[Cite as *State v. Hartman*, 2010-Ohio-5734.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25055
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
BRETT HARTMAN	
Appellant	CASE No. CR 1997 09 1987

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

MOORE, Judge.

{¶1} Appellant, Brett Hartman, appeals from the judgment of the Summit County Court of Common Pleas that denied his petition for postconviction relief. Because the trial court lacked jurisdiction to consider the merits of his petition, this Court reverses the trial court's judgment and remands for the trial court to dismiss the petition.

I.

{¶2} Winda Snipes was murdered in her apartment in 1997. She was found tied to her bed with her body stabbed over 130 times and her throat slit. Her hands had been cut from her arms. Hartman denied he committed the murder.

{¶3} A jury convicted Hartman of the aggravated murder of Ms. Snipes in 1998. His conviction and death sentence were affirmed by the Ohio Supreme Court. *State v. Hartman* (2001), 93 Ohio St.3d 274. While his direct appeal was pending, he also sought postconviction

relief. The trial court denied his petition. *State v. Hartman* (Oct. 23, 2000), Summit C.P. No. CR-1997-09-1987.

{¶4} Hartman sought federal habeas corpus relief, which was denied in 2004. As part of that litigation, Hartman claimed that DNA from semen found in the victim's anal cavity would prove that he was not the killer because he denied having anal sex with the victim, although he admitted having consensual, vaginal intercourse. The DNA test results confirmed that Hartman was the source of the semen in the victim's anal cavity.

{¶5} In March 2009, Hartman filed a second petition for postconviction relief. In that petition, he presented two claims for relief: (1) the State's withholding of evidence deprived him of a fair trial, and (2) lethal injection constitutes cruel and unusual punishment. After concluding that Hartman filed an untimely, successive petition, the trial court reviewed the merits of his claims and denied the petition. *State v. Hartman* (Sept. 25, 2009), Summit C.P. No. CR-1997-09-1987. Hartman appealed, presenting five assignments of error for our review. Because it is dispositive, we begin with his last assignment of error.

II.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT ERRED IN NOT DETERMINING THAT MR. HARTMAN'S PETITION WAS TIMELY AND PROPERLY FILED."

{¶6} In his fifth assignment of error, Hartman argues that the trial court erred when it decided that he had improperly filed a successive petition for postconviction relief. We do not agree.

{¶7} R.C. 2953.21 authorizes a person convicted of a criminal offense to petition the trial court to set aside the judgment or sentence. R.C. 2953.23 imposes limitations on a person's ability to seek that relief. Pursuant to R.C. 2953.23(A)(1), the trial court lacks jurisdiction to

consider either a petition filed after the deadline set forth in R.C. 2953.21(A) or a successive petition, unless:

> "(1) Both of the following apply:
>
> "(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.
>
> "(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."

There is no dispute that Hartman filed his petition after the deadline set forth in R.C. 2953.21(A) and that this is Hartman's second petition. Thus, if he cannot meet both of these provisions, the trial court lacked jurisdiction to consider his petition.

A second "first" petition.

{¶8} Before we apply the statute, we must consider Hartman's preliminary argument that the statute does not apply in this case. Hartman acknowledged in his petition that this was his second petition. He also argued, both to the trial court and on appeal, that his petition, although "technically second in time to [his] first petition" cannot be construed as a second petition. He points to numerous federal habeas corpus cases to support his argument, but, distills his argument to this point: if the no-successive-petition limitation is applied, then he will be unable to present his later-arising claim.

{¶9} This Court is not the proper forum for his policy argument. The Ohio General Assembly enacted a postconviction relief statute with clear language and directives. It could

have, but did not, make an allowance for the situation Hartman describes. It is not this Court's place to rewrite the statute to allow him to proceed with a successive petition. *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, ¶30. Where the language of a statute is clear, this Court cannot interpret it, but must apply it as written. Id.

{¶10} Hartman also argues that the Ohio Supreme Court has recognized that a successive petition can be treated as a first petition. The Court in *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, ¶17, did note that Lott's petition was more akin to a first petition than a successive petition. The Court reached that conclusion because Lott presented a claim based on a case recently decided by the United States Supreme Court, *Atkins v. Virginia* (2002), 536 U.S 304. *Atkins* gave rise to a new claim that met "the requirements of R.C. 2953.23(A)(1)(b) because the Supreme Court has recognized a new federal right applying retroactively to convicted defendants facing the death penalty." *Lott* at ¶17. Having met the requirement to present his otherwise barred claim, the Ohio Supreme Court analogized it to a first petition. Id. The Court did not, however establish a new category of successive petitions that must be treated as first petitions. Hartman's attempt to grasp at this language in *Lott* is ineffective to pull himself past the jurisdictional bar created by R.C. 2953.23(A).

{¶11} Hartman filed an untimely, successive petition. For the trial court to consider it, he must have met the requirements of R.C. 2953.23(A).

R.C. 2953.23(A)(1)(a) - Unavoidably prevented from discovering facts.

{¶12} The first alternative for Hartman to bypass the prohibition of a second petition is for him to show that he "was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief * * *." R.C. 2953.23(A)(1)(a). He has argued that he

was unavoidably prevented from discovering the facts upon which he now relies to prove he is actually innocent.

{¶13} Hartman first points to a hair and a used condom found in the victim's apartment. Hartman has not alleged that he was unaware of this evidence at the time of his trial. Rather, he argues that this evidence should be subject to DNA testing to show that another person is responsible for their presence. Hartman has not shown that he was unavoidably prevented from discovering these facts. The evidence was available to him at his trial many years ago. He cannot now argue that he was prevented from discovering an additional hair and a used condom.

{¶14} He also argues that he has just learned that the testimony of a jailhouse informant that Hartman confessed to the crime while awaiting trial may have been perjured. While acknowledging that he is still investigating this claim, Hartman argues that the informant perjured himself because the informant's attorney met with the trial judge after the informant testified, the informant's attorney has declined to reveal the subject of the meeting because of attorney-client privilege, and the informant refused to speak with Hartman's investigator. From this, Hartman concludes that the informant committed perjury, the informant's attorney knew that he committed perjury, and the attorney informed the trial court judge, who did nothing about it.

{¶15} Hartman merely alleged a possibility, not a fact, he has discovered. If Hartman pointed to some evidence – any evidence – to show that he recently learned that the informant committed perjury, this may be sufficient to meet the requirements of R.C. 2953.23(A)(1)(a). Instead, Hartman *believes* that the informant committed perjury because the informant's attorney talked with the trial court judge following the informant's testimony. The claim is so undeveloped that Hartman has not even alleged what testimony was perjured. Hartman has not

persuasively argued that he has discovered a new fact, that the informant committed perjury, to satisfy R.C. 2953.23(A)(1)(a).

{¶16} Hartman did not meet his burden to show that he was unavoidably prevented from discovery of the facts upon which he must rely to present his claim for relief. Accordingly, he has not met the requirement of R.C. 2953.23(A)(1)(a) to file a successive petition as to the hair, the condom, or the allegedly perjured testimony.

R.C. 2953.23(A)(1)(a) - New federal or state right.

{¶17} Hartman also sought to challenge Ohio's method of lethal injection. He argues that, after the time to file his first petition expired, the United States Supreme Court recognized a new federal right that applies retroactively to persons in his situation, that his petition asserts a claim based on that right, and, therefore, his claim that Ohio's method of lethal injection is unconstitutional is cognizable in postconviction relief. Ten years after Hartman was convicted and sentenced, and eight years after the trial court denied his first petition for postconviction relief, the United States Supreme Court recognized a condemned prisoner's right to challenge the method of execution and adopted the appropriate standard to be applied in considering that challenge. *Baze v. Rees* (2008), 553 U.S. 35. Although *Baze* recognized a new right, Hartman must also satisfy R.C. 2953.23(A)(1)(b) in order to proceed with his successive petition.

R.C. 2953.32(A)(1)(b) - The petitioner's burden.

{¶18} In addition to satisfying the requirements of R.C. 2953.23(A)(1), Hartman must also prove

> "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] 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 [him] eligible for the death sentence." R.C. 2953.23(A)(1)(b).

Hartman cannot meet this burden.

Method of execution.

{¶19} Hartman's challenge to Ohio's method of execution falls under the second half of R.C. 2953.23(A)(1)(b), which requires him to prove that, "if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found [him] eligible for the death sentence." R.C. 2953.21(A)(1)(b). The factfinder does not consider the constitutionality of the method of execution when deciding whether the death sentence is appropriate. This provision is more appropriately read to mean a challenge to the death specifications, not the means of carrying out the execution. Accordingly, Hartman cannot meet the requirements of R.C. 2953.23(A)(1)(b) to present his challenge to Ohio's lethal injection protocol.

The second petition is barred.

{¶20} Hartman failed to meet the requirements of R.C. 2953.23 to allow him to file an untimely or second petition for postconviction relief. Although the trial court recognized this, it considered the merits of Hartman's claims. Because it lacked jurisdiction, however, the trial court should have dismissed the petition without addressing the merits of his claims.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT VIOLATED O.R.C. §2953.21(C) IN DENYING MR. HARTMAN'S PETITION WITHOUT REVIEWING THE TRIAL PROCEEDINGS."

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN DENYING MR. HARTMAN DISCOVERY, EVIDENTIARY HEARING, AND RELIEF DUE TO THE STATE'S USE OF PERJURED TESTIMONY AT TRIAL."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN DENYING MR. HARTMAN THE ABILITY TO CONDUCT DNA TESTING ON PHYSICAL EVIDENCE FOUND AT THE CRIME SCENE, AN EVIDENTIARY HEARING, AND RELIEF ON THE BASIS OF ACTUAL INNOCENCE."

ASSIGNMENT OF ERROR IV

"THE PRACTICE OF EXECUTION BY LETHAL INJECTION VIOLATES HARTMAN'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶21} This Court need not address assignments of error one through four, as our resolution of the fifth assignment of error renders them moot. App.R. 12(A)(1)(c).

III.

{¶22} Hartman's fifth assignment of error is overruled. This Court will not review the remaining assignments of error because the trial court lacked jurisdiction to consider Hartman's claims.

{¶23} Because the trial court lacked jurisdiction to consider Hartman's untimely, second petition for postconviction relief, this Court reverses the trial court's judgment and remands to the trial court for the trial court to dismiss the petition.

Judgment reversed,
and cause remanded,
with instructions to dismiss.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

MICHAEL J. BENZA, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.