

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 16CA3757
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
RONALD E. GAVIN,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 1/6/17

APPEARANCES:

Ronald E. Gavin, London, Ohio, pro se appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, Portsmouth, Ohio, for appellee.
Harsha, J.

{¶1} Ronald E. Gavin appeals the judgment denying his petition for postconviction relief. Gavin contends that the trial court abused its discretion by failing to conduct an evidentiary hearing on his petition, which raised claims of ineffective assistance of his trial counsel and fraud upon the court.

{¶2} We reject Gavin’s contention because his untimely petition failed to demonstrate the existence of facts necessary for the trial court to exercise jurisdiction over the merits of his claims. Consequently, we affirm the judgment of the trial court as modified to reflect the dismissal of his petition.

I. FACTS

{¶3} The Scioto County Grand Jury returned a joint indictment charging Gavin and an accomplice with several drug related charges. The case proceeded to a jury trial at which several witnesses, including Manual Lofton, testified that Gavin sold heroin

to several people on numerous occasions during the summer of 2013. Gavin obtained the heroin from several sources in Chicago, including his cousin.

{¶4} The jury convicted Gavin of several heroin related offenses and tampering with evidence, and the trial court sentenced him to prison. In *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, we reversed his conviction for tampering with evidence and remanded the cause to the trial court to vacate that conviction and sentence. But we affirmed his remaining convictions and rejected his contention that he had received ineffective assistance of counsel. More specifically, we overruled Gavin's assignment of error claiming that he received ineffective assistance of counsel when his trial attorney did not move to suppress evidence obtained as a result of the warrantless search of a car. Gavin could not demonstrate that his trial counsel's performance was deficient because a motion to suppress would have been meritless—the officers had a reasonable suspicion that the car contained evidence of a crime. On direct appeal Gavin was represented by a new attorney. We subsequently denied his pro se application for reopening. On remand, the trial court vacated Gavin's conviction and sentence for tampering with evidence.

{¶5} In April 2016, nearly two years after the transcript was filed in his direct appeal, in June 2014, Gavin filed a petition for postconviction relief claiming that he was denied the effective assistance of trial counsel and that his convictions were obtained through fraud on the court. He attached the affidavits of several persons who claimed that Lofton and Woods had framed Gavin by planting the heroin in the car that Gavin regularly drove and that Gavin had informed his trial attorney about his potential

witnesses, but his attorney failed to call them to testify on his behalf at trial. Gavin did not specify how any of this evidence could qualify as “newly discovered.”

{¶6} The state filed a response to Gavin’s petition asserting that it was untimely and barred by res judicata. The trial court denied the petition without conducting an evidentiary hearing.

II. ASSIGNMENT OF ERROR

{¶7} Gavin assigns the following error for our review:

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT APPELLANT AN EVIDENTIARY HEARING PURSUANT TO R.C. [] 2953.21(C).[.]

III. STANDARD OF REVIEW

{¶8} The postconviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Postconviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Id.* It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 18.

{¶9} “[A] trial court’s decision granting or denying a postconviction relief petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. A trial court

abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *In re H. V.*, 138 Ohio St.3d 408, 2014-Ohio-812, 7 N.E.3d 1173, ¶ 8.

{¶10} A criminal defendant seeking to challenge a conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun*, 86 Ohio St.3d at 282, citing *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing, the trial court must consider the petition, supporting affidavits, documentary evidence, files and records including the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript, to determine whether there are substantive grounds for relief. R.C. 2953.21(C). If the court concludes that petitioner has failed to set forth operative facts to establish substantive grounds for relief, no hearing is necessary. *See Calhoun*, 86 Ohio St.3d 279, at paragraph two of the syllabus; *see also State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012–Ohio–1936, ¶ 14, quoting *State v. Bradford*, 4th Dist. Ross No. 08CA3053, 2009-Ohio-1864, ¶ 10.

IV. LAW AND ANALYSIS

{¶11} Gavin challenges the trial court's denial of his petition for postconviction relief without holding an evidentiary hearing. R.C. 2953.21(A)(2) provides that a petition for postconviction relief must be filed "no later than three hundred sixty-five 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." Gavin's petition was untimely because it was filed ten months after the expiration of this 365-day period. *See, e.g., State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 15.

{¶12} R.C. 2953.23(A)(1) authorizes a trial court to address the merits of an untimely filed petition for postconviction relief only if: (1) the petitioner shows either that he was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief or that the United States Supreme Court recognized a new federal or state right that applies retroactively to him; and (2) the petitioner shows by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial.

{¶13} Gavin does not contend that the United States Supreme Court recognized a new right that applied retroactively to him, so he had to prove that he was unavoidably prevented from the discovery of the facts upon which he relied to present his ineffective-assistance-of-counsel claim. See, e.g., *State v. McDougald*, 4th Dist. Scioto No. 16CA3736, 2016-Ohio-5080, ¶ 23. “A defendant is ‘unavoidably prevented’ from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonable diligence, learned of their existence within the time specified for filing his petition for postconviction relief.” *State v. Cunningham*, 3d Dist. Allen No. 1-15-61, 2016-Ohio-3106, ¶ 19, citing *State v. Holnapy*, 11th Dist. Lake No.2013-L-002, 2013-Ohio-4307, ¶ 32, and *State v. Roark*, 10th Dist. Franklin No. 15AP-142, 2015-Ohio-3206, ¶ 11.

{¶14} In his initial brief Gavin claims that “[t]he delayed petition is excused because it was counsel’s duty to adequately investigate the case and interview witness[es] and call them to trial to testify.” (Ant. Brief, p. 8) In his reply brief Gavin adds that the evidence attached to his petition “could not have been obtained any sooner than it actually was because [he] had no knowledge of the existence of [this]

information,” but he then contradicts himself by admitting that some of this evidence “may have been available to [him] at the time of trial.”

{¶15} Gavin does not explain how either he or his appellate counsel were unavoidably prevented from having access to the evidence attached to his petition at the time he filed his direct appeal or when he could have filed a timely petition for postconviction relief. Instead, he contests his trial counsel’s failure to properly investigate, interview, and present these witnesses after he informed his counsel of the availability of potential witnesses to support his claim that he was being framed. But “ [t]he fact that appellant raises claims of ineffective assistance of counsel suggests that the bases for his claims could have been uncovered if “reasonable diligence” had been exercised.’ ” *Cunningham*, 2016-Ohio-3106, at ¶ 22, quoting *State v. Creech*, 4th Dist. Scioto No. 12CA3500, 2013-Ohio-3791, ¶ 18; *McDougald*, 2016-Ohio-5080, at ¶ 25.

{¶16} Therefore, Gavin did not establish that the trial court had the authority to address the merits of his untimely petition for postconviction relief. In the absence of jurisdiction, the trial court should have dismissed the petition, rather than denying on the merits. Upon authority of App.R. 12(A)(1)(a), we modify the trial court’s judgment to reflect the dismissal of the petition, and we affirm the judgment of the trial court as modified. See *State v. McManaway*, 4th Dist. Hocking No. 16CA8, 2016-Ohio-7470, 2016-Ohio-7470, ¶ 19, citing *State v. Brewer*, 2d Dist. Montgomery No. 24910, 2012-Ohio-5406, ¶ 10; *State v. Griffin*, 1st Dist. Hamilton Nos. C-150258 and 150005, 2016-Ohio-782, ¶ 13.

V. CONCLUSION

{¶17} Having overruled Gavin's assignment of error, we affirm the judgment of the trial court, as modified.

JUDGMENT AFFIRMED

AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED AS MODIFIED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.