

[Cite as *State v. Billiter*, 2009-Ohio-6788.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

FRED L. BILLITER, JR.

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09AP100055

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 1999CR080159

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 22, 2009

APPEARANCES:

For Plaintiff-Appellee

MICHAEL J. ERNEST
125 East High Avenue
New Philadelphia, OH 44663

For Defendant-Appellant

FRED L. BILLITER, JR., PRO SE
15708 McConnellsville Road
Caldwell, OH 43724

Farmer, P.J.

{¶1} On November 1, 1999, appellant, Fred Billiter, Jr., pled guilty to two counts of rape in violation of R.C. 2907.02, one count of pandering obscenity involving a minor in violation of R.C. 2907.321, and one count of gross sexual imposition in violation of R.C. 2907.05. By judgment entry filed November 3, 1999, the trial court sentenced appellant to an aggregate term of thirty-one years in prison.

{¶2} On September 14, 2009, appellant filed a pro se motion for relief from judgment pursuant to Civ.R. 60(B) and Crim.R. 57(B). By judgment entry filed September 29, 2009, the trial court denied the motion.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE APPELLANT'S UNITED STATES FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE HAD FAILED TO PROPERLY EXECUTE A SEARCH WARRANT ON THE APPELLANT'S RESIDENCE THEREBY VIOLATING HIS UNITED STATES FOURTH AMENDMENT RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE."

I

{¶5} Appellant claims the trial court erred in denying his motion for relief from judgment pursuant to Civ.R. 60(B) and Crim.R. 57(B) regarding violations of his due process rights. We disagree.

{¶6} Appellant filed his pro se motion pursuant to Civ.R. 60(B) via Crim.R. 57(B) which states, "If no procedure is specifically prescribed by rule, the court may

proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."

{¶7} In *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶11, the Supreme Court of Ohio reviewed a similar filing and held the following:

{¶8} "We must now consider whether Schlee properly resorted to Civ.R. 60(B) in this case, that is, whether the absence of an applicable Criminal Rule justified invoking a Civil Rule in its place. The state contends, and we agree, that Crim.R. 35, which sets forth the procedure by which criminal defendants can file petitions for postconviction relief, was available to Schlee and serves the same purpose as the Civ.R. 60(B) motion he filed."

{¶9} Crim.R. 35 provides for petitions for postconviction relief pursuant to R.C. 2953.21. Subsection (A)(2) states the following:

{¶10} "(2) 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 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, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

{¶11} The trial court sentenced appellant on November 3, 1999. Appellant did not file a direct appeal. Nearly ten years later, appellant filed the subject motion for

relief from judgment on September 14, 2009. Therefore, pursuant to R.C. 2953.21(A)(2), we find the statutory time period for appellant's motion for postconviction relief had expired.

{¶12} A trial court does not have any jurisdiction to hear an untimely petition for postconviction relief unless the movant meets the requirements in R.C. 2953.23(A). *State v. Tanner*, Muskingum App. No. CT2005-0022, 2005-Ohio-5377. R.C. 2953.23(A) states the following:

{¶13} "(A) 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:

{¶14} "(1) Both of the following apply:

{¶15} "(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.

{¶16} "(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 or, if the claim challenges a

sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence."

{¶17} Upon review, we find appellant has not shown any reason under R.C. 2953.23(A) for the untimely filing of his motion.

{¶18} Also, appellant's arguments about the execution of the search warrant was available on direct appeal. He failed to file a direct appeal. Therefore, appellant's arguments are barred under the doctrine of res judicata. As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraphs eight and nine of the syllabus, the doctrine of res judicata is applicable to petitions for postconviction relief. The *Perry* court explained the doctrine at 180-181 as follows:

{¶19} "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 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."

{¶20} Upon review, we find the trial court did not err in denying appellant's Civ.R. 60(B) motion for relief from judgment.

{¶21} The sole assignment of error is denied.

{¶22} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio
is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

SGF/db 1201

