

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93534

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIE S. SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-325283 and CR-323987

BEFORE: Blackmon, J., Kilbane, P.J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Willie S. Smith appeals the trial court's decision denying his petition for postconviction relief. Smith assigns the following errors for our review:

“I. The trial court committed reversible error in denying relief where the counts in the indictment did not charge an offense under Ohio law and there was a complete failure to invoke subject matter jurisdiction. The defendant is legally innocent as a matter of law.”

“II. Defendant Smith experienced ineffective assistance of counsel in the trial court and in his first appeal of right in violation of the Sixth Amendment and the Fourteenth Amendment to the United States Constitution.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} The long history of the present case arises from the issuance of two separate grand jury indictments. On June 5, 1995, the Cuyahoga County Grand Jury issued a one-count indictment in Case No. CR-323987 against Smith for kidnapping. On June 28, 1995, the grand jury issued a separate three-count indictment in Case No. CR-325283. Count 1 of the indictment charged Smith with aggravated murder with a firearm specification and a felony murder specification; Count 2 of the indictment charged him with aggravated murder with a firearm specification and a felony murder specification; Count 3 of the indictment charged him with having a weapon under disability in violation of R.C. 2923.13 with a firearm specification and a violence specification. On August 21, 1995, the trial court

consolidated the two cases for trial. On October 24, 1995, following a jury trial, Smith was convicted of kidnapping and aggravated murder. The trial court sentenced Smith to life imprisonment for the aggravated murder and ten to twenty-five years for kidnapping. The trial court ordered the sentences to be served consecutively. In addition, the trial court ordered Smith to pay a fine of \$35,000.

{¶ 4} Smith appealed his convictions; we affirmed in *State v. Smith* (Nov. 17, 1997), Cuyahoga App. Nos. 69799, 70451, and 71643. The Ohio Supreme Court declined review. *State v. Smith* (1998), 81 Ohio St.3d 1467, 690 N.E.2d 1287. While Smith's direct appeal was pending, he filed a motion for a new trial, or in the alternative a petition for postconviction relief.

Attached to the motion were several affidavits submitted by friends and family of Smith attesting to various facts surrounding the murder.

{¶ 5} The trial court denied Smith's motion for a new trial based on the grounds that it had no jurisdiction due to the pending appeal. The trial court also denied the petition for postconviction relief, finding no substantial grounds for relief because it found the affidavits were not credible. Smith then appealed the trial court's denial.

{¶ 6} On appeal, we agreed that the trial court had no jurisdiction while the appeal was pending, but found that the credibility of the affidavits could not be determined without a hearing. Consequently, we reversed and

remanded the matter to the trial court for a hearing on Smith's postconviction petition. *State v. Smith* (Apr. 8, 1999), Cuyahoga App. No. 75178.

{¶ 7} On January 3, 2000, pursuant to our remand, the trial court conducted a hearing to determine the credibility of the affidavits that Smith submitted. The trial court again denied Smith's motion for a new trial in a three-page opinion, finding that the affidavits and the witnesses' testimony were not credible.

{¶ 8} Smith appealed the trial court's denial of his petition for postconviction relief. We affirmed the trial court's decision. *State v. Smith* (May 10, 2001), Cuyahoga App. No. 78229. The Ohio Supreme Court declined jurisdiction a second time. *State v. Smith* (2001), 93 Ohio St.3d 1427, 755 N.E.2d 351.

{¶ 9} In January 2006, Smith filed another motion for a new trial and a motion to disqualify the trial judge. On April 13, 2006, the trial court denied both motions, and Smith appealed. On July 6, 2006, we sua sponte dismissed Smith's appeal. On November 16, 2006, the Ohio Supreme Court declined review a third time.

{¶ 10} Thereafter, Smith filed a petition for habeas corpus relief in federal court, which was denied. *Smith v. Wilson* (N.D. Ohio 2008), Case No. 1:07 CV3427. On March 19, 2009, Smith filed another petition for postconviction relief seeking to dismiss the aggravated murder and

kidnapping counts. On June 1, 2009, the trial court denied the motion. Smith now appeals.

Postconviction Relief

{¶ 11} In the first assigned error, Smith argues the trial court erred in denying his petition for postconviction relief because the indictments did not charge an offense under Ohio law, and as such, he is legally innocent as a matter of law. We disagree.

{¶ 12} A petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Easley*, 10th Dist. No. 09AP-10, 2009-Ohio-3879, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. It is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441, 751 N.E.2d 481.

{¶ 13} R.C. 2953.21 affords a prisoner postconviction relief “only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to litigate his or

her conviction. *State v. Hessler*, 10th Dist. No. 01 AP-1011, 2002-Ohio-3321, ¶32; *Murphy*, supra.

{¶ 14} Effective September 21, 1995, R.C. 2953.21 was amended to require that a petition under R.C. 2953.21(A)(1) 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 or adjudication.” R.C. 2953.21(A)(2). The amendment further provides “[i]f no appeal is taken * * * the petition shall be filed no later than 180 days after the expiration of the time for filing the appeal.” Id.

{¶ 15} In the instant case, because Smith previously appealed his conviction, he was required to file his postconviction petition within 180 days after the expiration of the time for filing his appeal. As previously stated, we issued our opinion in Smith’s direct appeal on November 17, 1997. Smith filed the latest of his numerous motions for postconviction relief on March 19, 2009, more than 11 years after we issued our opinion in his direct appeal. Smith filed the instant motion almost three years after he filed the last motion for postconviction relief. Consequently, Smith’s petition was untimely and the trial court was without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340.

{¶ 16} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a).

{¶ 17} If Smith was able to satisfy one of those two conditions, R.C. 2953.23(A) then requires he also demonstrate that but for the constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶ 18} Smith satisfied neither of the above two conditions. In his petition, he failed to indicate that he was unavoidably prevented from discovering facts necessary for the claim for relief. In addition, he failed to assert any new federal or state right recognized by the United States Supreme Court that would retroactively apply to him. Instead, Smith merely alleged that the indictment was defective and that he was denied the effective assistance of trial and appellate counsel.

{¶ 19} Based on the foregoing, the trial court was without jurisdiction to consider Smith's motion to essentially vacate his convictions. Moreover, our review of the petition indicates that all of the issues raised therein were addressed or could have been addressed in Smith's direct appeal.

Consequently, even if the trial court had jurisdiction to entertain Smith's petition, it would be barred by the doctrine of res judicata.

{¶ 20} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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. Reynolds*, 5th Dist. No. 09-CA-13, 2009-Ohio-3998, quoting *State v. Perry*, (supra, 10 Ohio St.2d 175, 226 N.E.2d 104).

{¶ 21} Nonetheless, Smith argues the trial court denied his petition without a hearing. A criminal defendant seeking to challenge his or her conviction through a petition for postconviction relief is not automatically entitled to a hearing. *State v. Vinson*, 10th Dist. No. 09AP-163, 2009-Ohio-3751, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169. Prior to granting a hearing, the court shall determine whether there are substantial grounds for relief. *Id.*, R.C. 2953.21(C).

{¶ 22} Pursuant to the provisions of R.C. 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds

for relief. *Id.*, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 23} We review a trial court's decision to deny a postconviction petition without a hearing under the abuse of discretion standard. *State v. Banks*, 10th Dist. No. 08AP-722, 2009-Ohio-1667, ¶10. Res judicata is a proper basis upon which to dismiss, without a hearing, an R.C. 2953.21 petition. *Id.* at ¶9. A petition for postconviction relief may be dismissed without a hearing, based upon the doctrine of res judicata, if the trial court finds that the petitioner could have raised the issues in the petition at trial or on direct appeal without resorting to evidence beyond the scope of the record. *State v. Scudder* (1998), 131 Ohio App.3d 470, 475, 722 N.E.2d 1054.

{¶ 24} Here, we find no abuse of discretion in the trial court's denial of the petition for postconviction relief without a hearing. Accordingly, we overrule the first assigned error.

Ineffective Assistance of Counsel

{¶ 25} In the second assigned error, Smith argues he was denied effective assistance of counsel. We decline to address this assigned error; Smith raised ineffective assistance of counsel in his direct appeal. *State v. Smith* (Nov. 17, 1997), Cuyahoga App. Nos. 69799, 70451, and 71643.

{¶ 26} Under the doctrine of res judicata, as discussed above, this assigned error is barred. Accordingly, we overrule the second assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR