

[Cite as *State v. Black*, 2010-Ohio-5338.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

LAWRENCE BLACK

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010CA00136

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 1999CR0222

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, J.

{¶1} On February 25, 1999, the Stark County Grand Jury indicted appellant, Lawrence Black, on one count of rape in violation of R.C. 2907.02 and one count of domestic violence in violation of R.C. 2919.25. A jury trial commenced on May 6, 1999. The jury found appellant guilty as charged. By judgment entry filed May 14, 1999, the trial court sentenced appellant to an aggregate term of nine years in prison. Appellant's conviction and sentence were affirmed on appeal. See, *State v. Black* (June 26, 2000), Stark App. No.1999CA00185.

{¶2} This court revisited appellant's case based upon a motion for reopening and once again affirmed appellant's conviction and sentence. See, *State v. Black* (July 23, 2001), Stark App. No.1999CA00185.

{¶3} On March 15, 2010, appellant filed a motion to vacate or set aside void judgment, claiming false imprisonment and invoking Civ.R. 60(B)(5). By judgment entry filed April 28, 2010, the trial court denied appellant's petition, finding "these issues have been raised before at both the trial and appellate levels.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-MOVANT'S MOTION TO VACATE AND SET ASIDE VOID JUDGMENT."

II

{¶6} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-MOVANT'S CIVIL RULE 60(B)(5) MOTION."

III

{¶7} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-MOVANT'S FALSE IMPRISONMENT CLAIM."

IV

{¶8} "THE TRIAL COURT ERRED IN NOT GRANTING RELIEF DUE TO PROSECUTORIAL MISCONDUCT."

{¶9} Prior to addressing appellant's assignments of error, we must review the procedural status of the case. On June 11, 1999, appellant filed a direct appeal of his convictions. The assignments of error were as follows:

{¶10} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY NOT ALLOWING CROSS EXAMINATION PERTAINING TO PRIOR BAD ACTS."

{¶11} "II. THE TRIAL COURT ERRED IN NOT ORDERING A MISTRIAL FOLLOWING IMPROPER CLOSING ARGUMENT BY PROSECUTION."

{¶12} "III. THE JURY VERDICT FINDING APPELLANT GUILTY OF RAPE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶13} This court denied the assignments of error and affirmed the convictions. See, *State v. Black* (June 26, 2000), Stark App. No. 1999CA00185. On November 22, 2000, the Supreme Court of Ohio denied appellant's motion for delayed appeal. See, *State v. Black* (2000), 90 Ohio St.3d 1471.

{¶14} On September 14, 2000, appellant filed a motion to reopen his appeal pursuant to App.R. 26. By judgment entry filed November 1, 2000, this court granted the motion in part. Appellant assigned the following error:

{¶15} "THE TRIAL COURT ERRED WHEN IT EMPANELLED [SIC] AN ANONYMOUS JURY IN THE ABSENCE OF ANY EVIDENCE OR FINDINGS THAT AN ANONYMOUS JURY WAS NECESSARY IN THIS CASE, THEREBY COMMITTING STRUCTURAL ERROR, IN VIOLATION OF LAWRENCE BLACK'S DUE PROCESS RIGHT UNDER THE UNITED STATES AND OHIO CONSTITUTIONS, INCLUDING HIS RIGHT TO THE PRESUMPTION OF INNOCENCE, AND HIS RIGHT TO A FAIR AND IMPARTIAL JURY."

{¶16} This court denied the appeal under the authority of *State v. Hill*, 92 Ohio St.3d 191, 2001-Ohio-141. See, *State v. Black* (July 23, 2001), Stark App. No. 1999CA00185. On May 15, 2002, the Supreme Court of Ohio denied appellant's motion for delayed appeal. See, *State v. Black*, 95 Ohio St.3d 1457, 2002-Ohio-2230.

{¶17} On October 19, 2001, appellant filed a motion to arrest judgment, claiming he was not afforded a preliminary hearing and was not afforded counsel at the hearing. By judgment entry filed December 11, 2001, the trial court denied the motion. Appellant filed an appeal on December 20, 2001. By judgment entry filed February 11, 2001, this court dismissed appellant's appeal for the reasons stated in the state's motion to dismiss.

{¶18} On February 8, 2002, appellant filed a petition to vacate or set aside sentence, claiming ineffective assistance of trial counsel because his counsel failed to move for a mistrial based upon prosecutorial misconduct, failed to object to the use of

the anonymous jury, and failed to argue that the rape count violated the due process clause. On same date, appellant filed a delayed motion to amend his motion to arrest judgment to include ineffective assistance of counsel, claiming the motion was still pending because the trial court had failed to issue findings of fact and conclusions of law when it denied the motion on December 11, 2001. By judgment entry filed March 13, 2002, the trial court denied appellant's motion to vacate or set aside sentence.

{¶19} On March 14, 2002, appellant filed numerous motions, including a motion to dismiss the rape charge because it violated the double jeopardy clause and the Fifth and Fourteenth Amendments, a motion for declaratory judgment to amend postconviction relief petition, and a motion to compel the trial court to issue findings of fact and conclusions of law. By judgment entries filed May 13, 2003, the trial court denied these motions.

{¶20} On April 12, 2006, appellant filed a pleading titled "JUDICIAL NOTICE IS GIVEN TO JUDGE HAAS CONCERNING NO WARRANT IN OVER SIX(6)YEARS BEYOND STATUE (SIC) OF LIMITATIONS, AND LACK OF PERSONAL JURISDICTION, AND APPELLANTS MAKES HIS OBJECTIONS PURSUANT TO CR.R. 52(B) KNOWN."

{¶21} On May 4, 2006, the trial court denied appellant's postconviction relief petition and motion to dismiss.

{¶22} On May 8, 2006, appellant filed objections to all the claims made by the prosecutor, again arguing no warrant had been filed and six years had passed. Appellant again asked for a dismissal of his original case. Appellant also filed a separate motion asking for findings of fact and conclusions of law on the May 4, 2006

judgment entry. On June 2, 2006, the trial court incorporated the state's proposed findings of fact and conclusions of law.

{¶23} On June 5, 2006, appellant filed an appeal on the trial court's May 4, 2006 judgment entry, and listed on the docketing statement the probable issues for review included the failure to file "the mandatory warrant." Appellant's assignment of error argued the trial court erred in overruling his motion to dismiss based upon the warrant issue. On October 10, 2006, this court denied appellant's assignment, finding "appellant's April 12, 2006 motion was untimely under R.C. 2953.21 and 2953.23, waived pursuant to Crim.R. 12 and barred by the doctrine of res judicata." *State v. Black*, Stark App. No. 2006CA00157, 2006-Ohio-5356, ¶17. On March 14, 2007, the Supreme Court of Ohio did not accept appellant's appeal. See, *State v. Black*, 113 Ohio St.3d 1415, 2007-Ohio-1036.

{¶24} On March 15, 2010, appellant filed a motion to vacate or set aside void judgment, claiming false imprisonment and invoking Civ.R. 60(B)(5). This motion is the genesis of this appeal. A hearing was held on April 14, 2010.

{¶25} Essentially, appellant argued his postconviction relief petition should be granted because he was unavoidably prevented from the discovery of the facts upon which he based his claims (R.C. 2953.21). He argued jurisdictional issues were ripe for review regardless of the lateness in bringing up the issues. In support, appellant cited the case of *State v. Wilson*, 73 Ohio St.3d 40, 1995-Ohio-217, wherein the Supreme Court of Ohio held the following at syllabus:

{¶26} "1. Absent a proper bindover procedure pursuant to R.C. 2151.26, the juvenile court has the exclusive subject matter jurisdiction over any case concerning a

child who is alleged to be a delinquent. (R.C. 2151.23, 2151.25 and 2151.26[E], applied.)

{¶27} "2. The exclusive subject matter jurisdiction of the juvenile court cannot be waived."

{¶28} Appellant based his jurisdictional claims upon a "warrant not being issued for his arrest" which constituted prosecutorial misconduct. By judgment entry filed April 28, 2010, the trial court denied appellant's petition, finding "these issues have been raised before at both the trial and appellate levels.

{¶29} We note on October 25, 2002, appellant had filed a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 5:02CV2335, claiming lack of jurisdiction which was dismissed.

{¶30} R.C. 2953.21(A)(2) provides that a petition for post-conviction 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 or adjudication***."

{¶31} If a postconviction relief petition is filed beyond the 180-day time limitation or the petition is a second or successive petition for postconviction relief, R.C. 2953.23(A) precludes the court from entertaining the petition unless:

{¶32} "(1) Both of the following apply:

{¶33} "(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.

{¶34} "(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."

{¶35} "Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for postconviction relief. *State v. Palmer*, 7th Dist. No. 08 JE 18, 2009-Ohio-1018, ¶11; *State v. Christian*, 7th Dist. No. 06 MA 167, 2007-Ohio-3336, ¶9." *State v. Haschenburger*, Mahoning App. No. 08-MA-223, 2009-Ohio-6527, ¶12.

I, II, III

{¶36} In his most recent petition for postconviction relief, appellant argued false imprisonment, and invoked Civ.R. 60(B)(5). Appellant claimed the trial court lacked jurisdiction and failed to afford him a preliminary hearing in the Alliance Municipal Court, the Alliance Municipal Court case was not dismissed prior to his indictment, a warrant for his arrest on the indictment was not issued, and the crime of rape was not established.

{¶37} As we noted supra, in his petition for postconviction relief filed October 19, 2001 (motion to arrest judgment), appellant argued the trial court did not have jurisdiction because of the failure to hold a preliminary hearing. Crim.R. 5(B) specifically states, "[t]he preliminary hearing will not be held, however, if the defendant is indicted."

Appellant was secretly indicted on February 25, 1999, prior to his preliminary hearing set for February 26, 1999. Therefore, the trial court was not divested of jurisdiction.

{¶38} Appellant also argues there was a lack of due process because a warrant was not issued for his arrest on the indictment. Appellant admits he was "in custody" prior to the return of the indictment. The indictment is signed by the grand jury foreman, and notes in the return that it "was personally delivered" to appellant on February 26, 1999. This matter was also previously litigated on appeal and as noted supra, was rejected by this court (*State v. Black*, Stark App. No. 2006CA00157, 2006-Ohio-5356) and an appeal was not accepted by the Supreme Court of Ohio. See, *State v. Black*, 113 Ohio St.3d 1415, 2007-Ohio-1036.

{¶39} As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraphs eight and nine of the syllabus, the doctrine of res judicata is applicable to petitions for postconviction relief. The *Perry* court explained the doctrine at 180-181 as follows:

{¶40} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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."

{¶41} In addition, appellant argues no crime was committed, there was no violation of a protection order, and the rape charge should be dismissed. The manifest weight of the evidence on the rape charge argument was reviewed on direct appeal and rejected. See, *State v. Black* (June 26, 2000), Stark App. No.1999CA00185.

{¶42} Upon review, we find these assignments of error lack merit.

{¶43} Assignments of Error I, II, and III are denied.

IV

{¶44} Appellant claims the prosecutor was guilty of prosecutorial misconduct. Despite the fact that this claim was clearly cognizable during the direct appeal process, appellant argues he can pursue this claim because his complaint for legal misconduct was dismissed by the Supreme Court of Ohio, Office of Disciplinary Counsel.

{¶45} In a letter dated August 6, 2009, the Disciplinary Counsel rejected appellant's complaint and stated the following:

{¶46} "In your complaint, you have alleged what amounts to a claim of prosecutorial misconduct. Please be advised that prosecutorial misconduct is a claim that must be raised on appeal. Once you have fully litigated this claim and have achieved a judicial finding of misconduct, you may send us a certified copy of the judgment entry. We will reopen our investigation at that time.

{¶47} "For the aforementioned reasons, your grievance is dismissed, and our file on this matter is closed."

{¶48} Appellant argues the language of the letter permits him to appeal despite the untimeliness of the appeal and the doctrine of res judicata. T. at 6-12.

{¶49} The issue of prosecutorial misconduct was clearly cognizable during the direct appeal and the motion for reopening and is therefore res judicata. *Perry*, supra. We find the advisory language in the letter does not override the established case law of Ohio nor does it activate a new right of action.

{¶50} Assignment of Error IV is denied.

{¶51} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 1020

