

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-16
BRIAN A. CRAWFORD	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas Court Case No. 2007-CR-
411D

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 29, 2009

APPEARANCES:

For Plaintiff-Appellee:

Kirsten L. Pscholka-Gartner
Assistant Richland County Prosecutor
38 South Park Street
Mansfield, Ohio 44902

For Defendant-Appellant:

Brian A. Crawford
Inmate No. A540-154
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, Ohio 45699

Delaney, J.

{¶1} Appellant, Brian A. Crawford, appeals the January 23, 2009, entry of the Richland County Court of Common Pleas denying his *pro se* “Petition to Vacate or Set Aside Judgment of Conviction or Sentence”. For the following reasons, we affirm.

{¶2} In 2007, Appellant was found guilty by a jury of eight counts of rape, fifteen counts sexual battery and twenty counts of gross sexual imposition. He was sentenced to a total of 40 years for those offenses, found to be a sexual predator and also a Tier III sex offender.

{¶3} Appellant pursued a direct appeal and this Court affirmed Appellant’s conviction and sentence in *State of Ohio v. Brian A. Crawford*, Richland County App. 07 CA 116, 2008-Ohio-6260. On April 8, 2009, the Ohio Supreme Court denied leave to appeal as the case did not involve any substantial constitutional question.

{¶4} On November 3, 2008, Appellant filed the instant motion pursuant to R.C. 2953.21, Ohio’s post-conviction relief statute. In his memorandum in support, Appellant insists that his 2007 conviction is void or voidable because his trial counsel rendered ineffective assistance of counsel. First, he claims his trial counsel was ineffective for failing to seek admission of the results of his polygraph test at trial. Second, Appellant asserts trial counsel failed to inform the trial court a potential juror could be biased due to a “strained past personal issue” with Appellant’s brother.

{¶5} The trial court issued a decision denying the motion. The decision is supported by detailed findings of fact and conclusions of law. The trial court found the motion was untimely under R.C. 2953.21(A)(2), which requires that a petition of post-conviction relief must be filed no later than 180 days after the date the trial transcript is

filed in the direct appeal from the judgment of conviction and sentence. The trial court stated that the transcript was filed on May 1, 2008, and Appellant had until October 29, 2008, to file the petition. The petition was filed on November 3, 2008; therefore, the trial court found the petition was untimely by four days. The trial court found it was without jurisdiction to hear the untimely petition because two conditions found in R.C. 2053.21 (A)(1) did not apply; namely, the petition did not demonstrate Appellant was unavoidably prevented from the discovery of facts upon which Appellant relied to present his claims or the U.S. Supreme Court recognized a new federal or state right that applies to the Appellant's situation and the petition asserts a claim based on that right.

{¶6} The trial court further found Appellant's two arguments of ineffective assistance of counsel were available and were made on direct appeal, therefore the doctrine of *res judicata* bars the claims. From that judgment, Appellant now brings this appeal.

{¶7} Appellant raises four Assignments of Error:

{¶8} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S POST CONVICTION PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

{¶9} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S POST CONVICTION PETITION FINDING RES JUDICATA BARRED CONSIDERATION OF THE MERITS.

{¶10} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING APPELLANT'S POST CONVICTION PETITION WAS TIME BARRED.

{¶11} "IV. THE TRIAL COURT ERRED IN CONSIDERING THE STATE'S OPPOSITION TO THE APPELLANT'S POST CONVICTION PETITION.

STANDARD OF REVIEW

{¶12} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶13} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form."

{¶14} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶15} This appeal shall be considered in accordance with the aforementioned rules.

III.

{¶16} We will begin by addressing Appellant's third assignment of error because it is dispositive of this appeal. Appellant contends the trial court erred in finding the petition was filed untimely filed.

{¶17} R.C. 2953.21 sets forth the requirements for filing a petition for postconviction relief. R.C. 2953.21(A)(2) provides:

{¶18} “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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, * * * the petition shall be filed no later than one hundred and eighty days after the expiration of the time for filing the appeal.”

{¶19} Pursuant to this statute, Appellant had to file his conviction petition no later than 180 days after May 1, 2008, the date the trial transcript was filed in his direct appeal of the judgment of conviction to this Court. Thus, the petition was due on or around October 29, 2008. Appellant did not file his petition until November 3, 2008. Therefore, Appellant’s petition was filed beyond the 180-day period.

{¶20} Appellant concedes his motion was untimely filed. Appellant contends that due to his incarceration his petition was delayed by “agents of the state”. He urges this Court to find that the filing date of the motion should be the mailing date indicated on the motion’s certificate of service, which is October 29, 2008. We find Appellant’s contention to be without merit. The plain language of the statute clearly indicates the petition must be filed, not mailed, within the 180-day period.

{¶21} A trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless petitioner demonstrates that one of the exceptions in R. C. 2953.23(A) applies. A petitioner must satisfy a two-pronged test by demonstrating that (1) he was unavoidably prevented from discovering the facts upon which he based his petition, or that the petitioner’s claim was based upon a newly-created federal or state right; (2) clear and convincing evidence demonstrated that no reasonable fact-finder

would have found him guilty in the absence of the constitutional error. See, R.C. 2953.23(A)(1)(a) and (b).

{¶22} In his petition for post-conviction relief, Appellant raises the claim of ineffective assistance of counsel based upon failure to present evidence of a polygraph examination of the Appellant and failure to properly inform the trial court a potentially biased juror. Both of these matters were either known to Appellant at the time of trial, or facts which he was not unavoidably prevented from discovering. Nor do these claims rely on a newly recognized federal or state right.

{¶23} Because Appellant failed to establish the applicability of an exception that would allow the trial court to consider his untimely petition, the trial court lacked jurisdiction to entertain his petition for postconviction relief.

{¶24} Accordingly, Appellant's third assignment of error is overruled.

I., II. & IV.

{¶25} Our disposition of the jurisdictional issue renders moot Appellant's remaining assignments of error.

{¶26} Accordingly, we affirm the judgment of the Richland County Court of Common Pleas.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

JUDGES

[Cite as *State v. Crawford*, 2009-Ohio-5176.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRIAN A. CRAWFORD	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-16
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

JUDGES