

ORIGINAL

IN THE SUPREME COURT OF OHIO

On Appeal from the Sixth Appellate District Court
for Erie County, Ohio
Case No. E-13-065

14-0630

STATE OF OHIO,
Plaintiff/Appellee,

Supreme Court No. _____

- vs -

RONALD J. DORITY,
Defendant/Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

FILED
APR 21 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Appearances:

FOR THE DEFENDANT/APPELLANT

FOR THE PLAINTIFF/APPELLEE

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STATEMENT AS TO WHY THIS CASE IS OF GREAT PUBLIC INTEREST

[T]his case is of great public interest because it invokes and involves the public policy that no person shall be deprived of life, liberty or property without due process of law.

This case in turn involves a felony, though of even greater constitutional significance, this case lies upon a conflicted and unequal application of fundamental principles of law, namely, whether a judgment that is void is enforceable for the purpose of preventing 'double jeopardy' protection as defined in and under: O.R.C. § 2941.25(A); and, U.S.C.A. Const. Amend. 5.

This court has wrestled with the meaning and effect of a void judgment to such extent that there exists no clarity as to whether a judgment which is argued 'partially void' under Fischer is actually exempt from the well settled provisions of: State v. Beasley (1984), 14 Ohio St. 3d 74, *75.

This case involves a situation where an appellate court had found that the 'res judicata' prevents or otherwise bars a criminal defendant from seeking relief from a manifest failure of the trial court to employ its mandatory statutory and constitutional duties under: O.R.C. § 2941.25(A), and where the record presents a prima facie case for both 'allied offense inquiry' and 'relief.'

There is a well established public policy that the courts of this state shall be open for relief and redress 'without denial or delay,' and even moreso, that no person be convicted of more offenses than are authorized by law.

There is a vested public policy and established public interest that 'equal protection under the laws be equally applied to all citizens of this state, and where, as here, a criminal defendant is treated differently in such way so as to amount to a violaton of due process, that public interest and public policy is inherently implicated.

This case involves a substantial constitutional question in that it is predicated upon a clear and compelling departure from the established rule of law which has resulted in an *unconstitutional confinement in violation of [] multiple Amendments to the United States Constitution.

This action respectfully follows.

STATEMENT OF CASE AND FACTS

[T]his case originated in the Erie County Common Pleas Court as the criminal matter entitled: State of Ohio v. Ronald J. Dority, Case No. 2008 CR 352, therein charging the offense(s) of: 'kidnapping,' 'violating a protection order,' and, 'felonious assault,' to which (after entering pleas of guilty to each of those offense(s) listed above, appellant was sentenced of an 'aggregate' stated prison term of: (12) twelve years.

A timely appeal was taken therefore, State v. Dority, 6th Dist. No. E-09-027, 2011 Ohio 2438, wherein appellant alleged (in part) that 'kidnapping' and 'violation of a protection order were allied offenses subject to merger.

The court of appeals denied the appeal and affirmed the judgment of the trial court, however, the court noted, inter alia, that until the "law changes regarding allied offense applicability,' no relief would be available to appellant accordingly.

Appellant (after substantive changes in the law regarding allied offenses) and relying on the law-of-the-case, filed a ('pro se') motion for allied offense determination on: 'August 30, 2013.'

The trial court denied appellant's motion ['without hearing'] and a 'timely' appeal did follow to the Ohio Sixth App. Dist. Court, to which the court of appeal again 'affirmed the judgment of the trial court' urging that Fifth Amendment 'double jeopardy' protections (as codified in: O.R.C. § 2941.25(A)) are subject to waiver.

The instant appeal respectfully follows.

LAW AND ARGUMENT:

PROPOSITION OF LAW NO. 1

Fifth Amendment 'double jeopardy' protections cannot be waived in the absence of a knowing, intelligent and voluntary 'written waiver' executed in open court with instruction by the court as per the effect and consequences of such waiver.

[I]n raising that constitutional proposition, appellant does so from the position, that:

"Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity and void." see: State v. Beasley (1984), 14 Ohio St. 3d 74, *75.

It is equally manifest, that:

"It is a fundamental rule that a judgment must be complete and certain in itself." 62 Ohio Jurisprudence 3d (1985), Judgments, Section 27, citing: 46 American Jurisprudence 2d, Judgments, Section 67. Further, a "judgment must so dispose of the matters at issue between the parties that they *** will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined." id., citing: Licht v. Woertz (1929), 32 Ohio App. 111, 167 N.E. 614. A judgment that does not do so, **is void for uncertainty.**" see: Short v. Short, 2002 WL 537990 (6th Dist.), 2002 Ohio 2290, at: [3] *2.

The same effect occurs here.

O.R.C. § 2941.25(A) provides, that:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." id.

Clearly, *** the language of the statute unquestionably prohibits ['the conviction itself'] on the allied offense or offenses.

There exists no provision under O.R.C. § 2941.25(A) which authorizes anything other than a prohibition against 'the conviction itself,' and while O.R.C. § 2929.14 (which permits merger at the sentencing hearing) is in direct conflict with O.R.C. § 2941.25(A) prohibiting the conviction itself, this inherent* and irreconcilable conflict must be resolved in favor of the prohibition against the conviction.

So says basic fairness and due process of law.

The same effect occurs with respect to the law-of-the-case wherein the court of appeal had formerly indicated that "when the law governing allied offenses changes, appellant would be entitled to challenge and relief."

The law governing the assessment of allied offense determination has and had in fact change.

The Supreme Court of Ohio overruled State v. Rance, 85 Ohio St. 3d 632, 1999 Ohio 291, in favor of: 'State v. Johnson, 128 Ohio St. 3d 153, 2010 Ohio 6314, 942 N.E. 2d 1061 ('instructing trial court to look at the defendant's conduct when evaluating whether offenses are allied.'). id.

see also: State v. Underwood, 124 Ohio St. 3d 365.

It is well settled, that:

"The Fifth Amendment's 'Double Jeopardy Clause' provides a criminal

defendant with three protections: "[I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" see: State v. Rogers, 2013 Ohio 3235 (8th App. Dist. Ct.), 2013 Ohio App. LEXIS 3326, at: [*P6] HN1, citing: Brown v. Ohio, 432 U.S. 161, 165, 97 S Ct. 2221, 53 L. Ed. 2d 187 (1977), quoting: North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); and, Ohio v. Johnson, 467 U.S. 493, 498, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

[a]nd that:

"R.C. 2941.25 places no burden on prosecutors to establish that offenses do not merge. The determination of merger is in the hands of the trial judge based on the charges and the facts before the court." id., at: Rogers, supra., at: HN23.

We also recognize, that:

"In failing to address a merger issue, there is a deviation from a legal rule ... " id., at: HN28.

Ultimately, *** it is manifest, that:

"The duty to merge implies a duty to inquire and determine whether multiple charges are allied offenses of similar import. Without the duty to inquire and determine, the duty to merge would be empty ... " id., at: HN31.

In a deliberate and calculated attempt to sustain convictions which would otherwise fail under application of the constitutional scrutiny of both: O.R.C. § 2941.25(A) and its interpretation by this court in: State v. Johnson, supra., many Ohio courts have sought to conclude that 'such fundamental judicial error' in failing to comply with the statutory requirements of: O.R.C. § 2941.25(A) constitutes 'plain error,' verses that of a 'void judgment,' hence, two fatal

results occur:

1. the doctrine of res judicata (which would otherwise be inapplication) is brought into play; and,

2. because the 'judgment' is not considered 'void ab initio' subject to attack at anytime, in any proceeding, 'direct or collaterally,' postconviction relief preclusion is used to create a procedural bar.

*compare: State v. Whatley, 9th Dist. No. 24231, 2006 Ohio 6128.

As a threshold matter, *** it must be remembered, that:

"The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time, but rather a rule of fundamental fairness and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness requires, and that it is not to be so rigidly applied as to defeat the ends of justice or so as to work an injustice." see: Grava v. Parkman Township, 73 Ohio St. 3d 379, 653 N.E. 2d 226, at: 232.

[a]nd that:

"Underlying all discussion of the problem must be the principle of fundamental fairness in the due process sense. The public policy underlying the principle of res judicata must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case." id., at: 232, citing: 46 Am. Jurisprudence 2d (1994), 786-787, Judgments, Section 522; and, Goodson v. McDonough Power Equip., Inc. (1983), 2 Ohio St. 3d 193, 202, 443 N.E. 2d 978, 987-989.

The doctrine of res judicata, 'as systemcially applied here,' does inherently defeat the ends of justice while forever foreclosing (to an entire class of offenders) the availability of relief from convictions which are not only contrary to law, but offend multiple Amendments to the United States []

Constitution.

This proposition was made evident in: State v. Collins, 2013 Ohio 3726 (8th Dist.), 2013 Ohio App. LEXIS 3869, to which the court recognized, that:

"Even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." id., at: HN6.

This result equally adds substantial weight to the proposition that O.R.C. § 2941.25(A) ['prohibits the conviction itself'] on an allied offense, and not that conviction might occur and 'merger' follow at the sentencing hearing as contemplated in: O.R.C. § 2929.14(B).

So says fairness and due process of law.

It is the position of appellant that a trial court's complete disregard for the statutory requirements of O.R.C. § 2941.25(A), renders any resulting judgement a mere nullity and void, exempt from the doctrine of res judicata, and that regardless of the 'reclassification' or 'recharacterization' of the proceedings through which the 'double jeopardy' challenge is made, a trial court must vacate the void judgment and the prohibited conviction on the allied offense therefore.

Finally, *** it is the position of appellant that 'double jeopardy' claims cannot be waived, and even if such a waiver were possible, it would necessarily be knowingly, intelligently and voluntarily made 'in writing' 'in open court' and with the advice of the court as per the consequences of such waiver, where clearly, 'absent which' a trial judge (by his or her negligence or inaction) cannot waive rights secured to a criminal defendant by the United States Constitution.

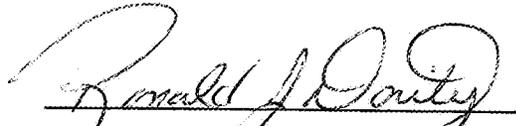
So says basic fairness and due process of law.

CONCLUSION:

[W]herefore, *** and for each of those substantive reasons stated above, this Court should accept jurisdiction in and over this matter and permit appellant the full and fair adjudication of his statutory and federal constitutional claims therefore.

[R]elief is accordingly sought.

[E]xecuted this 1st day of April, 2014.



Ronald J. Dority, #552-012

M.C.I.

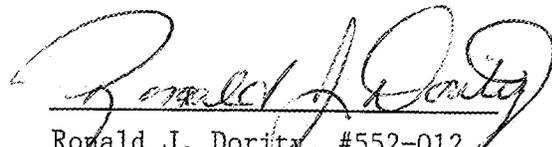
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Marion, Ohio

43301

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Erie County Prosecutor, at: 247 Columbus Avenue, Sandusky, Ohio, 44807, on this 1st day of April, 2014.



Ronald J. Dority, #552-012

M.C.I.

P.O. Box 57

Marion, Ohio

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

State of Ohio

Court of Appeals No. E-13-065

Appellee

Trial Court No. 2008-CR-352

v.

Ronald J. Dority

DECISION AND JUDGMENT

Appellant

Decided:

MAR 14 2014

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Ronald J. Dority, pro se.

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Ronald J. Dority, appeals from the judgment of the Erie County Court of Common Pleas, which denied, without a hearing, his postconviction "Motion for Allied Offenses Determination." We affirm.

711/397
3/14/14

34/191
3/14/14

A. Facts and Procedural Background

{¶ 2} This is the third time appellant has appeared before our court in this matter. In 2009, appellant pleaded guilty to violation of a protection order, kidnapping, and felonious assault, and was sentenced to a total prison term of 12 years. Appellant appealed his conviction and sentence, which we affirmed on May 20, 2011, in *State v. Dority*, 6th Dist. Erie No. E-09-027, 2011-Ohio-2438. Notably, in his appeal, appellant argued that the kidnapping and violation of a protection order charges were allied offenses, but we held that the offenses were not committed with a single state of mind, and thus were not subject to merger. *Id.* at ¶ 30.

{¶ 3} Thereafter, on October 25, 2012, appellant filed a motion to withdraw his guilty plea. The trial court denied his motion. On November 15, 2013, we affirmed the trial court's decision in *State v. Dority*, 6th Dist. Erie No. E-13-018, 2013-Ohio-5068.

{¶ 4} While his second appeal was pending, appellant filed a "Motion for Allied Offenses Determination" on August 30, 2013. The trial court again denied his motion without a hearing. It is from this decision that appellant presently appeals.

B. Assignment of Error

{¶ 5} Appellant offers one assignment of error for our review:

1. Whether the Federal Constitution's Fifth Amendment "double jeopardy" protections (and as codified in: O.R.C. § 2941.25), are subject to waiver even under the guise of res judicata. see: *Brown v. Ohio*, 432 U.S.

161, 165; North Carolina v. Pearce, 395 U.S.711, 717; and, Ohio v. Johnson, 467 U.S. 493, 498.

II. Analysis

{¶ 6} In his assignment of error, appellant argues that the trial court was required by R.C. 2941.25(A) to conduct an allied offenses analysis at his original sentencing. Because the court did not conduct such an analysis, appellant argues that his sentence is void. Therefore, appellant concludes that he is entitled to challenge his void sentence in a postconviction petition, and requests that we remand the matter to the trial court for an allied offenses determination. Furthermore, appellant argues that refusing to conduct an allied offenses analysis on the basis of res judicata or the timeliness of his petition is tantamount to impermissibly forcing him to waive his constitutional right against double jeopardy. We disagree.

{¶ 7} Appellant's arguments are not new to this court. *See, e.g., State v. Yee*, 6th Dist. Erie No. E-12-017, 2013-Ohio-5184; *State v. Porter*, 6th Dist. Lucas No. L-12-1243, 2013-Ohio-1360; *State v. Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728. We begin by noting that appellant's "Motion for Allied Offenses Determination" is properly characterized as a petition for postconviction relief. *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus ("Where 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”). We review a trial court’s decision granting or denying a postconviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion connotes that the trial court’s attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} A petition for postconviction 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.” R.C. 2953.21(A)(2). Here, the trial transcripts were filed on August 10, 2009. Thus, appellant’s petition is well beyond the 180-day statutory time limit.

{¶ 9} A trial court “may not entertain” an untimely petition for postconviction relief unless the untimeliness is excused. R.C. 2953.23(A). Under R.C. 2953.23(A)(1), the time limit is excused if both (1) it can be shown that either the petitioner was unavoidably prevented from discovering the facts relied on in the claim for relief, or that 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; and (2) the petitioner presents clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty.

{¶ 10} Here, appellant does not argue that this timeliness exception applies. Further, we find that the circumstances of appellant’s case do not support application of

the exception. Therefore, the trial court could not have considered his untimely petition for postconviction relief, and as a result, it did not abuse its discretion in denying his petition.

{¶ 11} Appellant attempts to escape this result by arguing that his conviction is void because the court did not conduct a merger analysis, and thus his conviction is subject to attack at any time. *See State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 30 (res judicata does not bar a trial court from correcting a void sentence). However, appellant is incorrect on the former point: “the failure to merge allied offenses at sentencing does not render a sentence void.” *Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728 at ¶ 8. Because appellant’s sentence is not void, it is subject to res judicata. In particular, we have held, “The res judicata bar applies to any defense that was raised or could have been raised in a criminal defendant’s prior direct appeal from his conviction and/or sentence.” *Yee*, 6th Dist. Erie No. E-12-017, 2013-Ohio-5184 at ¶ 10, quoting *State v. Collins*, 2d Dist. Montgomery No. 25612, 2013-Ohio-3645, ¶ 9. Therefore, even if the trial court could have entertained appellant’s untimely postconviction petition, appellant’s petition would be barred by res judicata as he has already raised an allied offenses claim in his direct appeal.

{¶ 12} Accordingly, appellant’s assignment of error is not well-taken.

III. Conclusion

{¶ 13} For the foregoing reasons, the judgment of the Erie 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.

Arlene Singer, J.



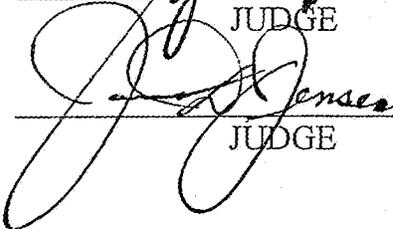
JUDGE

Stephen A. Yarbrough, P.J.



JUDGE

James D. Jensen, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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