

[Cite as *State v. Kemp*, 2009-Ohio-6399.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

CASE NO. 09-MA-21

THOMAS KEMP,

OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 88CR634

Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 88CR634

JUDGMENT: Affirmed

Affirmed

APPEARANCES:
For Plaintiff-Appellee

Paul Gains
Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503-1426

For Plaintiff-Appellee

Paul Gains
Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503-1426

Paul Gains
Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503-1426

For Defendant-Appellant

Thomas Kemp, pro-se
#209-194
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044

Thomas Kemp, pro-se
#209-194
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

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Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 3, 2009

[Cite as *State v. Kemp*, 2009-Ohio-6399.]
DONOFRIO, J.

{¶1} Defendant-appellant Thomas Kemp appeals the denial of his successive petition for postconviction relief. Kemp challenges his conviction based on a violation of his speedy-trial rights and alleges his sentence was void because a three-judge panel was not convened to sentence him.

{¶2} Over twenty years ago and in the presence of his wife, Bonnie, and his step-daughter, Lori, Kemp shot and killed Thomas Beno, who had just married Lori earlier in the day. Kemp was indicted on two counts of aggravated murder with death specifications in connection with Beno's death and two counts each of kidnapping and felonious assault in connection with Bonnie and Lori. All six counts carried firearm specifications.

{¶3} On February 29, 1989, Kemp pleaded no contest to all six counts in exchange for the state's dismissal of the death specifications. The trial court entered a guilty finding and sentenced Kemp to twenty-five years to life in prison.

{¶4} Kemp appealed his conviction alleging a violation of his speedy-trial rights and this court found no merit to those arguments and affirmed his conviction. *State v. Kemp* (Feb. 13, 1990), 7th Dist. No. 89 C.A. 43.

{¶5} In 1996, Kemp filed a petition for postconviction relief alleging ineffective assistance of counsel based on his trial counsel's conflict of interest. Kemp had been appointed two attorneys to represent him. One of them had performed legal services for his stepdaughter Lori, a victim-witness who was widowed when Kemp murdered her husband and was also one of the victims of the kidnapping and felonious assault counts. The trial court summarily dismissed the petition. This court reversed and remanded for an evidentiary hearing. *State v. Kemp* (Nov. 24, 1999), 7th Dist. No. 97 CA 123.

{¶6} On remand, the trial court conducted an evidentiary hearing on Kemp's claims. The trial court again denied the petition, this time after considering the merits of Kemp's claims. Kemp appealed again and this court affirmed the trial court's decision denying the petition. *State v. Kemp*, 7th Dist. No. 04 MA 54, 2005-Ohio-2115.

{¶7} On September 10, 2008, Kemp filed a pro se motion entitled, “MOTION TO VACATE VOID PROCEEDINGS AND SENTENCE.” He again asserted a violation of his speedy-trial rights. Additionally, he argued that his sentence was void because it had been entered by a single judge and not a three-judge panel as required by statute. Construing Kemp’s motion as a petition for postconviction relief, the trial court denied it as untimely, adding that it also failed to set forth substantive grounds for relief. This appeal followed.

{¶8} Kemp’s sole assignment of error states:

{¶9} “THE TRIAL COURT EXCEEDED ITS AUTHORITY IN DENYING APPELLANT’S MOTION BECAUSE HIS SENTENCES ARE VOID, VIOLATION OF THE DUE PROCESS CLAUSES OF BOTH THE UNITED STATES AND OHIO CONSTITUTION.”

{¶10} “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* (1997), 79 Ohio St.3d 158, 679 N.E.2d 1131, syllabus. Kemp’s petition fulfills the definition of a motion for postconviction relief: (1) the petition was filed after his direct appeal; (2) he seeks to vacate his sentence as void, and; (3) in the petition, he alleged that his constitutional rights were violated and that the trial court sentenced him without appropriate jurisdiction. Therefore, the trial court properly construed Kemp’s motion as a motion for postconviction relief.

{¶11} Petitions for postconviction relief are governed by R.C. 2953.21 and R.C. 2953.23. Under R.C. 2953.21, relief from a judgment or sentence is available for a person convicted of a criminal offense who shows that “there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.”

{¶12} Except as provided in R.C. 2953.23, a petition for postconviction relief must be filed no later than 180-days after the date on which the trial transcript is filed in the court of appeals. R.C. 2953.21(A)(2).

{¶13} If a postconviction relief petition is filed beyond the 180-day time limitation or the petition is a second or successive petition for postconviction relief, R.C. 2953.23(A) precludes the court from entertaining the petition unless: (1) the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based, or (2) after the 180-day time period expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. R.C. 2953.23(A)(1)(a). The petitioner must then show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found [him] guilty of the offense of which [he] was convicted.” R.C. 2953.23(A)(1)(b).

{¶14} Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for post-conviction relief. *State v. Carter*, 2d Dist. No. 03-CA-11, 2003-Ohio-4838, citing *State v. Beuke* (1998), 130 Ohio App.3d 633, 720 N.E.2d 962.

{¶15} In this case, Kemp’s petition was unquestionably filed beyond the 180-day time limit set forth in R.C. 2953.21. Kemp failed to allege any of the specifically enumerated timeliness exceptions under R.C. 2953.23. Therefore, Kemp’s petition was untimely and the trial court was without jurisdiction to entertain it.

{¶16} Assuming the petition was timely and turning to the substance of Kemp’s claims – speedy-trial violation and failure to convene a three-judge sentencing panel; each is barred under the doctrine of res judicata.

{¶17} The Ohio Supreme Court has long recognized that “any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶16 (holding that a defendant who fails on direct appeal to

challenge the sentence imposed on him for an offense is barred by *res judicata* from appealing that sentence following a remand for resentencing on other offenses).

{¶18} “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 * * * on an appeal* from that judgment.” (Emphasis added.) *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶19} “Thus, the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, *res judicata* promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.” (Citation omitted.) *Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶18.

{¶20} Each of Kemp’s claims here is one that was raised or could have been raised in his direct appeal. Kemp’s first claim is one that could have been raised in his direct appeal.

{¶21} Kemp argues that the trial court disregarded the statutory requirements of R.C. 2945.06 and R.C. 2929.03, and Crim.R. 11(C)(3) when it failed to convene a three-judge panel to sentence him. That, he believes, in addition to the Ohio Supreme Court’s decision in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, renders his sentence void.

{¶22} Concerning Kemp’s argument that his sentence is void for failure to convene a three-judge panel, the Ohio Supreme Court has specifically rejected the argument in the context of a collateral attack:

{¶23} “The failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court’s judgment void ab initio and subject to collateral attack in habeas corpus.

It constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992,

{¶24} Like in *Pratts*, Kemp's attack on his sentence fails because he is asserting it in a postconviction petition which is a collateral attack. Kemp should have raised the issue in his direct appeal and failed to do so. Therefore, the matter is now barred under the doctrine of res judicata.

{¶25} Contrary to Kemp's assertion, the Ohio Supreme Court's decision in *Simpkins* did not overrule *Pratts*. *Pratts* was merely distinguished by *Simpkins*. In *Simpkins*, the sentencing court failed to include in a defendant's sentence a statutorily mandated period of postrelease control. The question became whether that failure rendered the sentence void or simply voidable. After noting the general rule that sentencing errors are not jurisdictional and do not necessarily make a sentence void, the Court acknowledged that there are exceptions to that general rule and that a sentencing court's failure to impose a sentence as required by law is just one such exception. In *Simpkins*, the Court viewed the sentencing court's failure to include in the defendant's sentence a statutorily mandated period of postrelease control as a failure to impose a sentence as required by law rendering the sentence void. The court noted that "[a]lthough res judicata applies to a voidable sentence and may operate to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence, * * * we have not applied res judicata to cases in which the sentence was void." *Simpkins* specifically distinguished *Pratts* observing that *Pratts* addressed aspects of res judicata doctrine in collateral attacks on voidable judgments. The Court left undisturbed *Pratts*' holding that failure of a court to convene a three-judge panel, as required by R.C. 2945.06, renders the sentence voidable and not subject to collateral attack. Thus, the *Simpkins*' court must not have viewed a sentencing court's failure to convene a three-judge panel as required by R.C. 2945.06 as a failure to impose a sentence as required by law rendering the sentence void.

{¶26} Kemp's second claim – violation of his speedy-trial rights – is one that was raised in his direct appeal. Since Kemp was arrested and jailed on November 4, 1988, there was no dispute that he had to be tried on or before February 3, 1989. Kemp's was one of twenty cases that were delayed for presentation to the grand jury until the new prosecutor took office in 1989. Because the grand jury added the death specification, the jury commissioner had to seat a special venire which is required for death penalty cases. Because the jury commissioner was unable to seat a special venire in time for trial, the court continued the trial on its own accord. Kemp ended up pleading no contest shortly thereafter on February 28, 1989. On appeal, this court deemed the trial court's continuance reasonable in light of its necessity and purpose. *State v. Kemp* (Feb. 13, 1990), 7th Dist. No. 89 C.A. 43. Consequently, since this court addressed the merits of Kemp's speedy-trial arguments in his direct appeal, the issue is now barred by res judicata.

{¶27} Accordingly, Kemp's sole assignment of error is without merit.

{¶28} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.