

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-170060
		C-170068
Plaintiff-Appellee,	:	TRIAL NO. B-9408111
vs.	:	
JOSEPH C. ELLIOTT,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Joseph C. Elliott appeals the Hamilton County Common Pleas Court’s judgment overruling his “Motion to Vacate Void Sentence.” We dismiss the case numbered C-170068 as duplicative of the case numbered C-170060. And in the case numbered C-170060, we affirm the court’s judgment as modified to dismiss the motion for lack of jurisdiction.

Elliott was convicted in 1996 upon jury verdicts finding him guilty on two counts of rape and a single count of aggravated burglary. He unsuccessfully challenged his convictions on direct appeal and in postconviction motions filed between 2002 and 2017. *See State v. Elliott*, 1st Dist. Hamilton No. C-060443 (Apr. 18, 2007); *State v. Elliott*, 1st Dist. Hamilton No. C-050606, 2006-Ohio-4508; *State v. Elliott*, 1st Dist. Hamilton No. C-020736, 2003-Ohio-4962; *State v. Elliott*, 1st Dist. Hamilton No. C-

010598, 2002-Ohio-4454; *State v. Elliott*, 1st Dist. Hamilton No. C-960072, 1996 WL 733140 (Dec. 24, 1996), *appeal not allowed*, 87 Ohio St.3d 1442, 719 N.E.2d 5 (1999).

In this appeal from the overruling of his 2017 “Motion to Vacate Void Sentence,” Elliott presents a single assignment of error, contending that his rape sentences were void, because those offenses were allied offenses of similar import subject to merger under R.C. 2941.25. The assignment of error essentially restates the ground for relief advanced in his motion and thus may fairly be read to challenge the denial of relief on that ground. We overrule the assignment of error upon our determination that the common pleas court had no jurisdiction to entertain the motion.

In his motion, Elliott did not specify a statute or rule under which the relief sought might have been afforded, leaving the common pleas court to “recast” the motion “into whatever category necessary to identify and establish the criteria by which the motion should be judged.” *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 and syllabus. Under R.C. 2953.21 et seq., postconviction relief may be granted upon proof of a constitutional violation during the proceedings resulting in the conviction. *See* R.C. 2953.21(A)(1). R.C. 2941.25, governing sentencing on multiple counts charged in the same indictment, effectuates the protections against multiple punishments for the same offense secured under the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution. *State v. Payne*, 1st Dist. Hamilton No. C-790257, 1980 WL 352849 (May 28, 1980). Therefore, Elliott’s merger claim was reviewable by the common pleas court under the standards provided by the postconviction statutes.

But the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain Elliott’s motion. He filed the motion well after the time

prescribed by R.C. 2953.21(A)(2) had expired. And he failed to satisfy the jurisdictional requirements for entertaining a late postconviction claim, when the record does not, as it cannot, demonstrate that, but for the claimed sentencing error, “no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted.” See R.C. 2953.23(A)(1)(b).

Nor were Elliott’s rape sentences subject to correction under the jurisdiction to correct a void judgment. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. Those sentences are not void, because the sentencing court did not find that R.C. 2941.25 mandated merger. See *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26.

Because the common pleas court had no jurisdiction to entertain Elliott’s “Motion to Vacate Void Sentence,” the motion was subject to dismissal. See R.C. 2953.21(D) and 2953.23(A). Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect the dismissal of the motion. And we affirm the judgment as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., ZAYAS and DETERS, JJ.

To the clerk:

Enter upon the journal of the court on May 16, 2018
per order of the court _____
Presiding Judge