

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-001

Appellee

Trial Court No. 2003CR0265

v.

Gerald Riley

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebbers and Jacqueline Assistant Prosecuting Attorneys,
for appellee.

Gerald Riley, pro se.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Wood County Court of Common Pleas, which dismissed appellant's petition for postconviction relief. Because we conclude that the trial court's dismissal was proper, we affirm.

{¶ 2} In 2003, appellant, Gerald L. Riley, pro se, was convicted of aggravated burglary, in violation of R.C. 2911.11(A)(1). Appellant appealed that conviction, filing the trial transcript in the Sixth District Court of Appeals on December 8, 2003. This court affirmed that conviction in part, but reversed in part, on errors related to his sentence and restitution order. See *State v. Riley*, 6th Dist. No. WD-03-076, 2007-Ohio-879. Appellant was resentenced and again appealed from that judgment. On appeal, this court again affirmed in part, and reversed in part, remanding to the trial court for resentencing. See *State v. Riley*, 6th Dist. No. WD-08-025, 2009-Ohio-3227.

{¶ 3} In August 2008, appellant filed a petition for postconviction relief, seeking to vacate his conviction for a variety of reasons. The trial court dismissed appellant's petition because it was filed beyond the time limit required under R.C. 2953.21(A)(2) and none of the exceptions to that time limit under R.C. 2953.23(A)(1) and (2) applied.

{¶ 4} Appellant argues the following three assignments of error:

{¶ 5} "First Assignment of Error:

{¶ 6} "The trial court erred barring Defendant's petition by the doctrine of res judicata.

{¶ 7} "Second Assignment of Error:

{¶ 8} "The trial court lacked jurisdiction of the subject matter where the indictment failed to charge an offense.

{¶ 9} "Third Assignment of Error:

{¶ 10} "Trial counsel was ineffective failing to dismiss the indictment."

{¶ 11} In his first assignment of error, appellant essentially claims that the trial court erred in barring his petition because it was not timely filed.

{¶ 12} A petition for postconviction relief must 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 * * *." R.C. 2953.21(A)(2). A trial court may not "entertain a petition filed after the expiration" of that time period, unless the petitioner can demonstrate one of the exceptions under R.C. 2953.23(A). The exception which is applicable¹ to appellant's petition includes two requirements. R.C.2953.23(A)(1). First, "the 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, * * *" or, subsequent to the time for filing the petition, "the United States Supreme Court recognized a new federal or state right" which is the basis of petitioner's claims. R.C.2953.23(A)(1)(a). Second, the petitioner must also show, 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. R.C.2953.23(A)(1)(b).

{¶ 13} In this case, appellant did not file his petition until August 22, 2008, more than four and a half years after the filing of the trial transcript in his direct appeal. As a result, since the petition was not timely on its face pursuant to R.C. 2953.21, appellant

¹The second exception, which provides that DNA testing establishes, by clear and convincing evidence, the actual innocence of a petitioner convicted of a felony, is inapplicable to appellant's case.

needed to establish both requirements under the exception provided in R.C.

2953.23(A)(1). Appellant did not establish that he was unavoidably prevented from discovering facts which supported his claim for relief nor did he cite any United States Supreme Court ruling which recognized a new federal or state right." Consequently, appellant did not meet the first requirement of the applicable exception to permit him to file his petition past the time limits of R.C. 2953.21. Therefore, the trial court properly dismissed appellant's petition for postconviction relief.

{¶ 14} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 15} Appellant's second and third assignments of error, which address the merits of his petition for postconviction relief, are moot.

{¶ 16} The judgment of the Wood County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.