

[Cite as *State v. Elkins*, 2010-Ohio-4605.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-6 (C.P.C. No. 00CR12-7245)
	:	
David Elkins,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 28, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

David Elkins, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, David Elkins, appeals from a judgment of the Franklin County Court of Common Pleas denying appellant's "Common Law Motion to Vacate Void Judgment and Sentence." For the following reasons, we affirm that judgment.

{¶2} In 2001, a jury found appellant guilty of a number of charges, including multiple counts of robbery, aggravated robbery, felonious assault, and aggravated possession of drugs. The trial court sentenced him accordingly. This court affirmed appellant's convictions but remanded the matter for resentencing. *State v. Elkins*, 148

Ohio App.3d 370, 2002-Ohio-2914. After a number of subsequent appeals, appellant was finally resentenced in 2006. Appellant did not appeal that sentencing.

{¶3} On September 14, 2009, appellant filed in the trial court a "Common Law Motion to Vacate Void Judgment and Sentence." In that motion, appellant alleged errors that he claimed rendered a number of his convictions and sentences void. Specifically, he first alleged that certain verdict forms were insufficient because they did not state that the jury found him guilty of each of the elements of the offense. Second, he similarly alleged that other verdict forms were also insufficient because they also did not state that the jury found him guilty of enhancements that subjected him to greater punishments for those convictions. Lastly, appellant alleged that the trial court improperly sentenced him for a number of his drug possession convictions because those convictions should have merged for sentencing with other convictions.

{¶4} The trial court construed appellant's motion as a petition for postconviction relief pursuant to R.C. 2953.21. Accordingly, the trial court first determined that the petition was untimely and that appellant did not demonstrate an exception that would allow it to consider the untimely petition. See R.C. 2953.23(A)(1). The trial court also determined that appellant's claims were barred by res judicata because they were based solely on matters that were apparent on the record and appellant had not raised them on appeal. For these reasons, the trial court denied appellant's motion.

{¶5} Appellant appeals and assigns the following errors:

ASSIGNMENT OF ERROR I

THE VERDICT AND SENTENCE ENTERED BY THE FRANKLIN COUNTY COURT OF COMMON PLEAS ON JUNE 14, 2006, FINDING APPELLANT GUILTY OF ONE COUNT OF AGGRAVATED ROBBERY, R.C. 2911.01, A

FELONY OF THE FIRST DEGREE, WAS MADE CONTRARY TO STATUTE AND IS THEREBY A NULLITY AND VOID AB INITIO.

ASSIGNMENT OF ERROR #2

THE VERDICT AND SENTENCE ENTERED BY THE FRANKLIN COUNTY COURT OF COMMON PLEAS ON JUNE 14, 2006, FINDING APPELLANT GUILTY OF ONE COUNT OF FELONIOUS ASSAULT, R.C. 2903.11, AS A FELONY 1, AND POSSESSING CRIMINAL TOOLS, R.C. 2923.24, AS A FELONY 5, WERE MADE CONTRARY TO STATUTE AND ARE THEREBY A NULLITY AND VOID AB INITIO.

ASSIGNMENT OF ERROR #3

COUNTS 12-17 ARE ALLIED OFFENSES TO EACH OTHER, AS ARE COUNTS 18-20, THEREFORE, THE CONVICTION AND SENTENCE ENTERED BY THE FRANKLIN COUNTY COURT OF COMMON PLEAS ARE CONTRARY TO THE ALLIED OFFENSE SENTENCING STATUTE, AND THEREFORE ARE VOID AB INITIO, AND SHOULD BE MERGED FOR SENTENCING PURPOSES.

ASSIGNMENT OF ERROR #4

TRIAL COURT ERRED WHEN IT BARRED APPELLANT'S MOTION AS "RES JUDICATA" * * *.

ASSIGNMENT OF ERROR #5

TRIAL COURT ERRED WHEN, IN PART III OF ITS DENIAL, AND PARTS A,B AND C OF IV, FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT MISCONSTRUED APPELLANT'S MOTION ATTACKING VOID JUDGMENT AS A PETITION FOR POST CONVICTION, THEN PROCEEDED TO APPLY ALL LAWS AND CASE LAWS WHICH APPLY TO POST CONVICTION PETITIONS TO DENY APPELLANT'S MOTION.

{¶6} For purposes of our analysis, we first address appellant's fifth assignment of error, in which he claims the trial court erred by construing his motion as a petition for postconviction relief.

{¶7} A motion that is not filed pursuant to a specific rule of criminal procedure "must be categorized by a court in order for the court to know the criteria by which the motion should be judged." *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶10. Appellant has not provided any legal authority or rule that authorizes the filing of a "Common Law Motion to Vacate Void Judgment and Sentence" in a criminal case. See *State v. Brooks*, 9th Dist. No. 24510, 2009-Ohio-2341, ¶5; see also *State v. Caldwell*, 3d Dist. No. 11-05-07, 2005-Ohio-5375, ¶8 (construing motion filed absent statutory or procedural authorization as petition for postconviction relief). Therefore, the trial court had to characterize appellant's motion in order to properly address it.

{¶8} The trial court construed appellant's motion as a petition for postconviction relief. Where a criminal defendant, subsequent to a 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. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, syllabus. Appellant's motion satisfies this definition of a petition for postconviction relief.

{¶9} Appellant filed his "Common Law Motion to Vacate Void Judgment and Sentence" after his direct appeal and sought to vacate certain of his convictions and sentences based on alleged violations of his constitutional rights. Specifically, appellant alleged that it is not clear from the face of his verdict forms that the jury found him guilty of all the essential elements of the offenses. This is a constitutional due process claim. See *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶36 ("Due process requires that the state establish beyond a reasonable doubt every fact necessary to constitute the crime charged.") (citing *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 1073).

He also alleged that the trial court violated R.C. 2941.25 by failing to merge certain offenses for sentencing. That statute protects against multiple punishments for the same conduct, a violation of the Double Jeopardy Clauses of both the United States and Ohio Constitutions. See *State v. Moore* (1996), 110 Ohio App.3d 649, 653 (citing *N. Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072).

{¶10} Because appellant filed his motion after his direct appeal and raised constitutional claims to vacate his convictions and sentences, the trial court properly construed appellant's motion as a petition for postconviction relief. *Brooks*; *State v. Lynch*, 9th Dist. No. 06CA008938, 2006-Ohio-5813, ¶6 (trial court properly construed "Motion to Vacate Void Judgment" as a petition for postconviction relief); *State v. Pearson* (Aug. 10, 2000), 3d Dist. No. 13-2000-12 ("Motion to Vacate a Void Judgment and Void Sentence" properly construed as petition for postconviction relief); *State v. Kemp*, 7th Dist. No. 09-MA-21, 2009-Ohio-6399, ¶10 (trial court properly construed "Motion to Vacate Void Proceedings and Sentence" as petition for postconviction relief). Therefore, we overrule appellant's fifth assignment of error.

{¶11} Appellant's four remaining assignments of error do not address the timeliness of his petition, which is a jurisdictional issue. The state asserts that the trial court properly denied appellant's petition because it was untimely. We agree.

{¶12} R.C. 2953.21 sets forth the requirements for filing a petition for postconviction relief. R.C. 2953.21(A)(2) provides:

[A] petition under division (A)(1) of this section 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is

taken, * * * the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

{¶13} Pursuant to this statute, appellant had to file his postconviction petition no later than 180 days after November 20, 2001, the date the trial transcript was filed in his direct appeal of the judgment of conviction to this court. That date was on or about May 19, 2002. Appellant did not file this petition until September 14, 2009. Therefore, appellant's petition was untimely.

{¶14} A trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless petitioner demonstrates that one of the exceptions in R.C. 2953.23(A) applies. *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶8 (citing *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶5).

{¶15} Appellant has made no attempt to show that any of the exceptions to the jurisdictional bar apply to his petition. With regard to R.C. 2953.23(A)(1), appellant has not alleged that he was unavoidably prevented from discovering the facts upon which he relies in his petition or that his claim was based on a new federal or state right recognized by the United States Supreme Court that could be retroactively applied to his case. Nor has he alleged that DNA results establish his actual innocence. R.C. 2953.23(A)(2).

{¶16} Because appellant failed to establish the applicability of an exception that would allow the trial court to consider his untimely petition, the trial court lacked jurisdiction to entertain his petition for postconviction relief. *State v. Dugger*, 10th Dist. No. 06AP-887, 2007-Ohio-1243, ¶10; *State v. Russell*, 10th Dist. No. 05AP-391, 2006-Ohio-383, ¶10. Accordingly, the trial court did not err in denying appellant's petition,

although technically, the petition should have been dismissed for lack of jurisdiction.

State v. Hamilton, 10th Dist. No. 03AP-852, 2004-Ohio-2573, ¶9.

{¶17} Our disposition of the jurisdictional issue renders moot appellant's first through fourth assignments of error, which address the merits of his petition. *Hollingsworth* at ¶11.¹

{¶18} Lastly, we deny appellant's application to reconsider our June 3, 2010 journal entry.

{¶19} In conclusion, we overrule appellant's fifth assignment of error, a disposition that renders his other assignments of error moot. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

*Application to reconsider journal entry denied;
judgment affirmed.*

SADLER and FRENCH, JJ., concur.

¹ Appellant's motion raises one claim that arguably is purely statutory and non-constitutional. Appellant argues that his verdict forms violated R.C. 2945.75 by not stating the enhancements for which the jury found him guilty. Appellant has not provided any authority indicating that such a violation would render appellant's conviction or sentences void. In fact, the only authority this court has found indicates that such an error renders a conviction or sentence voidable, not void. Therefore, even if the trial court had jurisdiction to address this claim, the claim would be barred by *res judicata*.