

[Cite as *State v. Abdussatar*, 2009-Ohio-5232.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92439

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WAJID ABDUSSATAR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-454996

BEFORE: Blackmon, J., McMonagle, P.J., and Jones, J.

RELEASED: October 1, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Wajid Abdussatar (“Abdussatar”) appeals, pro se, the trial court’s denial of his motion to set aside or vacate his sentence. Abdussatar assigns the following errors for our review:

“I. The trial court erred to the prejudice of appellant when it denied the petition without an evidentiary hearing.”

“II. Appellant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On August 4, 2004, a the Cuyahoga County Grand Jury indicted Abdussatar on one count of rape, kidnapping, and aggravated burglary. A jury found him guilty of the rape and kidnapping. On April 20, 2005, the trial court sentenced him to an eight-year prison term. Abdussatar appealed his conviction, and in *State v. Abdussatar*,¹ we affirmed his conviction.

{¶ 4} On January 10, 2008, Abdussatar filed a motion to set aside or vacate his sentence. In his motion, he asserted the indictment was defective and that he was denied access to evidence. The trial court denied the motion and Abdussatar now appeals.

Post-Conviction Relief

¹Cuyahoga App. No. 86406, 2006-Ohio-803.

{¶ 5} In the first assigned error, Abdussatar argues the trial court erred when it denied his petition to set aside or vacate his sentence. We disagree.

{¶ 6} A petition for post-conviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment.² It is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record.³

{¶ 7} 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.”⁴ A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction.⁵

{¶ 8} 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

²*State v. Easley*, 10th Dist. No. 09AP-10, 2009-Ohio-3879, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111.

³*State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441.

⁴*State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus.

⁵*State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32; *Murphy*, supra.

of appeals in the direct appeal of the judgment of conviction or adjudication.”⁶
The amendment further provides that “[i]f no appeal is taken * * * the petition shall be filed no later than 180 days after the expiration of the time for filing the appeal.”⁷

{¶ 9} Because Abdussatar’s trial transcript was filed in this court on May 17, 2005, after the effective date of amended R.C. 2953.21, Abdussatar, who appealed his conviction, was required to file his petition within 180 days after the expiration of the time for filing an appeal. Abdussatar filed his motion on January 10, 2008, more than two years after we issued our opinion in his direct appeal. Consequently, Abdussatar’s petition was untimely and left the trial court without jurisdiction to consider it.⁸

{¶ 10} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he 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

⁶R.C. 2953.21(A)(2).

⁷Id.

⁸*State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340.

retroactively to persons in defendant's situation.⁹ If Abdussatar were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also demonstrate that but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted.¹⁰

{¶ 11} Abdussatar satisfies neither of the above two conditions. In his petition, he failed to indicate how he was unavoidably prevented from discovering facts necessary for the claim for relief. In addition, he failed to assert any new federal or state right recognized by the United States Supreme Court that would retroactively apply to him. Instead, he merely alleged that the indictment was defective and that he was denied access to evidence.

{¶ 12} Based on the foregoing, the trial court was without jurisdiction to consider Abdussatar's motion to vacate his sentence. Moreover, our review of the petition, including the attached affidavit, indicates that all the complained-of issues could have been addressed in Abdussatar's direct appeal. Consequently, even if the trial court had jurisdiction to entertain Abdussatar's petition, it would be barred by the doctrine of res judicata.

{¶ 13} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process

⁹R.C. 2953.23(A)(1)(a).

that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.”¹¹

{¶ 14} Nonetheless, Abdussatar argues the trial court denied his petition without a hearing. A criminal defendant seeking to challenge his or her conviction through a petition for post-conviction relief is not automatically entitled to a hearing.¹² Prior to granting a hearing, the court shall determine whether there are substantial grounds for relief.¹³

{¶ 15} Pursuant to the provisions of R.C. 2953.21(C), a trial court properly denies a defendant’s petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.¹⁴

{¶ 16} We review a trial court’s decision to deny a post-conviction petition without a hearing under the abuse of discretion standard.¹⁵ Res judicata is a

¹⁰R.C. 2953.23(A)(1)(b).

¹¹*State v. Reynolds*, 5th Dist. No. 09-CA-13, 2009-Ohio-3998, quoting *State v. Perry* (1967), 10 Ohio St.2d 175.

¹²*State v. Vinson*, 10th Dist. No. 09AP-163, 2009-Ohio-3751, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113.

¹³*Id.*, R.C. 2953.21(C).

¹⁴*Id.*, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102.

¹⁵*State v. Banks*, 10th Dist. No. 08AP-722, 2009-Ohio-1667, ¶10.

proper basis upon which to dismiss, without a hearing, an R.C. 2953.21 petition.¹⁶

A petition for post-conviction relief may be dismissed without a hearing, based upon the doctrine of res judicata, if the trial court finds that the petitioner could have raised the issues in the petition at trial or on direct appeal without resorting to evidence beyond the scope of the record.¹⁷

{¶ 17} Here, we find no abuse of discretion in denying the petition without a hearing. Accordingly, we overrule Abdussatar's first assigned error.

Ineffective Assistance of Counsel

{¶ 18} In the second assigned error, Abdussatar argues he was denied effective assistance of counsel. We decline to address this assigned error, because Abdussatar raised ineffective assistance of counsel in his direct appeal.¹⁸

{¶ 19} Under the doctrine of res judicata, as discussed above, this assigned error is barred. Accordingly, we overrule the second assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹⁶Id. at ¶9.

¹⁷*State v. Scudder* (1998), 131 Ohio App.3d 470, 475.

¹⁸*Abdussatar*, Cuyahoga App. No. 86406, 2006-Ohio-803.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR