

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95136

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE BOYNTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511811

BEFORE: Jones, J., Gallagher, A.J., and Vukovich, J.*

RELEASED AND JOURNALIZED: December 16, 2010

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LARRY A. JONES, J.:

{¶ 1} In this accelerated appeal, defendant-appellant Andre Boynton appeals the trial court’s denial of his petition for postconviction relief and assigns one error for our review:

“That the defendant was deprived his constitutional rights under the Ohio and United States Constitution for effective assistance of counsel as the actions of his trial counsel so departs from the standard applicable as to deprive the defendant-appellant of his right to effective assistance of counsel.”

{¶ 2} For the reasons set forth below, we affirm the judgment of the trial court.

Facts

{¶ 3} Boynton was convicted of rape with a sexually violent predator and repeat violent sexual offender specifications, kidnapping, intimidation, and failure to comply. The trial court sentenced him to an aggregate 15 years to life in prison.

{¶ 4} Boynton directly appealed to this court, and we affirmed his conviction. *State v. Boynton*, Cuyahoga App. No. 93784, 2010-Ohio-4670. While the appeal was pending, Boynton filed a petition for postconviction relief. The trial court denied the petition because it was untimely filed and his claims were barred by res judicata based on his pending appeal.

Untimely Petition for Postconviction Relief

{¶ 5} A petition for postconviction relief “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.” R.C. 2953.21(A)(2). When a petition is untimely and no recognized exceptions to the 180-day deadline apply, a trial court is without jurisdiction to entertain the petition. R.C. 2953.23(A); *State v. Wells*, Cuyahoga App. No. 90753, 2009-Ohio-223; *State v. Gresham*, Cuyahoga App. No. 90433, 2008-Ohio-4248; *State v. Schultz*, Cuyahoga App. No. 85430, 2005-Ohio-6627.

{¶ 6} In order for a trial court to consider an untimely petition for postconviction relief, the petitioner must demonstrate either that he “was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, * * * the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right.” R.C. 2953.23(A)(1)(a) and (b). Alternatively, an untimely postconviction petition may be considered when DNA testing establishes the petitioner’s “actual innocence.” R.C. 2953.23(A)(2).

{¶ 7} In the present case, the trial transcript in Boynton’s direct appeal was filed on September 23, 2009. His petition was filed on March 24, 2010. Thus, it was not filed until 182 days after the trial transcript was filed in his direct appeal; therefore, the petition was untimely filed. Boynton does not claim to meet one of the statutory exceptions in R.C. 2953.23(A)(1) or (2); therefore, the trial court was without jurisdiction and properly denied the petition.

{¶ 8} Even if the petition had been timely filed, res judicata would have barred his claims. The arguments he raised in his petition are the identical arguments he raised in his fourth assigned error in his direct appeal. Res judicata precludes a defendant from raising in a petition for postconviction relief an ineffective assistance of counsel claim that was or could have been

raised at trial or on direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169. Accordingly, Boynton's assigned error is overruled.

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 be sent to said 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
JOSEPH J. VUKOVICH, J.,* CONCUR

(*Sitting by assignment, Judge Joseph J. Vukovich, of the 7th District Court of Appeals.)