

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

State of Ohio

Court of Appeals Nos. L-10-1258
L-10-1259

Appellee

Trial Court Nos. CR0199505885
CR0199407270

v.

Edmund Brooks

DECISION AND JUDGMENT

Appellant

Decided: October 14, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant; Edmund Brooks, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Edmund Brooks, appellant, appeals an August 3, 2010 judgment of the
Lucas County Court of Common Pleas, denying his April 7, 2010 motion challenging his

conviction to multiple counts of rape, sexual penetration, and gross sexual imposition in 1995.¹ The convictions were pursuant to jury verdicts in a June 1995 jury trial.

{¶ 2} The trial court sentenced appellant to serve eight consecutive sentences of life imprisonment, two concurrent sentences of five to twenty-five years, and five consecutive sentences of one year for the offenses. This court affirmed the trial court judgment of conviction and sentence on direct appeal in *State v. Brooks* (Sept. 20, 1996), 6th Dist. No. L-95-188.

{¶ 3} This is an *Anders* case. Counsel for appellant filed an appellate brief, but has also moved for leave to withdraw as counsel under *Anders v. California* (1967), 386 U.S. 738. Counsel advises the court that he is unable to find a meritorious ground for appeal. Counsel provided appellant with copies of both the appellate brief and the motion to withdraw. Afterwards, appellant filed his own pro se appellate brief.

{¶ 4} Appellant's counsel argues two potential assignments of error on appeal:

{¶ 5} "Possible Assignment of Errors

{¶ 6} "1.) The trial court erred by applying the time restraints of ORC §2953.21 to appellant's motion as it was not a motion for post-conviction relief.

¹Appellant was convicted of four counts of rape of a person less than thirteen-years old in violation of R.C. 2907.02(A)(1)(b) and 2907.02(B); one count of rape in violation R.C. 2907.02(A)(2); four counts of felonious sexual penetration of a person less than thirteen-years old in violation of R.C. 2907.12(A)(1)(b) and 2907.12(B); one count of felonious sexual penetration in violation of R.C. 2907.12; four counts of gross sexual imposition of a person less than thirteen-years old in violation of R.C. 2907.05(A)(4); and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1).

{¶ 7} "2.) The trial court erred by denying appellant's motion for being untimely and barred by res judicata."

{¶ 8} The trial court denied appellant's April 7, 2010 motion on two grounds—res judicata and the time limitations applicable to postconviction relief under R.C. 2953.21(A)(2). We consider whether appellant's motion is barred by res judicata first.

{¶ 9} Appellant has filed successive applications for postconviction relief. They include petitions or motions filed on September 20, 1996, February 8, 1999, June 7, 2007, and April 7, 2010. This appeal is from an August 3, 2010 trial court judgment denying appellant's April 7, 2010 motion for the trial court to set aside the convictions and order a new trial.

{¶ 10} In the April 7, 2010 motion, appellant claims his indictment was "fatally defective" and that the trial court lacked subject matter jurisdiction to convict due to defects in the indictment on 12 of 15 counts. In the motion appellant claims prosecutorial misconduct in preparing and proceeding upon such an indictment. Appellant also argues that he was provided ineffective assistance of counsel on two grounds: first that counsel failed to properly challenge the indictment and, second, that trial counsel failed to inform appellant of the availability of an alibi defense based upon the fact that he was a long distance truck driver.

{¶ 11} Some of these issues have been raised before. Appellant challenged his convictions based upon claimed deficiencies in the indictment and claimed lack of subject matter jurisdiction to convict on 12 of 15 counts of the indictment in applications

for postconviction relief filed on February 8, 1999, and June 7, 2008. The trial court denied the motions in judgments journalized on April 15, 1999, and February 1, 2008.

{¶ 12} Appellant is barred by res judicata from relitigating those claims through the April 7, 2010 motion. The doctrine of res judicata applies to postconviction proceedings. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95; *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph eight of the syllabus. A basic tenet of the doctrine is that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, syllabus.

{¶ 13} Appellant also claims ineffective assistance of counsel based upon a claimed failure of trial counsel to challenge the validity of the indictment in the trial court and claimed prosecutorial misconduct arising from maintaining the prosecution under such an indictment. Such claims do not require consideration of materials outside of the record in the trial court. The necessary facts concerning the nature of the indictment were part of the record in trial court. Whether counsel was deficient in failing to properly challenge the indictment at trial is reviewable on appeal from the record of trial court proceedings.

{¶ 14} Longstanding Ohio law recognizes that res judicata bars a convicted defendant from postconviction relief based on grounds that could have been raised at trial or on direct appeal:

{¶ 15} "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 of conviction, or on an appeal from that judgment." *State v. Perry* at paragraph nine of the syllabus.

{¶ 16} As appellant's claims of ineffective assistance of counsel based upon a claimed failure of trial counsel to challenge the validity of the indictment and claimed prosecutorial misconduct arising from maintaining the prosecution under such an indictment could have been raised on direct appeal, we conclude res judicata bars consideration of the claims in the April 7, 2010 motion for postconviction relief.

{¶ 17} We find appellant's Possible Assignment of Error No. 2 is not well-taken as to the issue of whether res judicata bars appellant's claims challenging his convictions based upon claimed deficiencies in the indictment, claimed lack of subject matter jurisdiction, claimed prosecutorial misconduct due to the nature of the indictment, and claimed ineffective assistance of counsel in failing to effectively challenge the indictment in trial court proceedings. The trial court did not err in holding these claims are barred by res judicata.

{¶ 18} This leaves one remaining claim—whether appellant was denied ineffective assistance of counsel due to the claimed failure of trial counsel to pursue an available alibi defense. Under Possible Assignment of Error No. 1 appellant argues that

the trial court erred in holding that his April 7, 2010 motion constituted a petition for postconviction relief and was subject to the restrictions on relief under R.C. 2953.21. Under Possible Assignment of Error No. 2 appellant asserts that the trial court erred in holding the April 7, 2010 motion was barred as untimely under R.C. 2953.21(A)(2).

{¶ 19} We view these issues as moot with respect to the claims that we determined are barred by res judicata. See App.R. 12(A)(1)(c). We do consider the claims with respect to the remaining claim of ineffective assistance based upon trial counsel's failure to pursue an available alibi defense.

{¶ 20} The Ohio Supreme Court in the decision of *State v. Reynolds* (1997), 79 Ohio St.3d 158 identified the standard for determining whether a motion is to be treated as a motion for postconviction relief under R.C. 2953.21: "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." *State v. Reynolds* at syllabus.

{¶ 21} The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and Sections 10 and 16 of Article I of the Ohio Constitution. *Strickland v. Washington* (1984), 466 U.S. 668, 685-686; *State v. Lytle* (1976), 48 Ohio St.2d 391, 395-396, vacated, in part, on other grounds (1978), 438 U.S. 910. Accordingly, under *State v. Reynolds*, the ineffective assistance of counsel claim is to be treated as a claim for postconviction relief under R.C. 2953.21. We find

appellant's Possible Assignment of Error No. I is not well-taken as to the remaining claim of ineffective assistance of counsel.

{¶ 22} In the April 7, 2010 motion, appellant asserts a new claimed deficiency of counsel, in failing to advise appellant of the availability of an alibi defense. Even if such a claim were not barred generally by res judicata due to piecemeal presentation of ineffective assistance of counsel claims, we agree with the trial court that it is barred because it fails to meet the statutory time limitation under R.C. 2953.21(A)(2) for the claim. See *State v. Harper* (Aug. 28, 1998), 6th Dist. No. L-98-1126. Appellant's motion was filed over ten years after the 180 day time limitation under R.C. 2953.21(A)(2) had expired.

{¶ 23} Counsel argues that the case comes within exceptions under R.C. 2953.23(A)(1) and (2) to the time limitation. 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.

{¶ 24} The remaining ineffective assistance of counsel claim is not based upon any newly established constitutional right. Appellant was not prevented from discovering the facts upon which the motion is based—failure of trial counsel to pursue an available alibi defense at trial. Accordingly, the exceptions under R.C. 2953.23(A)(1) do not apply.

{¶ 25} The exception under R.C. 2953.21(A)(2) also does not apply as the exception relates to claims based upon DNA testing. Appellant's April 7, 2010 motion is not based upon DNA testing.

{¶ 26} As no exception applies, we conclude R.C. 2953.21(A)(2) bars postconviction relief on the ineffective assistance of counsel claim based upon the failure to pursue an alibi defense. Accordingly, the trial court did not err in holding that the ineffective assistance of counsel claim was untimely and barred under R.C. 2953.21(A)(2). We find Possible Assignment of Error No. 2 is not well-taken as to the latest ineffective assistance of counsel claim.

{¶ 27} In his pro se appellant's brief, appellant reargues the merits of his motion. He does not address the grounds upon which the trial court denied his motion: whether the motion is to be treated as a motion for postconviction relief, whether the motion is untimely under R.C. 2953.21(A)(2), or whether it is barred by res judicata.

{¶ 28} Under the procedure announced in *Anders*, we have undertaken a review of the entire record of proceedings in the trial court to determine whether this appeal is wholly frivolous. After independently reviewing the record, we find no grounds for a

meritorious appeal. Appellate counsel's motion to withdraw is found well-taken and it is hereby granted.

{¶ 29} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal. The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, 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:
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