

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CA 0091
	:	
	:	
ANDREW J. CHAMBERS	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Licking County Court of Common Pleas Case No. 08 CR 435

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: June 28, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor

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Edwards, P.J.

{¶1} Defendant-appellant, Andrew Chambers, appeals from the June 8, 2009, Judgment Entry of the Licking County Court of Common Pleas denying his Petition for Post-Conviction Relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 27, 2008, the Licking County Grand Jury indicted appellant on one count (Count One) of attempted murder in violation of R.C. 2923.02(A) and 2903.02(A), a felony of the first degree, one count of felonious assault (Count Two) in violation of R.C. 2903.11(A)(1) and/or (A)(2), a felony of the second degree, and one count of aggravated robbery (Count Three) in violation of R.C. 2911.01(A)(1) and/or (A)(3), a felony of the first degree. Appellant also was indicted on one count of kidnapping (Count Four) in violation of R.C. 2905.01(A)(2) and/or (A)(3), a felony of the first degree, two counts of kidnapping (Counts Five and Six) in violation of R.C. 2905.01(A)(2), felonies of the second degree, one count of disrupting public services (Count Seven) in violation of R.C. 2909.04(A)(1), a felony of the fourth degree, and one count of tampering with evidence (Count Eight) in violation of R.C. 2921.12(A)(1), a felony of the third degree. At his arraignment on July 8, 2008, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on November 26, 2008, appellant withdrew his former not guilty plea and pleaded no contest to Counts Three, Four, Five and Six and guilty to Counts Two and Eight. As memorialized in a Judgment Entry filed on November 26, 2008, appellant was sentenced to aggregate prison sentence of ten (10) years. Upon

appellee's motion, Counts One and Seven were dismissed with prejudice via an Entry filed on December 2, 2008.

{¶4} Appellant filed a Notice of Appeal on May 14, 2009, and a Motion for Leave to File a Delayed appeal. The appeal was assigned Case No. 09 CA 0068.

{¶5} On June 8, 2009, appellant filed a Petition for Post-Conviction Relief pursuant to R.C. 2953.21. Such motion was denied as memorialized in a Judgment Entry filed on the same day.

{¶6} Pursuant to a Judgment Entry filed on June 15, 2009, this Court denied appellant's pro se motion for leave to file a delayed appeal from his conviction and sentence in Case No. 09 CA 0068.

{¶7} Appellant now raises the following assignments of error on appeal:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S (SIC) POST CONVICTION PETITION WITHOUT MAKING FINDINGS OF FACTS AND CONCLUSIONS OF LAW IN VIOLATION OF APPELLANT'S 14TH AMENDMENT RIGHT OF THE U.S. CONSTITUTION.

{¶9} "1-A. PETITIONER'S 6TH AND 14TH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN HIS COUNSEL FAILED TO CONSULT WITH AN EXPERT IN THE FIELD OF POST TRAUMATIC STRESS DISORDER AND FAILED TO HAVE EXPERT TESTIFY ON PETITIONER'S BEHALF.

{¶10} "II. PETITIONER'S 6TH AND 14TH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN HIS COUNSEL FAILED TO CONDUCT A (SIC) ADEQUATE, REASONABLE INVESTIGATION.

{¶11} “III. PETITIONER’S GUILTY PLEA WAS NOT MADE VOLUNTARILY OR INTELLIGENTLY DUE TO HIS MENTAL DISORDER, AND THE COERCION TACTIC USED BY HIS COUNSEL (SIC), COUNSEL PROMISED PETITIONER HE WOULD NOT RECEIVE MORE THAN A FIVE (5) YEAR TERM OF IMPRISONMENT IN EXCHANGE FOR HIS GUILTY PLEA. IN VIOLATION OF PETITIONER’S 6TH AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION.

{¶12} “IV. PETITIONER’S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED DUE TO THE STRUCTURAL ERROR WITHIN HIS INDICTMENT.

{¶13} “V. PETITIONER’S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED WHEN THE GRAND JURY WAS PROVIDED FALSE OR MISLEADING TESTIMONY TO SECURE A CHARGE OF FELONIOUS ASSAULT.”

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{¶14} Appellant, in his first assignment of error, argues that the trial court erred in denying appellant’s Petition for Post-Conviction Relief without making findings of fact and conclusions of law.

{¶15} R.C. 2953.21 addresses initial petitions for post-conviction relief that are timely filed. Trial courts are required to issue findings of fact and conclusions of law only in regard to petitions that are filed pursuant to R.C. 2953.21(A)(2). See R.C. 2953.21(C) and *State v. Lester* (1975), 41 Ohio St.2d 51, 322 N.E.2d 656, paragraph two of the syllabus. See also *State ex rel. Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459, at paragraph 6.

{¶16} R.C. 2953.21(A)(2) states as follows: “ 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.” R.C. 2953.23 governs untimely, second or successive petitions for post-conviction relief.

{¶17} In the case sub judice, appellant’s Petition for Post-Conviction Relief was timely filed pursuant to R.C. 2953.21(A)(2) because it was filed no later than 180 days after the expiration of the time for filing a direct appeal. Because appellant’s petition was filed pursuant to R.C. 2953.21(A)(2), the trial court was required to issue findings of fact and conclusions of law when it denied the same. See *Basinger*, supra.

{¶18} The Ohio Supreme Court has held that a judgment entry denying post-conviction relief without findings of fact and conclusions of law is not a final, appealable order. As a result, a defendant cannot appeal from such an entry. *State ex rel. Ferrell v. Clark* (1984), 13 Ohio St.3d 3, 469 N.E.2d 843; *Lester*, supra; *State v. Mapson* (1982), 1 Ohio St.3d 217, 438 N.E.2d 910. See also our Opinions in *State v. Pressley*, Muskingum App. No. CT2007-0044, 2008-Ohio-2473 and *State v. Francis*, Guernsey App. No. 07CA000023, 2008-Ohio-3307. The proper remedy is for a defendant to seek a writ of mandamus directing the trial court to issue findings of fact and conclusions of law. *Ferrell*, supra.

{¶19} Because the trial court did not issue findings of fact and conclusions of law when it denied appellant's petition for post-conviction relief, we hereby dismiss appellant's appeal for lack of a final, appealable order.

By: Edwards, P.J.

Wise, J. and

Delaney, J. concur

s/Julie A. Edwards

s/John W. Wise

s/Patricia A. Delaney

JUDGES

JAE/d0401

