

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-853
 : (C.P.C. No. 92CR-5064)
 Wendell H. Rutledge, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Wendell H. Rutledge, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Wendell H. Rutledge, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition to vacate or set aside his judgment of conviction. Because the trial court properly concluded both that defendant's petition is untimely and, that res judicata bars defendant's petition, we affirm.

I. Facts and Procedural History

{¶ 2} An 11-count indictment filed on December 2, 1992, charged defendant with the murders of Stephen Faun and Laura Williams and related crimes. A jury trial resulted in the jury's finding defendant guilty of (1) three counts of aggravated murder with capital

and other specifications, (2) two counts of involuntary manslaughter, two counts of kidnapping, two counts of aggravated robbery, all with specifications, and (3) one count of having a weapon while under disability. When the jury deadlocked on the sentence recommendation following the mitigation hearing, the trial court imposed a life sentence with parole eligibility after 30 years on the capital offenses and substantial terms of imprisonment on the remaining offenses. Defendant appealed, and this court affirmed. *State v. Rutledge*, 10th Dist. No. 93APA08-1212 (Sept. 27, 1994). Although defendant timely appealed, the Ohio Supreme Court declined to accept jurisdiction. *State v. Rutledge*, 71 Ohio St.3d 1476 (1995).

{¶ 3} On August 20, 1996, defendant filed a motion to vacate or set aside his sentence. The trial court concluded *res judicata* barred defendant from re-litigating his claimed errors, as they either were raised or could have been raised on direct appeal from his judgment of conviction. Accordingly, the court denied the motion and dismissed defendant's petition for post-conviction relief. Defendant filed a notice of appeal on November 4, 1996, but this court dismissed the appeal on November 26, 1996 because the notice was not timely filed.

{¶ 4} Defendant filed his second motion to vacate or set aside judgment of conviction and sentence on April 6, 2010. Defendant asserted that because his convictions were allied offenses and should have merged under R.C. 2941.25, the trial court erred in failing to hold a hearing on that issue. The trial court denied the petition, noting not only that the petition was not timely filed under R.C. 2953.21 et seq., but that *res judicata* barred it. The trial court nonetheless addressed the merits of defendant's allied offenses contentions and determined they lacked merit. As a result, the trial court denied the petition.

II. Assignments of Error

{¶ 5} Defendant appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION BY CONVICTING AND SEPARATELY SENTENCING DEFENDANT-APPELLANT FOR THE CRIMES OF AGGRAVATED ROBBERY AND KIDNAPPING WHERE THOSE CRIMES SHOULD HAVE BEEN

MERGED AS ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO OHIO REV. CODE 2941.25.

SECOND ASSIGNMENT OF ERROR

TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO HOLD A HEARING ON THE ISSUE OF ALLIED OFFENSES OF SIMILAR IMPORT AS COMTEMPLATED [sic] BY R.C. 2941.25.

Because defendant's two assignments of error suffer the same deficiencies, we address them jointly.

{¶ 6} Defendant claims to have "suffered a denial of [his] rights sufficient to render the judgment of conviction voidable under the Ohio Constitution and the Constitution of the United States." (Petition, 1-2.) Accordingly, his motion raises issues that fall within the parameters of a petition for post-conviction relief. *See State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997) (stating that "[w]here a criminal defendant, subsequent to his or her 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"). Because defendant's motion fits within the parameters *Reynolds* delineated, it properly is reviewed as a denied petition for post-conviction relief. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 14 (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

{¶ 7} 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). "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*, 10th Dist. No. 00AP-233 (Dec. 26, 2000), discretionary appeal not allowed, 92 Ohio St.3d 1441 (2001). 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*, 10 Ohio St.2d 175 (1967), 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*.

{¶ 8} 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). Although defendant was sentenced prior to the effective date of amended R.C. 2953.21, the legislature, in the uncodified law set forth in 1995 S.B. No. 4, Section 3 specified that "a person who seeks post-conviction relief" under R.C. 2953.21 through 2953.23 "with respect to a case in which sentence was imposed prior to the effective date of this act * * * shall file a petition within the time required" in R.C. 2953.21(A)(2), as amended by this act, or within one year from the effective date of this act, whichever is later.

{¶ 9} Defendant's judgment entry of conviction was filed on August 10, 1993. Pursuant to the uncodified law set forth in 1995 S.B. No. 4, Section 3, defendant was required to file his motion, or petition, within one year of the effective date of the act. Because defendant filed his motion on April 6, 2010, it is untimely, and the trial court lacked jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521, ¶ 13; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649, ¶ 9; *State v. Hayden*, 10th Dist. No. 01AP-728 (Dec. 6, 2001) (concluding the trial court lacked jurisdiction over defendant's post-conviction relief petition where, even though defendant was convicted before the effective date of the statute, he failed to file his petition within one year of the amended statute's effective date).

{¶ 10} 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 for which he was convicted. R.C. 2953.23(A)(1)(b).

{¶ 11} Defendant does not fall 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 appellate brief notes the Ohio Supreme Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, that case does not assist defendant in meeting the timeliness requirement because R.C. 2953.23(A)(1)(a) requires a decision from the United States Supreme Court, not one from the Ohio Supreme Court. Nor does defendant suggest he was unavoidably prevented from discovering facts necessary for the motion, as his argument is legal. Because defendant does not 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*

{¶ 12} 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 of 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 conviction, or on an appeal from that judgment." (Emphasis omitted.) *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *Perry* at paragraph nine of the syllabus. "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.

{¶ 13} Defendant's arguments fail under res judicata, as his allied offenses and merger argument under R.C. 2941.25 could have been resolved in defendant's direct appeal. Res judicata thus bars defendant's raising them in a petition for post-conviction relief. *Perry*.

{¶ 14} Accordingly, defendant's two assignments of error are overruled.

III. Disposition

{¶ 15} Having overruled defendant's two assignments of error, we affirm the judgment of the trial court denying, or more precisely dismissing, defendant's petition for post-conviction relief.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.
