

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-236
v.	:	(C.P.C. No. 07CR-4563)
	:	
Kim L. Anderson,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2011

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

Kim L. Anderson, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Kim L. Anderson, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to vacate a void judgment.

Defendant assigns a single error:

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE APPELLANT, BY DENYING HIS MOTION WITHOUT A HEARING.

Because the trial court properly denied defendant's motion, more aptly deemed a petition for post-conviction relief, we affirm.

I. Facts and Procedural History

{¶2} Defendant was indicted on one count of engaging in a pattern of corrupt activity, one count of theft, five counts of forgery, five counts of money laundering, one count of identity fraud, and five counts of securing writings by deception; by subsequent indictment, he was further charged with one count each of forgery, identity fraud, and securing writings by deception. *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566, ¶2, appeal not allowed, 125 Ohio St.3d 1411, 2010-Ohio-1893.

{¶3} As noted in our decision in *Anderson*, defendant participated in a mortgage fraud scheme that involved six properties and defrauded mortgage lenders of over \$1 million dollars. Defendant never represented himself to be buyer, seller, or real estate agent in any of the transactions, but instead a facilitator. *Id.* at ¶3. As part of the scheme, defendant paid others to portray straw buyers in pre-arranged property transactions, prepared falsified loan applications for the buyers, and presented falsified documents to mortgage brokers. *Id.* As to the counts involved in the first indictment, defendant kept \$180,476.55 in proceeds from the mortgages arising from five real estate transactions.

{¶4} Ultimately, the court granted the prosecution's motion to dismiss the counts in both indictments that charged defendant with securing writings by deception. The jury found defendant guilty of the remaining counts in the first indictment but could not reach a verdict on the remaining counts in the second indictment, causing the court to dismiss those counts. Defendant appealed, asserting error in: (1) the court's imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4),

(2) lack of sufficient evidence to support theft as a first-degree felony, (3) violation of Crim.R. 16 in allowing the prosecution to use a surprise witness, (4) not applying R.C. 2941.25 to merge theft and forgery, and (5) denying defendant due process as a result of his attorney's alleged involvement with the co-defendant. Rejecting each of the assigned errors, this court affirmed defendant's conviction on December 15, 2009.

{¶5} On July 27, 2010, defendant filed a motion to vacate a void judgment. Relying on cases that addressed a void sentence in the context of post-release control, defendant contended his conviction was void because (1) the court erroneously convicted him of first-degree felony theft when the evidence established defendant exerted control over less than \$181,000; (2) the court allowed a violation of Crim.R. 16; (3) the prosecution advised the trial court that defendant's own attorney was implicated in the same transaction for which defendant was being tried; (4) prior to imposing consecutive terms of incarceration for defendant's felony convictions, the trial court failed to overcome the statutory presumption favoring concurrent sentences under R.C. 2929.14(E)(4); (5) none of the suits were instigated through the alleged victims' filing charging instruments; and (6) the trial court improperly modified its judgment following appeal.

{¶6} The state responded with a memorandum that asserted the doctrines of res judicata and law of the case barred defendant's arguments, as they raise the same issues presented in defendant's direct appeal. The state further contended the motion was untimely under R.C. 2953.21. Accordingly, the state requested that the trial court deny defendant's motion. Following defendant's reply, the trial court issued a decision and entry denying defendant's motion. The court noted that each of the grounds defendant posited, with the exception of defendant's contentions regarding the charging instruments and the

modified entry, were raised in defendant's appeal to this court. The trial court thus determined defendant could not re-litigate those issues in the common pleas court after the court of appeals resolved them in defendant's direct appeal.

{¶7} As to defendant's argument regarding the charging instruments, the trial court determined not only that res judicata barred the argument since it could have been raised during the direct appeal, but also that the argument lacked merit. Lastly, addressing defendant's contention that the court lacked jurisdiction to change the sentencing entry after defendant filed his notice of appeal, the court pointed out that the nunc pro tunc entry diverged from the original sentencing entry only to effect corrections that did not disturb the substance of defendant's sentence. The court concluded that, in any event, defendant suffered no prejudice since his 15-year sentence remained the same.

II. Assignment of Error

{¶8} Defendant's single assignment of error on appeal asserts the trial court erred in denying his motion to vacate his void sentence.

{¶9} "A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus. In so stating, the Supreme Court made clear that only the void portion of the sentence relating to post-release control may be vacated; the remainder of the judgment stands. Apparently relying on that line of cases, defendant captions his motion as one to vacate a void sentence.

{¶10} In reality, only one small part of defendant's motion challenges the modified judgment entry as void; the vast majority of his motion raises issues that fall, if anywhere, within the parameters of a petition for post-conviction relief. See *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶12, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304 (concluding that a motion styled "Motion to Correct or Vacate Sentence" met the definition of a petition for post-conviction relief pursuant to R.C. 2953.21(A)(1) because it was " '(1) filed subsequent to [the defendant'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' "). Because defendant's motion fits within the parameters *Schlee* delineated, it properly is reviewed as a denied petition for post-conviction relief. *Id.* (noting that rather than dismiss a motion as wrongly filed, a trial court appropriately may consider such motion to be a petition for post-conviction relief under R.C. 2953.21).

A. Timeliness

{¶11} A petition for post-conviction relief 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-Ohio-111. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. R.C. 2953.21 affords a prisoner post-conviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. A post-conviction petition does not provide a petitioner a second opportunity

to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32; *Murphy*.

{¶12} Effective September 21, 1995, R.C. 2953.21 was amended to require that a petition under R.C. 2953.21(A)(1) 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." R.C. 2953.21(A)(2). The amendment further provides that "[i]f 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." *Id.*

{¶13} Defendant directly appealed his judgment of conviction, and the transcript was filed in the court of appeals on February 27, 2009. Defendant then had 180 days to file his petition for post-conviction relief. He, however, did not file his petition until July 27, 2010, well past the 180-day deadline set forth in R.C. 2953.21. Because it was untimely, the trial court was without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340, appeal not allowed, 112 Ohio St.3d 1442, 2007-Ohio-152.

{¶14} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If defendant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also must demonstrate that but for the

constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶15} Defendant does not suggest that he falls within either of the two prongs of R.C. 2953.23(A) that would extend the time for him to file a petition for post-conviction relief. Although defendant's reply brief notes the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, that case does not assist defendant in meeting the timeliness requirement because R.C. 2953.23(A)(1)(a) requires a United States Supreme Court opinion, not one from the Ohio Supreme Court. See also *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830 (overruling *Colon*). Because defendant does come within the parameters of either prong of R.C. 2953.23(A)(1)(a), the trial court lacked jurisdiction to consider defendant's petition for post-conviction relief.

B. *Res Judicata*

{¶16} The other significant restriction on Ohio's statutory procedure for post-conviction relief is the doctrine of *res judicata*. The doctrine requires a defendant to support the error claimed in the petition with evidence outside the record that was created from the direct criminal proceedings. "Under 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 or that conviction, or on an appeal from that judgment." *State v. Cole* (1982), 2 Ohio St.3d 112, 113, quoting *Perry* at paragraph nine of the syllabus. (Emphasis omitted.) "Res judicata also implicitly bars a petitioner from 're-

packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *Hessler* at ¶37.

{¶17} The first four grounds for relief of defendant's petition for post-conviction relief, as set out above, address the precise issues this court considered and overruled in defendant's direct appeal. The fifth issue, contending the victims were required to file charging instruments before he could be indicted, concerns an issue defendant could have raised on appeal. Because the first five issues either were resolved on direct appeal or could have been resolved on direct appeal, *res judicata* bars defendant's raising them in a petition for post-conviction relief. *Perry*.

C. Modified Entry

{¶18} Defendant presents one issue not raised on appeal and contends the corrected entry the trial court entered after he filed his notice of appeal is void because the trial court at that point lacked jurisdiction of the case.

{¶19} The trial court properly resolved defendant's contentions. Noting "no change of substance was made in any corrected Entry," the trial court explained defendant originally was sentenced to four years on Count 16, but the count was a felony of the fifth degree. Accordingly, the court reduced the sentence for Count 16 to 12 months. Because the sentence on that count, whether sentenced as a fourth or fifth-degree felony, is to be served concurrently with the sentence on all other counts, defendant's aggregate sentence of 15 years did not change.

{¶20} Crim.R. 36 provides that "[c]lerical mistakes in judgments * * * arising from oversight or omission, may be corrected by the court at any time." The trial court thus retains jurisdiction over issues not inconsistent with an appellate court's ability to review,

affirm, modify, or reverse an appealed judgment. *State v. Wilson*, 2d Dist. No. 24352, 2011-Ohio-5990, ¶17, citing *State v. Dixon*, 2d Dist. No. 06-CA-0145, 2008-Ohio-415, ¶5 (concluding "[t]he trial court's correction of a clerical error to recognize that Wilson's crime was an aggravated first-degree felony did not interfere with our appellate jurisdiction").

{¶21} Accordingly, the trial court was within its jurisdiction in correcting the clerical error after defendant filed his notice of appeal.

III. Disposition

{¶22} The trial court properly denied defendant's motion to vacate a void sentence, more appropriately termed a petition for post-conviction relief, because (1) it lacked jurisdiction due to the untimely nature of defendant's petition, (2) res judicata bars all of defendant's contentions except this argument about the modified entry, and (3) the trial court was within its jurisdiction in correcting a clerical error in its entry.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.
