson has timely appealed the trial court's denial of his motion for resentencing.

B. Assignment of Error

{¶ 5} In his appeal, Robinson assigns the following error for our review:

THE TRIAL COURT ERRED IN FINDING APPELLANT'S
MOTION FOR RE-SENTENCING NOT WELL-TAKEN, CONFIRMING
ITS STATUTORILY UNAUTHORIZED SENTENCE OF MULTIPLE
CONVICTIONS FOR ALLIED OFFENSES, [AND] VIOLATING THE
CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

II. Analysis

{¶ 6} We initially note that Robinson's motion to resentence is properly construed as a petition for postconviction relief. *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus ("Where a criminal defendant, subsequent to his or her 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."). We review a trial court's decision granting or denying a postconviction relief petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion connotes that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 7} A petition for postconviction relief "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.” R.C. 2953.21(A)(2). Here, the trial transcript was filed in 1975. Thus, Robinson’s petition is untimely by more than three decades.

{¶ 8} “A trial court has no jurisdiction to consider an untimely petition for postconviction relief unless the untimeliness is excused under R.C. 2953.23(A)(1).” *State v. Guevara*, 6th Dist. No. L-12-1218, 2013-Ohio-728, ¶ 8. Under R.C. 2953.23(A)(1), the time limit is excused if both (1) it can be shown that either the petitioner was unavoidably prevented from discovering the facts relied on in the claim for relief, or that 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; and (2) the petitioner presents clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty.

{¶ 9} Here, Robinson makes no mention of the fact that his petition is time-barred. Further, he fails to show that he was prevented from discovering the facts relied on in the claim, or that the United States Supreme Court has recognized a new federal or state right that applies retroactively to his situation. Absent such a showing, Robinson’s petition for postconviction relief was untimely. Thus, the trial court did not abuse its discretion in denying the motion for resentencing. *See State v. Porter*, 6th Dist. No. L-12-1243, 2013-Ohio-1360, ¶ 12 (holding that a petition for postconviction relief challenging the trial

court's failure to merge allied offenses of similar import is subject to the 180-day time period).

{¶ 10} Additionally, we note that Robinson's argument fails on the merits as it rests on the faulty assumption that *Johnson* applies retroactively. Ohio law clearly establishes that the merger analysis set forth in *Johnson* does not apply retroactively. *Id.* at ¶ 13; *see also State v. Musselman*, 2d Dist. No. 25295, 2013-Ohio-1584, ¶ 20; *State v. Sturdivant*, 8th Dist. No. 98747, 2013-Ohio-584, ¶ 14-15; *State v. Hughes*, 10th Dist. No. 12AP-165, 2012-Ohio-4513, ¶ 16; *State v. Holliday*, 5th Dist. No. 11CAA110104, 2012-Ohio-2376, ¶ 16; *State v. Smith*, 3d Dist. No. 9-11-36, 2012-Ohio-1891, ¶ 25; *State v. Layne*, 4th Dist. No. 11CA17, 2012-Ohio-1627, ¶ 11.

{¶ 11} Accordingly, Robinson's sole assignment of error is not well-taken.

III. Conclusion

{¶ 12} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed. Robinson is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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