

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-838
 : (C.P.C. No. 99CR-1914)
 Michael A. Steward, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 12, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Michael A. Steward, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Michael A. Steward, appeals from a judgment of the Franklin County Court of Common Pleas in which the trial court dismissed appellant's petition for post-conviction relief pursuant to R.C. 2953.21. For the following reasons, we affirm.

{¶2} Prior to addressing appellant's assignments of error, we note that the present appeal marks the third time this court has ruled on issues relating to appellant's convictions stemming from a robbery and murder committed on March 11, 1999. See *State v. Steward* (May 24, 2001), 10th Dist. No. 00AP-984 ("*Steward I*"), and *State v. Steward*, 10th Dist. No. 08AP-974, 2009-Ohio-2990 ("*Steward II*"). Due to the longevity of

this case, a brief discussion regarding its procedural history is necessary in order to provide a framework for the matter currently before this court.

{¶3} On May 26, 1999, appellant was indicted on three counts of aggravated murder, one count of aggravated robbery, and one count of aggravated burglary, each with a firearm specification. *Steward I*. On August 4, 2000, the trial court found appellant guilty of the lesser-included offense of involuntary manslaughter in violation of R.C. 2903.04, and aggravated robbery, in violation of R.C. 2911.01, both first-degree felonies with firearm specifications. *Id.* The same day, the trial court sentenced appellant to nine years on the involuntary manslaughter count and six years on the aggravated robbery count, to be served consecutively. In addition, the trial court imposed an additional three-year term of incarceration for use of a firearm, totaling 18 years. *Id.*

{¶4} In *Steward I*, we overruled appellant's first and second assignments of error as to weight and sufficiency of the evidence, but sustained appellant's third assignment of error regarding the imposition of consecutive sentences without making the findings required by R.C. 2929.14. *Id.* Therefore, we affirmed in part and reversed in part and remanded the matter back to the trial court for resentencing. *Id.*

{¶5} On October 29, 2001, the trial court held a resentencing hearing and orally reimposed appellant's original sentence of 18 years. *Steward II* at ¶5. Subsequent to the hearing, the trial court failed to file a formal resentencing entry. *Id.* On October 22, 2008, approximately seven years after the resentencing hearing, the trial court filed an entry journalizing the previously imposed oral sentence. *Id.* at ¶6.

{¶6} In *Steward II*, we overruled appellant's three assignments of error regarding (1) alleged violation of R.C. 2941.25, Ohio's allied offense statute; (2) denial of effective

assistance of counsel; and (3) a claim that appellant was entitled to discharge due to the seven-year delay between sentencing and journalizing that sentence. *Id.* at ¶6. We, therefore, affirmed the trial court's decision.

{¶7} On June 21, 2010, appellant filed a petition for post-conviction relief. Therein, appellant admitted that the petition was untimely filed; however, he claimed that, pursuant to R.C. 2953.23(A), "he was unavoidably prevented from the discovery of the facts" entitling him to relief. (See June 21, 2010 Motion for Post-Conviction Relief.) Appellant also alleged that prosecutorial misconduct at the resentencing hearing on October 29, 2001, resulted in the trial court making "unconstitutional" fact findings in issuing consecutive sentences.

{¶8} As evidence in support of his petition, appellant attached: (1) a letter to the clerk of courts requesting a copy of a judgment entry in Franklin County C.P. No. 92JU-06-6082, (2) a letter from Franklin County Court of Common Pleas dated March 12, 2010, stating that, due to the age of the case, recordings of hearings are no longer available, (3) several "name inquiry" sheets dated April 18, 2002, (4) a journal entry in case No. 95JU-02-1008, (5) a magistrate's decision in case No. 95JU-08-6757, and (6) a judgment entry in case No. 92JU-06-6082. (See Motion for Post-Conviction Relief.)

{¶9} On June 30, 2010, the state filed its answer and motion to dismiss, arguing that: (1) appellant's petition is untimely, pursuant to R.C. 2953.21(A)(2), because the "180-day" time limit expired in June of 2009; (2) appellant does not meet the exception for "untimeliness," pursuant to R.C. 2953.23(A)(1)(a); and (3) appellant's petition is barred by *res judicata*. (See June 30, 2010 State's Answer and Motion to Dismiss Defendant's Post-Conviction Petition.)

{¶10} On August 16, 2010, the trial court denied appellant's petition for lack of jurisdiction because: (1) pursuant to R.C. 2953.21(A)(2), the petition was untimely, and (2) pursuant to R.C. 2953.21(A)(1)(b), appellant did not meet an exception to the 180-day time limit for filing the petition.

{¶11} On September 3, 2010, appellant filed a timely notice of appeal, setting forth two assignments of error for our consideration:

[1.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF UNDER [R.C.] 2953.23.

[2.] APPELLANT WAS DENIED DUE PROCESS TO A FAIR SENTENCING HEARING DUE TO THE MISCONDUCT OF THE PROSECTOR.

{¶12} R.C. 2953.21(A)(2) establishes the time limitations for filing a petition for post-conviction relief. *State v. Martin*, 10th Dist. No. 06AP-798, 2007-Ohio-1844, ¶7, see also *State v. McAllister*, 10th Dist. No. 06AP-843, 2007-Ohio-1816, ¶7. Here, appellant admits that his petition for post-conviction relief is untimely. Therefore, prior to addressing appellant's assignments of error, we must first determine whether the trial court had jurisdiction to consider appellant's petition for post-conviction relief. See *State v. Biddings*, 10th Dist. No. 04AP-1236, 2005-Ohio-3145, ¶6.

{¶13} In determining who is eligible to file a petition for post-conviction relief, R.C. 2953.21(A)(1)(a) states, in relevant part:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child 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.

Further, in determining the time limitations for filing the petition, R.C. 2953.21(A)(2) states, in relevant part:

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[.]

Finally, if a petition for post-conviction relief is untimely, R.C. 2953.23(A) states, in relevant part:

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) or (2) of this section applies:

(1) Both of the following apply:

(a) Either 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 period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.

(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[.]

{¶14} We briefly note that R.C. 2953.23(A)(2) is not applicable to the present matter because DNA evidence is not an issue on appeal.

{¶15} In the present matter, appellant filed a petition for post-conviction relief pursuant to R.C. 2953.21(A)(1)(a). However, pursuant to R.C. 2953.21(A)(2), appellant's petition 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 or adjudication." Here, the record shows that the trial transcript for *Steward II* was filed with this court on December 18, 2008. Therefore, appellant's time for filing his petition expired on approximately June 18, 2009. The record also shows that appellant filed his petition for post-conviction relief on June 21, 2010, almost one year after the expiration of the time for filing.

{¶16} Appellant, however, argues that pursuant to the exception for filing an untimely petition stated in R.C. 2953.23(A)(1)(a), he "was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief" (Appellant's Brief at 1) and, therefore, his petition for post-conviction relief is properly before the trial court.

{¶17} In *Biddings* at ¶9, this court addressed a similar fact pattern wherein the appellant conceded that he failed to meet the time requirement for filing his petition for post-conviction relief. In *Biddings*, the appellant also asserted that he "was unavoidably prevented from discovery of the facts upon which he must rely to present all of his claims for post-conviction relief," claiming that "the prosecutor's office and the police would not provide him with any information or documentation pertaining to his criminal convictions." *Id.* The state argued that, pursuant to R.C. 2953.23(A)(1)(a), the appellant failed to "indicate what evidence he was 'unavoidably prevented' from obtaining, and what information exists that he does not have access to in support of his claims." *Id.* at ¶10.

{¶18} This court held that the appellant "failed to satisfy the condition in R.C. 2953.23(A)(1)(a) that he was 'unavoidably prevented' from timely discovering facts in support of his claims." *Id.* Further, we held that, pursuant to R.C. 2953.23(A)(1)(b), the appellant "failed to allege, much less establish, that this exception applies to the instant matter." *Id.* at ¶11. Therefore, we determined that the trial court lacked jurisdiction to consider the appellant's petition for post-conviction relief and sua sponte dismissed the appeal. *Id.* at ¶12.

{¶19} Here, pursuant to R.C. 2953.23(A)(1)(a), appellant merely asserts that "he was unavoidably prevented from the discovery of the facts in which will entitle him to relief"; however, appellant does not further explain, in any type of detail, how or why he was "unavoidably prevented" from timely discovering facts in support of his claims for relief. (See Motion for Post-Conviction Relief.) Appellant further contends that "[he] acted diligently to gather the facts that were contrary to the prosecutor's misrepresentation of defendant's violent juvenile criminal convictions." (See Motion for Post-Conviction Relief.) In support of this contention, appellant attaches a letter to the clerk of courts, along with a response from the clerk of courts, and admits that "the clerk did provide defendant with journal entries of his juvenile records." (See Motion for Post-Conviction Relief.) Therefore, based upon the foregoing, appellant clearly does not meet the exception set forth in R.C. 2953.23(A)(1)(a), in that he did not prove that he was "unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief."

{¶20} Further, pursuant to R.C. 2953.23(A)(1)(b), appellant fails to "[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." In fact, similar to *Biddings*, appellant's petition for post-conviction relief does not allege that R.C. 2953.23(A)(1)(b) applies to the instant matter, nor does it provide *any* evidence in support of R.C. 2953.23(A)(1)(b). Therefore, in arguendo, even if appellant did prove that, pursuant to R.C. 2953.23(A)(1)(a), he was unavoidably prevented from discovering facts upon which he must rely to present his claim for relief, appellant failed to prove that, pursuant to R.C. 2953.23(A)(1)(b), no reasonable fact finder would have found him guilty of the alleged crimes, but for a constitutional error at trial.

{¶21} Finally, we note that, in his petition, appellant referenced *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and urged the court to order a new sentencing hearing "without the trial court imposing judicial factfindings." Appellant makes this request in the context of his discussion regarding the second assignment of error: that appellant was denied due process to a fair sentencing hearing because of alleged prosecutorial misconduct. As such, appellant argues that the trial court erred at sentencing by taking into consideration information, supplied by the prosecutor, regarding appellant's juvenile record. Nevertheless, appellant, represented by counsel at the time, did not raise a *Foster* argument on direct appeal of his sentence, imposed pursuant to remand in *Steward I*. See generally *Steward II*.

{¶22} In *State v. Thompkins*, 10th Dist. No. 08AP-454, 2008-Ohio-5373, ¶12 ("*Thompkins III*"), we stated that "[u]nder the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal." See *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337. See also ¶16 of

Thompkins III and ¶21, fn. 2 of *State v. Thompkins*, 10th Dist. No. 07AP-74, 2007-Ohio-4315 ("*Thompkins II*"). Based upon the foregoing, we conclude that res judicata bars consideration of a *Foster* claim at this time.

{¶23} Therefore, because appellant failed to establish the applicability of R.C. 2953.23(A)(1)(a) or (b), which would have allowed the trial court to consider his untimely petition, we find that the trial court lacked jurisdiction to consider appellant's petition for post-conviction relief. We also find that principles of res judicata bar appellant's *Foster* claim.

{¶24} Accordingly, the trial court did not err in denying appellant's petition for post-conviction relief, although "technically the petitions should have been dismissed for lack of jurisdiction." See *Martin* at ¶11. Therefore, our disposition of the jurisdictional issue renders both of appellant's assignments of error moot, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
