

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-246 (C.P.C. No. 08CR-7192)
Keith A. James,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Loretta A. Riddle, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Keith A. James, appeals from a judgment of the Franklin County Court of Common Pleas denying as untimely his petition for post-conviction relief under R.C. 2953.21. Because the trial court properly concluded defendant's petition is untimely and does not fall into either of the statutory exceptions set forth in R.C. 2953.23, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed September 30, 2008, defendant was charged with two counts of trafficking in marijuana in violation of R.C. 2925.03, a felony of the second degree. The charges arose out of an investigation prompted when Old Dominion Freight Line contacted the High Intensity Drug Trafficking Awareness Task Force concerning a four cubic foot crate scheduled for delivery the next day. According to the bill of lading, it was to be delivered to the Joker's Wild Motorcycle Club on West Park Avenue.

{¶3} Police obtained a search warrant for the crate, opened it, and found four smaller boxes that contained approximately 300 pounds of marijuana. With that information, the officers scheduled a controlled delivery for the next day, June 30, 2008. A task force surveillance before and during the delivery revealed that defendant, Darryl Wood, and a third individual were walking around the premises. All three assisted in unloading and placing the crate on its arrival; Wood signed for the shipment using the name "Will Phillips." When an alarm placed in the crate went off on opening, the officers entered the building and arrested all three individuals.

{¶4} On the day defendant's trial was scheduled to begin, defendant filed a motion in limine that requested the court to exclude both "any mention of the death of Darryl Wood" as well as "testimony or the admission of the Dominion Freight Line receipt dated 6/17/08." The motion explained that Wood was murdered on December 9, 2008 during the pendency of defendant's case. Defendant argued Wood's murder "is a separate crime and is not evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶5} Defendant's trial concluded with a verdict of guilty on March 6, 2010 to Count 1 of the indictment and to Count 2 of the indictment, amended to possession of marijuana in violation of R.C. 2925.11, a second-degree felony. The trial court sentenced defendant to eight years on each count, to be served concurrently, a five-year driver's license suspension, and a \$15,000 mandatory fine.

{¶6} Defendant appealed from the trial court's judgment, filing a transcript of the proceedings on May 29, 2009. Defendant assigned three errors: (1) the trial court erred, after granting the motion in limine, in reserving ruling on the duplicate document obtained from the freight company, (2) counsel rendered ineffective assistance in failing to object to the introduction of a text message and the publication of the delivery document, and (3) prosecutorial misconduct denied defendant a fair trial. In a decision issued on December 1, 2009, this court overruled each of the assigned errors and affirmed the judgment of the trial court. *State v. James*, 10th Dist. No. 09AP-368, 2009-Ohio-6274. On March 10, 2010, the Supreme Court denied defendant leave to appeal and dismissed his appeal. *State v. James*, 124 Ohio St.3d 1510, 2010-Ohio-799.

{¶7} On May 18, 2010, defendant filed a petition for post-conviction relief pursuant to R.C. 2953.21. Defendant cited five grounds for relief: (1) newly discovered evidence defendant was unavoidably prevented from timely discovering, (2) a recent Ohio Supreme Court ruling making search of a person's cell phone without a warrant illegal, (3) newly discovered evidence that a juror presented to the judge, (4) ineffective assistance

of trial and appellate counsel in failing to attach the charging instruments, and (5) prosecutorial misconduct in presenting inadmissible or perjurious evidence. After the state responded, defendant, through counsel, filed a supplemental motion for post-conviction relief.

{¶8} In resolving the petition, the trial court initially noted the petition was not timely under R.C. 2953.21(A). Acknowledging the exceptions set forth in R.C. 2953.23(A) that permit an untimely filing, the court concluded neither applied to defendant's petition. Accordingly, the court determined it lacked jurisdiction to consider the petition and denied it as untimely.

II. Assignments of Error

{¶9} Defendant appeals, assigning three errors:

Assignment of Error No. I

WHEN THE STATE OF OHIO VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS AND FAILS TO COMPLY WITH DISCOVERY BY WITHHOLDING EVIDENCE IN VIOLATION OF CRIM. R. 16 AND *BRADY* THE STATE OF OHIO WAIVES AND FORFEITS ANY TIME BARRIERS TO POST CONVICTION RELIEF UNDER R.C. § 2953.23 UNLESS THE STATE OF OHIO SEEKS AN *EX PARTE* ORDER INDICATING THAT THE EVIDENCE IS NOT MATERIAL, DISCOVERABLE, EXCULPATORY OR INCULPATORY OR SEEKS A MOTION IN LIMINE.

Assignment of Error No. II

KEITH JAMES MET HIS BURDEN IN ESTABLISHING NEWLY DISCOVERED EVIDENCE WHEN HE SUPPLIES [sic] SUFFICIENT INFORMATION ESTABLISHING THAT THE STATE OF OHIO WITHHELD EVIDENCE THAT A CO-OPERATING CO-DEFENDANT HAD "THREE BALES OF MARIJUANA" WHEN KEITH JAMES' THEORY OF THE CASE WAS THAT THE CO-DEFENDANT WAS THE OWN-

ER OF DRUGS CONTAINED IN THE INDICTMENT. THE COURT ABUSES IT'S DISCRETION BY NOT GRANTING JAMES' PETITION.

Assignment of Error No. III

THE TRIAL COURT ERRED BY NOT GRANTING JAMES' PETITION GRANTING RELIEF [sic] IN LIGHT OF *STATE V. SMITH*.

Although defendant's arguments on appeal raise several issues, his petition fails for at least one reason: the petition is untimely.

III. Applicable Law

{¶10} A petition for post-conviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. "It is a means to reach constitutional issues which 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. R.C. 2953.21 affords a prisoner post-conviction 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, paragraph four of the syllabus. A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32, appeal not allowed, 97 Ohio St.3d 1423, 2002-Ohio-5820; *Murphy*.

{¶11} 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). Defendant's trial transcript was filed in his direct appeal on May 29, 2009. His petition, however, was not filed until May 18, 2010, well outside the time limits imposed under R.C. 2953.21(A)(2).

{¶12} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless a defendant initially demonstrates either (1) the defendant 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). If a defendant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires the defendant also to demonstrate that but for the constitutional error at trial, no reasonable fact finder would have found the defendant guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b). Defendant's three assignments of error are interrelated and address the exceptions under R.C. 2953.23(A) and their effect on the timeliness of defendant's petition.

IV. Timeliness of Defendant's Petition under R.C. 2953.21 and 2953.23

A. Brady v. Maryland

{¶13} Defendant initially contends the trial court erred in finding defendant's petition untimely, as the state violated the principles in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct.1194 and thus waived or forfeited the time restrictions set forth in R.C. 2953.21 and 2953.23. Defendant's contention suffers both statutory and common law deficiencies.

{¶14} Initially, the time constraint set forth in R.C. 2953.21 is jurisdictional. R.C. 2953.23; *State v. King*, 5th Dist. No. CT2011-0006, 2011-Ohio-4529; *State v. Sargent*, 12th Dist. No. CA2001-11-270, 2002-Ohio-3597, ¶6 (stating "[a] trial court does not have jurisdiction to entertain an untimely filed petition for postconviction relief that does not meet the requirements set forth by R.C. 2953.23(A)(1) and (2)"). The state neither may waive nor forfeit a jurisdictional limitation. *In re King* (1980), 62 Ohio St.2d 87 (noting the lack of subject matter jurisdiction is not waivable).

{¶15} Moreover, the legislature specified the terms on which a defendant may exceed the 180-day time limit set forth in R.C. 2953.21: through newly discovered evidence the defendant was unavoidably prevented from earlier discovering or a United States Supreme Court case that recognizes a new federal or state right to be applied retroactively to defendant's circumstances, each coupled with the requisite prejudice. A *Brady* violation is not included within those exceptions, and case law does not suggest such an exception could be, much less has been, recognized. To the contrary, even in the context of a *Brady* claim, the Supreme Court applied the time constraints of R.C. 2953.21 by looking to an exception under R.C. 2953.23 to determine whether the petition was timely. See *State v. Broom*, 123 Ohio St.3d 114, 2009-Ohio-4778 (applying R.C. 2953.23 and holding, in defendant's post-conviction relief asserting the state committed a *Brady* violation at trial, that defendant was well outside the time restraints of R.C. 2953.21 and had not been unavoidably prevented from discovering facts underlying his claim).

B. *R.C. 2953.23 - The Exceptions*

{¶16} Although defendant devotes much of his appellate brief to arguing a *Brady* violation, the issue is not whether the state violated *Brady*, but whether defendant falls within either of the two exceptions set forth in R.C. 2953.23(A) for avoiding the 180-day time limit of R.C. 2953.21. If he does, he must additionally show that no fact finder would have found him guilty of the offenses for which he was convicted but for the constitutional error.

1. First Exception - Prevented from Discovering the Evidence

{¶17} Defendant first contends he was unavoidably prevented from discovering the evidence he contends would have changed the outcome of the trial. According to defendant, had he known of the considerable amount of marijuana discovered in Wood's home at the time of his death, defendant would have been able to convince the jury that Wood, not defendant, was both the drug dealer and the party responsible for the incident giving rise to defendant's conviction.

{¶18} Defendant, however, knew of Wood's death before trial and filed a motion in limine to prevent evidence of the murder from being presented to the jury. Nonetheless, even if we assume, without deciding, that defendant could not have discovered the evidence unless the prosecution so informed him, he also must demonstrate that, had he been given the evidence, no reasonable fact finder would have found him guilty of the offenses with which he was charged.

{¶19} Defendant cannot meet his burden, as other evidence in the record revealed defendant's involvement, including evidence of defendant's involvement in

various aspects of the wait for, and handling of, the shipment, as well as defendant's telling Duane Williams, with whom he had been incarcerated, that he was arrested for drug trafficking, described the circumstances of the arrest, and advised Williams that he and Wood were members of, as they referred to it, the Joker's Wrath Motorcycle Club where they received the shipment. Moreover, Wood's involvement with drugs was undisputed, so the additional evidence would have only provided more support for a proposition already before the jury. Indeed, defendant does not address whether evidence concerning the bales of marijuana found in Wood's home at the time of his murder would have been admissible in defendant's trial, since they involved a separate time period and location. Lastly, the trial court instructed that defendant could be found guilty as either a principal offender or a complicitor, so his successfully portraying Wood as the principal drug dealer would not have exonerated defendant. The exception in R.C. 2952.23(A)(1)(a) does not apply.

2. Second Exception—United States Supreme Court case

{¶20} Defendant next relies on the Ohio Supreme Court's decision in *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, cert. denied, 131 S.Ct. 102, to support his contention that the United States Supreme Court recognized a new federal or state right that applies retroactively and allows him to file outside the 180-day time limit set forth in R.C. 2953.21. As the trial court observed, *Smith* is a decision of the Ohio State Supreme Court, not the United States Supreme Court. Accordingly, it falls outside the second exception in R.C. 2953.23(A)(1)(b).

{¶21} Because neither exception in R.C. 2953.23 extending the 180-day time limit of R.C. 2953.21 applies to defendant's case, the trial court properly concluded defendant's petition is untimely. Defendant's three assignments of error are overruled.

V. Disposition

{¶22} Having overruled all three of defendant's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
