[Cite as *State v. Webb*, 2010-Ohio-5499.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
ANTHONY D. WEBB	:	Case No. 10CA67
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2007CR327D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 8, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH 44902	ANTHONY D. WEBB, PRO SE Inmate No. A524-652 Toledo Correctional Institution 2001 E. Central Avenue Toledo, OH 43608

Farmer, J.

{¶1} On April 5, 2007, the Richland County Grand Jury indicted appellant, Anthony Webb, on one count of aiding and abetting an aggravated murder with a firearm specification in violation of R.C. 2903.01 and 2941.145.

{¶2} A jury trial commenced on April 26, 2007. The jury found appellant not guilty of aiding and abetting aggravated murder, but guilty of aiding and abetting murder, and not guilty of the firearm specification. By judgment entry filed May 3, 2007, the trial court sentenced appellant to fifteen years to life in prison. This court affirmed appellant's conviction and sentence. See, *State v. Webb,* Richland App. No. 07CA43, 2008-Ohio-901.

{¶3} On March 15, 2010, appellant filed a petition to vacate or set aside judgment of conviction or sentence, claiming his trial counsel was ineffective for failing to pursue a potential witness on his behalf. By judgment entry filed May 4, 2010, the trial court denied the petition.

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

I

{¶5} "THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL TO WHICH HE IS ENTITLED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

II

{¶6} "THE TRIAL COURT ABUSED THERE (SIC) DISCRETION WHEN THEY OVERRULED ON THE APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT OF CONVICTION OR SENTENCE."

I, II

{¶7} Appellant claims the trial court erred in denying his petition to vacate or set aside judgment of conviction or sentence, as he was denied the effective assistance of counsel. We disagree.

{¶8} R.C. 2953.21(A)(2) provides that a petition for post-conviction relief "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***."

{¶9} Pursuant to this statute, appellant's petition had to be filed no later than February 18, 2008. However, appellant filed his petition on March 15, 2010, over two years late.

{¶10} If a postconviction relief petition is filed beyond the one hundred eighty day time limitation, R.C. 2953.23(A) precludes the court from entertaining the petition unless:

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

{¶12} "(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.

{¶13} "(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."

{¶14} "Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for postconviction relief. *State v. Palmer,* 7th Dist. No. 08 JE 18, 2009-Ohio-1018, ¶11; *State v. Christian,* 7th Dist. No. 06 MA 167, 2007-Ohio-3336, ¶9." *State v. Haschenburger,* Mahoning App. No. 08-MA-223, 2009-Ohio-6527, ¶12.

{¶15} Appellant argues his counsel was ineffective for failing to pursue a potential witness on his behalf, namely, Terrance Bluester. Appellant was not "unavoidably prevented from discovery" of Mr. Bluester, as appellant admits in his appellate brief at 6-7 that he "informed counsel that Mr. Bluester could possibly be a potential witness for the defense had counsel interviewed this witness." The question is whether or not trial counsel's performance sub judice constitutes ineffective assistance of counsel.

{¶16} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶17} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶18} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶19} Mr. Bluester was called as a witness for the prosecution and refused to testify. T. at 451-453. The trial court found him in contempt of court and sentenced him to thirty days in jail. T. at 453. When Mr. Bluester refused to testify, he was unavailable to the prosecution and was also unavailable to the defense. Defense counsel could not force Mr. Bluester to testify.

{¶20} Upon review, we find no ineffective assistance of counsel regarding Mr. Bluester, and no constitutional error.

{¶21} Furthermore, this issue could have been argued on direct appeal as appellant was aware of Mr. Bluester; therefore, it is barred by 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:

{¶22} "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."

{¶23} Upon review, we find the trial court did not err in denying appellant's petition to vacate or set aside judgment of conviction or sentence.

{¶24} Assignments of Error I and II are denied.

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

By Farmer, J.

Gwin, P.J. concur and

Hoffman, J. concurs separately

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_____

JUDGES

SGF/sg 1029

Hoffman, J., concurring

{¶26} I concur in the majority's decision to overrule Appellant's assignments of error. I agree Appellant's petition for post conviction relief fails to set forth sufficient evidence to demonstrate his counsel was ineffective. I further agree his petition was untimely filed.

{¶27} I write separately only to note I am not convinced res judicata bars the instant claim since it relies on information outside the trial record.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ANTHONY D. WEBB	:	
Defendant-Appellant	:	CASE NO. 10CA67

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ William B. Hoffman_____

JUDGES