

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

State of Ohio

Court of Appeals No. L-11-1226

Appellee

Trial Court No. CR201001338

v.

Benjamin F. Files

DECISION AND JUDGMENT

Appellant

Decided: July 20, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Benjamin F. Files, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Benjamin F. Files appeals an August 17, 2011 judgment of the Lucas County Court of Common Pleas that denied his pro se motion to vacate void judgment. Appellant filed the motion on June 16, 2011. The motion is directed against a July 9, 2010 judgment of the court. Under the judgment, appellant was sentenced on convictions

of one count of felonious assault with a firearm specification, a violation of R.C. 2903.11(A)(2) and 2941.145 and second degree felony, and a second count of felonious assault, a violation of R.C. 2903.11(A)(2) and second degree felony. Appellant pled no contest to charges that he committed the offenses on June 17, 2010.

{¶ 2} On the conviction for felonious assault with a firearm specification, the trial court sentenced appellant to serve a six-year prison term for the felonious assault and an additional three-year term on the firearm specification. On the second felonious assault conviction, the trial court imposed a four-year prison sentence. The court ordered that the sentences run consecutively, for a total period of incarceration of 13 years.

{¶ 3} Appellant asserts two assignments of error on appeal:

Assignment of Error No. I: The trial court erred by sentencing defendant-appellant to consecutive sentences without holding an allied offenses hearing pursuant to R.C. 2941.25(A), which would have proven allied offenses of similar import, thus violating defendant-appellant's right to due process of law and equal protection under the law in violation of the Ohio Constitution art. I, §16 and art. I, § 2; and in violation of the United States Constitution Amendment XIV.

Assignment of Error No. II: The trial court erred by denying defendant-appellant access to the trial transcript which was a necessity to this appeal, thus violating defendant-appellant's right to due process of law and equal protection under law in violation of App.R. 16(A)(3), (6), (7),

(D), the Ohio Constitution art. I, §16 and art. I, § 2 and the United States Constitution Amendment XIV.

{¶ 4} The trial court treated the motion to vacate void judgment as a petition for postconviction relief under R.C. 2953.21 and denied the motion on multiple grounds including the ground that the petition was untimely under R.C. 2953.21. The state argues that the trial court was correct in treating appellant's motion as a petition for postconviction relief and in holding that the petition was untimely under R.C. 2953.21. Appellant appears pro se and did not address in his appellate brief whether the requirements of R.C. 2953.21 apply to his motion and whether the motion is barred as untimely under the statute.

{¶ 5} We agree with the trial court that appellant's motion is a petition for postconviction relief under R.C. 2953.21. A motion filed by a criminal defendant after direct appeal or after the time for direct appeal has expired, that seeks to vacate or correct his sentence on constitutional grounds is to be treated as a petition for postconviction relief under R.C. 2953.21. *State v. Young*, 6th Dist. No. E-08-041, 2009-Ohio-1118, ¶ 16; *see State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Appellant's motion meets those elements. Appellant did not take a direct appeal from the July 9, 2010 judgment and filed the motion to vacate void judgment after time for direct appeal had expired. In his motion, appellant seeks to vacate or correct his sentence based upon claims that his constitutional rights were violated.

{¶ 6} There are specific time requirements for filing of petitions for postconviction relief. R.C. 2953.21(A)(2) states that “[i]f no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.” Appellant filed his petition for postconviction relief on June 16, 2011. Time for appeal of the July 9, 2010 judgment expired in August 2010, more than 180 days before appellant filed his petition. *See* S.Ct.Prac.R. 2.2(A).

{¶ 7} The exceptions to the 180-day filing period provided in R.C. 2953.23(A)(1) and (2) do not apply. The exception under R.C. 2953.23(A)(1) requires an appellant to:

(1) demonstrate either that he was unavoidably prevented from discovering the facts upon which he relied for his claim, or subsequent to the period prescribed in R.C. 2953.21(A)(2) the United States Supreme Court recognized a new state or federal right that applies retroactively to a person in petitioner's position and his or her petition asserts a claim based on that and right; and (2) show, 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.” R.C. 2953.23(A)(1)(a) and (A)(1)(b). *State v. Padilla–Montano*, 6th Dist. No. L-05-1099, 2006-Ohio-115, ¶ 13. *Accord State v. Brooks*, 6th Dist. Nos. L-10-1258 and L-10-1259, 2011-Ohio-5303, ¶ 23.

{¶ 8} Appellant has not contended that he was prevented from discovering facts upon which he relies to base his claims of trial court error. This case does not involve a new state or federal right that applies retroactively. Although R.C. 2923.23(A)(2) provides for an exception to the 180-day filing requirement for certain cases involving consideration of DNA evidence, this case does not involve DNA testing.

{¶ 9} Accordingly, we conclude that the trial court did not err in denying appellant's petition for postconviction relief as it was time barred under R.C. 2953.21. Our ruling renders Assignments of Error No. I and II moot. *See State v. Ullis*, 6th Dist. No. L-06-1221, 2007-Ohio-1192, ¶ 12. We therefore do not consider the merits of the two assignments of error. *See App.R. 12(A)(1)(c)*.

{¶ 10} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant 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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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