

[Cite as *State v. Kleyman*, 2010-Ohio-3612.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93896

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MIKHAIL KLEYMAN (a.k.a. KLEYMANN)

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-455272

BEFORE: Rocco, J., Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 5, 2010

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Mikhail Kleyman appeals from the trial court order that denied his “delayed petition for postconviction relief.”

{¶ 2} Kleyman presents one assignment of error, arguing that, in light of the evidence he attached to his petition, the trial court abused its discretion in “summarily” denying it. Since the record reflects the trial court lacked jurisdiction to do otherwise, Kleyman’s assignment of error is overruled. The trial court’s order is affirmed.

{¶ 3} This court previously addressed Kleyman's original conviction in *State v. Kleyman*, Cuyahoga App. No. 90817, 2008-Ohio-6656. In relevant part, the facts were set forth as follows:

{¶ 4} "On August 11, 2004, the Cuyahoga County Grand Jury indicted appellant on one count of gross sexual imposition, in violation of R.C. 2705.05(A)(1), and one count of gross sexual imposition, in violation of R.C. 2705.05(A)(5). On November 11, 2004, as part of a plea agreement, appellant pleaded guilty to Count two as amended to attempted gross sexual imposition. Count one was nolle. The trial court sentenced appellant to two years of community control sanctions.

{¶ 5} "On July 20, 2005, appellant moved to withdraw his guilty plea.¹ After a hearing on the motion, the trial court granted appellant's motion. On October 10, 2007, a jury trial commenced. The state presented evidence from several witnesses, including eyewitnesses Kellie Landau and James Sotak.

{¶ 6} "According to the record, on the afternoon of July 2, 2004, appellant, then 68 years old, was at the community pool in Solon, Ohio. Appellant is from the Ukraine, and his native language is Russian.Fn.1 [Fn.1. Appellant requires the use of an interpreter because his ability to communicate in English is limited.] On that same afternoon, the victim, a 13-year-old female with mental and

¹Kleyman filed his motion on the basis that his lack of fluency in the English language prevented him from fully understanding the plea proceeding.

physical disabilities, was also at the community pool accompanied by her care giver, Kellie Landau.

{¶ 7} “Ms. Landau testified that she had been the victim’s care giver for seven years. She testified that, at first sight, the victim does not appear to have any mental or physical disabilities, but anyone who spends even a short amount of time with her will immediately become aware that the victim is unable to communicate verbally. She testified that the victim’s affliction is known as apraxia and affects her ability to speak, but does not affect her ability to comprehend what she is being told. Ms. Landau further testified that the victim responds with certain hand signals or with grunts and groans.

{¶ 8} “James Sotak testified that he was a lifeguard at the community pool and that he was on duty on the afternoon of July 2, 2004. He testified that he recognized appellant as a patron at the pool that day. He also testified that on the day in question he observed the victim jumping off the diving board and swimming in his guard area in the late afternoon. Mr. Sotak testified that he did not notice that the victim had any physical impairments despite having observed her for 15 to 20 minutes on that day.

{¶ 9} “Both Ms. Landau and Mr. Sotak were eyewitnesses to the events that occurred between appellant and the victim. Both testified that they saw appellant sitting in a lounge chair that was facing away from the pool. They testified that appellant motioned to the victim to come over and sit beside him on

his lounge chair. They saw the victim sit down for a few seconds and then return to the pool to swim for a few more minutes.

{¶ 10} “Ms. Landau and Mr. Sotak testified that appellant again motioned for the victim to sit down beside him by patting his chair. They saw the victim return to appellant’s chair and sit down. Mr. Sotak testified he thought it was odd that appellant and the victim were sitting together because he did not think they had come to the pool together. He testified that he witnessed appellant hold the victim’s hand in one of his hands while rubbing her arm and shoulder with his other hand. Ms. Landau testified that she witnessed appellant rub the victim’s shoulder and arm, and then place his hand beneath the shoulder strap of her bathing suit top. She also testified that she witnessed appellant use his other hand to touch the victim’s stomach underneath the fabric of her tankini top. [Footnote omitted.]

{¶ 11} “Ms. Landau testified that she ran over to appellant’s chair and yelled at him, ‘Do you know her?’ then grabbed the victim by the arm and led her quickly away from appellant. Ms. Landau also testified that she thought appellant had an erection because she noticed a bulge in his bathing suit. She testified that the victim starting hitting her, a sign she believed meant that the victim thought she herself had done something wrong. Mr. Sotak testified that he ran to Ms. Landau’s assistance. Appellant was arrested that afternoon at the pool.

{¶ 12} “When questioned about the victim’s ability to assess social relationships, Ms. Landau testified that the victim is ‘very low functioning’ and that, although the victim is very social, she is ‘socially inappropriate because she doesn’t know how to act appropriately due to her disability.’ * * * Furthermore, when Ms. Landau was asked if the victim has the ability to discern appropriate touching from inappropriate touching, she answered, ‘She [the victim] has no concept of it,’ and that the victim would not have understood that inappropriate touching was wrong.

{¶ 13} “The state presented the victim’s mother and another lifeguard, Lindsey Reynolds-May, to testify about the victim’s disabilities. Both witnesses testified that the victim was unable to communicate with speech and that any person attempting to communicate with the victim would immediately recognize that the victim could not speak. * * * The victim’s mother testified that, to a stranger, her daughter may appear physically normal because her gross motor skills are not significantly impaired; however, upon closer inspection, the victim walks with an odd gait, and she is somewhat slouched in her posture.

{¶ 14} “ * * *

{¶ 15} “ * * * On October 12, 2007, the jury returned verdicts of guilty on Count two and not guilty on Count one. * * *” Id., ¶2-13.

{¶ 16} Obviously, as set forth above, Kleyman appealed his conviction. The record was filed in this court on January 29, 2008.

{¶ 17} Kleyman challenged his conviction on several grounds. In part, he argued that the state presented insufficient evidence to prove “his contact [with the victim] was sexual,” and that he “knew or had reason to believe the victim’s ability to resist or consent was substantially impaired.” *Id.*, ¶17.

{¶ 18} This court reviewed the evidence and determined it was sufficient to prove each element of the offense. *Id.*, ¶28-35. In pertinent part, it was noted that “Ms. Landau admitted that she could not recall whether appellant had an erection, * * * she only noticed a ‘bulge’ in his bathing suit.” *Id.*, at fn.4. Nevertheless, when viewed in a light most favorable to the prosecution, a rational trier of fact could find from the evidence that all the essential elements were proven beyond a reasonable doubt. *Id.*, ¶36.

{¶ 19} On May 27, 2009, Kleyman filed a “delayed petition for postconviction relief.” Kleyman argued both his trial and appellate counsel provided ineffective assistance in that neither presented evidence that would have resulted in his acquittal, viz., he “cannot achieve an erection,” and, further, he cannot speak English.

{¶ 20} Kleyman attached to his petition evidentiary materials that he claimed supported his argument. These included his “affidavit,” as translated by his daughter, and some recent medical records.²

²Kleyman’s doctor indicated he had diagnosed Kleyman with an “erectile disorder” in May 2009.

{¶ 21} In presenting his argument, Kleyman acknowledged his petition was untimely pursuant to R.C. 2953.21(A)(1)(a). He asserted, however, that his inability to understand English prevented him from discovering and presenting the facts underlying his claim.

{¶ 22} The state responded to Kleyman's petition with an opposition brief. On August 12, 2009, the trial court denied his "delayed petition for postconviction relief" without opinion.

{¶ 23} Kleyman appeals from that order with the following as his assignment of error.

{¶ 24} **"The trial court erred in summarily overruling the defense's petition for postconviction relief."**

{¶ 25} Kleyman argues the trial court abused its discretion in denying his petition because he presented enough evidence de hors the record to excuse his delay. This court disagrees.

{¶ 26} In pertinent part, R.C. 2953.21 states:

{¶ 27} "(A)(1)(a) Any person who has been convicted of a criminal offense * * * and who claims 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 * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate

relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 28} “ * * *

{¶ 29} (2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall 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 * * * .”

{¶ 30} R.C. 2953.23 states in pertinent part:

{¶ 31} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court *may not entertain* a petition filed *after the expiration of the period prescribed* in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner *unless* division (A)(1) * * * of this section applies:

{¶ 32} “(1) *Both of the following* apply:

{¶ 33} “(a) * * * [T]he petitioner shows that the petitioner was *unavoidably prevented from discovery* of the facts upon which the petitioner must rely to present the claim for relief * * * .

{¶ 34} “(b) The petitioner shows 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 * * *.
(Emphasis added.)

{¶ 35} The timeliness requirement of R.C. 2953.21 is jurisdictional. *State v. Beaver* (1998), 131 Ohio App.3d 458, 722 N.E.2d 1046; *State v. Cobb*, Cuyahoga App. No. 80265, 2002-Ohio-2138, ¶30. Thus, a trial court does not have jurisdiction to entertain an untimely filed petition for postconviction relief that does not meet the exceptions set forth by R.C. 2953.23(A)(1) and (2). *State v. Beaver*, *State v. Hill* (1998), 129 Ohio App.3d 658, 661, 718 N.E.2d 978; *State v. Gipson*, Warren App. No. CA2001-11-103, 2002-Ohio-4128, ¶16.

{¶ 36} As this court's detailed recitation of the facts in *State v. Kleyman*, demonstrated, both of the circumstances Kleyman cited as his excuse for filing a "delayed" petition, viz., his medical problem and his lack of fluency in the English language, if true, already existed at the time of his trial. Under these circumstances, he could not establish he was "unavoidably prevented" from discovering or presenting those facts.

{¶ 37} Since Kleyman failed to meet the prerequisites for filing an untimely petition for postconviction relief, the trial court lacked jurisdiction to consider it. Therefore, did not either err or abuse its discretion in denying it. *State v. Crum*, Stark App. No. 2005CA00024, 2005-Ohio-7037.

{¶ 38} Accordingly, Kleyman's assignment of error is overruled.

{¶ 39} The trial court's order is affirmed.

It is ordered that appellee recover from appellant 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 directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of judgment.

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

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR