

JOHNSON, APPELLANT, v. MITCHELL, APPELLEE.

[Cite as *Johnson v. Mitchell* (1999), ___ Ohio St.3d ____.]

Habeas corpus to compel relator's release from prison — Petition dismissed, when.

(No. 98-2277 — Submitted March 10, 1999 — Decided March 31, 1999.)

APPEAL from the Court of Appeals for Richland County, No. 98CA83.

In 1976, the Cuyahoga County Common Pleas Court convicted appellant, John A. Johnson, of aggravated murder with specifications, kidnapping, and rape. The common pleas court sentenced Johnson to death for the aggravated murder with specifications and further sentenced him to consecutive seven-to-twenty-five-year prison terms for his kidnapping and rape convictions. On appeal, the court of appeals affirmed. *State v. Johnson* (Jan. 30, 1978), Cuyahoga App. No. 36618, unreported. In 1978, we reversed Johnson's death sentence and reduced that sentence to life imprisonment based on *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, and *Bell v. Ohio* (1978), 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010.

In September 1998, Johnson filed a petition in the Court of Appeals for Richland County for a writ of habeas corpus to compel his release from prison. Johnson claimed that he was entitled to extraordinary relief in habeas corpus because he was never returned to the common pleas court for resentencing pursuant to Crim.R. 32 and 43 after his death sentence was vacated. Johnson did not attach a copy of his sentencing entries to his petition. The court of appeals subsequently dismissed Johnson's petition.

This cause is now before the court upon an appeal as of right.

John A. Johnson, pro se.

Betty D. Montgomery, Attorney General, and *Diane Mallory*, Assistant Attorney General, for appellee.

Per Curiam. Johnson asserts in his sole proposition of law that the court of appeals erred in dismissing his habeas corpus petition. For the following reasons, however, Johnson's claims lack merit, and the court of appeals properly dismissed his petition.

First, the Rules of Criminal Procedure, including Crim.R. 32 and 43, do not apply to cases on appeal. Crim.R. 1(C)(1); *State v. McGettrick* (1987), 31 Ohio St.3d 138, 141, 31 OBR 296, 299, 509 N.E.2d 378, 381, fn. 5. And, as appellee cogently observes, R.C. 2929.06, which requires a resentencing hearing in the trial court when a death sentence is vacated on appeal based on the unconstitutionality of the statutory procedures for imposing the death penalty, did not become effective until 1981, a few years after the vacation of Johnson's death sentence. 139 Ohio Laws, Part I, 1, 18-19.

Second, even assuming the invalidity of Johnson's new sentence, which replaced his vacated death sentence, his aggregate prison sentence for his non-capital crimes precludes the writ. In other words, "[w]here a petitioner is incarcerated for several crimes, the fact that the sentencing court may have lacked jurisdiction to sentence him on one of the crimes does not warrant his release in habeas corpus." " *Marshall v. Lazaroff* (1997), 77 Ohio St.3d 443, 444, 674 N.E.2d 1378, 1379, quoting *Swiger v. Seidner* (1996), 74 Ohio St.3d 685, 687, 660 N.E.2d 1214, 1216.

Finally, Johnson did not comply with the mandatory R.C. 2725.04(D) requirement to attach his pertinent commitment papers to his habeas corpus petition. *Boyd v. Money* (1998), 82 Ohio St.3d 388, 389, 696 N.E.2d 568, 569.

Based on the foregoing, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and
LUNDBERG STRATTON, JJ., concur.