

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2009-L-058 and 2009-L-059
STEVEN R. LAO,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Court of Common Pleas, Case Nos. 05 CR 000626 and 06 CR 000302.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Steven R. Lao, pro se, PID: 512-053, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Steven R. Lao appeals from the judgment of the Lake County Court of Common Pleas denying several motions he filed regarding his convictions and sentences for illegal manufacture of drugs and illegal assembly or possession of chemicals for the manufacture of drugs. This is the fourth time Mr. Lao appealed to this court regarding his convictions of these offenses. For the following reasons, we affirm the judgment of the trial court.

{¶2} This consolidated appeal involves two lower court cases. In Case No. 05 CR 000626, a grand jury returned a three-count indictment against Mr. Lao on February 3, 2006, in connection with several drug offenses he committed between August 15, 2005 and August 25, 2005. Count One of the indictment charged him with Illegal Manufacture of Drugs, a Felony of the Second Degree, in violation of R.C. 2925.04; Count Two charged him with Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, a Felony of the Third degree, in violation of R.C. 2925.041; and Count Three charged him with Aggravated Possession of Drugs, a Felony of the Fifth Degree, in violation of R.C. 2925.11.

{¶3} In Case No. 06 CR 000302, a grand jury returned a three-count indictment against Mr. Lao on June 23, 2006, in connection with drug offenses he committed between May 3, 2006 and May 5, 2006. Count One charged him with Illegal Manufacture of Drugs, a Felony of the Second Degree with Forfeiture Specification, in violation of R.C. 2925.04; Count Two charged him with Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, a Felony of the Third Degree, in violation of R.C. 2925.041, and Count Three charged him with Aggravated Possession of Drugs, a Felony of the Third Degree, in violation of R.C. 2925.11.

{¶4} On July 19, 2006, the trial court held a plea hearing on both cases, and on July 20, 2006, Mr. Lao entered a written plea in both cases. In the 2005 case, he pled guilty to Count One, Illegal Manufacture of Drugs, a Felony of the Second Degree. On July 21, 2006, the court issued a judgment entry accepting the guilty plea and entered a Nolle Prosequi as to the remaining two counts.

{¶5} In the 2006 case, he pled guilty to Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, a Felony of the Third Degree, with a Forfeiture Specification of \$1,010. On July 21, 2006, the court issued a judgment entry accepting his plea and entered a Nolle Prosequi as to the remaining two counts.

{¶6} The trial court held a sentencing hearing in both cases and, on August 8, 2006, the court filed a judgment entry sentencing him to six years in prison and imposed a mandatory post release control of three years in the 2005 case. It also filed a judgment entry sentencing him to four years in prison in the 2006 case. The court ordered these two terms to be served consecutively.

{¶7} On August 21, 2006, Mr. Lao filed a pro se notice of appeal in both cases, in Appeal No. 2006-L-177 (for the 2005 case) and Appeal No. 2006-L-178 (for the 2006 case). On November 6, 2006, this court sua sponte dismissed both appeals for failure to prosecute.

{¶8} On January 18, 2007, Mr. Lao filed a pro se notice of appeal and a motion for leave to file a delayed appeal in both cases, in Appeal No. 2007-L-007 (for the 2005 case) and Appeal No. 2007-L-008 (for the 2006 case). On April 13, 2007, this court denied his motion for leave to file a delayed appeal and dismissed both appeals. We noted that Mr. Lao failed to attach a memorandum in support of his motion for a delayed appeal, and the motion itself did not advance any reasons for his delay in perfecting his appeal, as required by App.R. 5(A). Because his motion was procedurally defective, we concluded that he failed to invoke this court's jurisdiction.

{¶9} On May 29, 2007, Mr. Lao, pro se, filed at the trial court a "Motion for Consolidation Pursuant to Crim.R. 8(A)" in both lower court cases, claiming he was

prejudiced by his trial counsel's failure to request a consolidation of these two cases. On June 20, 2007, the trial court journalized a judgment entry denying the "Motion for Consolidation" in the 2005 case. The court, however, did not journalize its judgment entry denying the "Motion for Consolidation" in the 2006 case until July 17, 2007.

{¶10} On July 11, 2007, Mr. Lao filed a pro se appeal from the trial court's judgment denying his "Motion for Consolidation" in the 2005 case, in Appeal No. 2007-L-111. Mr. Lao did not file a notice of appeal from the July 17, 2007 judgment (for the 2006 case) until September 20, 2007. On that day, he filed a pro se notice of appeal and a motion for leave to file a delayed appeal. In the notice of appeal he stated he was appealing from the trial court's July 17, 2007 judgment denying his "Motion for Consolidation Pursuant to Crim.R. 8(A)." In his memorandum supporting the delayed appeal, he stated he did not appeal the trial court's denial of his "Motion for Consolidation" in the 2006 case at the time he filed an appeal from the trial court's denial of his "Motion for Consolidation" in the 2005 case because he did not have a copy of the judgment entry for the former case at that time. This appeal was assigned Appeal Case No. 2007-L-157. We consolidated Appeal No. 2007-L-157 with Appeal No. 2007-L-111.

{¶11} On September 30, 2008, in *State v. Lao*, 11th District Nos. 2007-L-111 and 2007-L-157, 2008-Ohio-5013, we affirmed the trial court's judgment denying his "Motion for Consolidation Pursuant to Crim.R. 8(A)" in both lower court cases. In our decision, we pointed out Mr. Lao had alleged no errors and otherwise raised no issues for our consideration pertaining to the trial court's judgment denying his "Motion for Consolidation Pursuant to Crim.R. 8(A)." We admonished him for improperly utilizing

the appeal to essentially seek review of his guilty plea, an attempt at bootstrapping, i.e., the utilization of a subsequent order, to indirectly and untimely appeal a prior order.

{¶12} After we denied his third appeal, on January 7, 2009, Mr. Lao filed a pro se “Defendant’s Motion to Modify Improper Imposition of Consecutive Sentence” in both lower court cases. On January 27, 2009, the trial court denied the motion. He subsequently filed a “Response to State’s Response to Defendant’s Motion to Modify the Improper Imposition of Consecutive Sentencing.” He then filed a “Motion for Judgment on the Pleadings,” in which he asked the court to consider his reply brief and its attachments in ruling on his “Motion to Modify.” On March 10, the trial court denied that motion. On March 19, 2009, he filed a “Motion for Findings of Fact and Conclusion of Law,” in which he asked the trial court to provide reasons for denying his two motions. On April 9, 2009, the trial court denied that motion. Mr. Lao now appeals from the trial court’s denial of these three motions. His assignments of error state:

{¶13} “[1.] The trial court erred when it overruled appellant[’s] motion to modify improper imposition of consecutive sentences where trail [sic] counsel was ineffective in his failure to move to consolidate and merge all counts and sentence appellant to concurrent terms of imprisonment in accordance with Ohio Revised Code section 2941.25.

{¶14} “[2.] Trail [sic] court abused its discretion in overruling appellant[’s] motion to modify the imposition of improper consecutive sentence without holding a hearing on the matter.

{¶15} “[3.] Trial court abused its discretion when it refused to make a ruling upon appellant[’s] pleadings in response to state[’s] motion in response to his motion to modify improper imposition of consecutive sentence requesting his motion to be denied.

{¶16} “[4.] The trial court erred when it overruled appellant[’s] motion without the required findings of fact and conclusions of law based on appellant[’s] responsive pleadings.”

{¶17} Mr. Lao’s “Motion to Modify Improper Imposition of Consecutive Sentence” was filed more than two years after he filed his direct appeal, which this court dismissed for failure to prosecute. There is simply no authority for the filing of this motion. He did not style it as a postconviction petition pursuant to R.C. 2953.21, and, even if we construe it as such, the time has long expired for such a petition. Moreover, findings of fact and conclusions of law are unnecessary when the trial court dismisses untimely or successive petitions. *State ex rel. Bunting v. Haas*, 102 Ohio St.3d 161, 2004-Ohio-2055, ¶11.

{¶18} Furthermore, even if we construe the “Motion to Modify” as a timely postconviction petition, the ineffective assistance of counsel claim is barred by res judicata. See, e.g., *State v. Mike*, 11th Dist. No. 2007-T-0116, 2008-Ohio-2754, ¶11 (res judicata bars a claim of ineffective assistance of trial counsel raised for the first time in a postconviction motion where the issue could have been asserted on direct appeal without recourse to evidence dehors the record). The claim raised in his “Motion to Modify” that his trial counsel should have sought a consolidation of the two lower court cases pursuant to Crim.R. 8(A) is a claim that could have been asserted on direct appeal and, therefore, would be barred even if this motion were a timely filed

postconviction petition. The motion did not merit a hearing authorized under R.C. 2953.21(C) for postconviction petitions. Finally, regarding his complaint that the trial court did not consider his reply brief in ruling on his “Motion to Modify,” the criminal rules have no provisions for reply briefs and, therefore, the trial court did not err in ruling on his “Motion to Modify” based on his motion and the state’s response in opposition alone. None of Mr. Lao’s claims have merit, and we overrule all four assignments of error.

{¶19} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.