[Cite as *State v. Everette*, 2010-Ohio-2832.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23585
v.	:	T.C. NO. 2007 CR 3147
THOMAS E. EVERETTE, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 18th day of June, 2010.

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FROELICH, J.

{¶ 1} Thomas E. Everette, Jr., appeals, pro se, from a judgment of the Montgomery

County Court of Common Pleas, which dismissed his petition for post-conviction relief as untimely.

{¶ 2} Everette appeals from the dismissal of his petition for post-conviction relief. The Office of the Ohio Public Defender has submitted an amicus curiae brief in support of Everette's position. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} In June 2008, Everette was convicted after a jury trial of two counts of aggravated murder, aggravated robbery, and grand theft of a motor vehicle, all with firearm specifications. Everette was also convicted by the trial court of having a weapon while under disability. The charges stemmed from the shooting death of Phillip Cope on July 29, 2007, and the theft of Cope's vehicle. The two aggravated murder counts were merged, as were the firearm specifications; all of the charges were to be served concurrently to each other, and the three-year term for the firearm specification was to be consecutive and prior to this sentence as a matter of law. Everette was sentenced to an aggregate term of life imprisonment with the possibility of parole after 28 years.

{¶ 4} Everette appealed from his conviction on July 16, 2008. The same date, Everette's trial counsel requested that a transcript of the trial be prepared. On August 1, 2008, Everette's appellate counsel filed a "Praecipe/Instructions to Court Reporter" in this Court, requesting a transcript of a suppression hearing. On August 26, 2008, six videotapes – including the trial, the hearing on Everette's motion to suppress, and the sentencing hearing – were filed. A summary of docket was filed two days later and, the same day (August 28, 2008), the Clerk of Courts issued its App.R. 11(B) notification indicating that

the appellate record was complete. The App.R. 11(B) notification stated that the transcript of proceedings had been filed on August 26, 2008. Written transcripts of the suppression hearing and the trial were filed on October 15, 2008.

{¶ 5} On April 8, 2009, Everette submitted a petition for post-conviction relief. He claimed that his trial counsel had rendered ineffective assistance by failing to call a detective as a witness, to gather and present telephone records at trial, and to object to prosecutorial misconduct. Everette further argued that the prosecutor had engaged in misconduct by commenting on evidence that was not in the record during the State's rebuttal argument. Everette supported his petition with his own unsworn statement and indicated that he needed the transcripts to further support his claims.

{¶ 6} The State moved to dismiss Everette's petition or for summary judgment. It argued that Everette's petition was untimely because it was filed more than 180 days after the transcript of proceedings was filed on August 26, 2008. Alternatively, the State argued that Everette had not shown that there were substantive grounds for relief and that his petition should be summarily denied. The State argued that Everette did not explain how he was prejudiced by his counsel's failure to call a police detective as a witness and by failing to obtain telephone records. Further, the State asserted that Everette's claims of prosecutorial misconduct and his attorney's failure to object to such misconduct should be raised in Everette's direct appeal.

{¶ 7} Everette opposed the State's motion, arguing that his 180-day time limitation began to run on October 15, 2008, when the written transcripts were filed. He stated that his petition was due on April 13, 2009, not February 23, 2009, as the State asserted. He

also argued that he was prejudiced by the jury's not hearing the detective testify that Ashley Ross, one of the State's witnesses, knew him (Everette) prior to the day of Cope's death and not hearing that he had never made telephone calls to Daryl Stollings, another witness.

{¶ 8} In July 2009, the trial court dismissed Everette's petition. The court held that the petition was untimely under R.C. 2953.21(A)(2), and Everette had not established that this late filing met any of the exceptional circumstances listed in R.C. 2953.23(A). The court further stated that, even if Everette's petition had been timely, he did not show substantive grounds for relief.

{¶ 9} We affirmed Everette's conviction in his direct appeal on October 30, 2009. *State v. Everette*, Montgomery App. No. 22838, 2009-Ohio-5738.

{¶ 10} Everette appeals from the dismissal of his petition for post-conviction relief, raising two assignments of error.

II

{¶ 11} Everette's first assignment of error states:

{¶ 12} "THE TRIAL COURT ERRED IN ITS DECISION DENYING APPELLANT[']S PETITION FOR POST CONVICTION RELIEF."

{¶ 13} In his first assignment of error, Everette claims that the trial court erred in dismissing his petition as untimely. He argues that the time for filing his petition began to run on October 15, 2008, when the written transcripts were filed. Everette cites two cases from this appellate district – *State v. Carson*, Montgomery App. No. 22654, 2009-Ohio-1406, and *State v. Jamison*, Montgomery App. No. 22806, 2009-Ohio-3515 – to support his contention that the 180-day period begins to run when written transcripts are

filed. The Ohio Public Defender reiterates these arguments and further states that App.R. 9(A) indicates that, when written transcripts are certified by the court reporter, the written transcript constitutes the transcript of proceedings instead of the videotaped transcript.

{¶ 14} R.C. 2953.21(A)(1)(a) provides that "[a]ny person who has been convicted of a criminal offense *** and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, *** may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

{¶ 15} If a defendant has filed a direct appeal of his or her conviction, a petition for post-conviction relief must be filed no later than 180 days after the "trial transcript" is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). If the petition is not filed within that statutory time period, the trial court lacks jurisdiction to consider the petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, ¶7.

{¶ 16} Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if he was unavoidably prevented from discovering the facts upon which he relies to present his claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to his situation. Id. If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶ 17} Everette does not argue that the trial court had jurisdiction over his petition under R.C. 2953.23. Rather, he claims that his petition was filed within 180 days of the filing of the trial transcript, in accordance with R.C. 2953.21. The crucial questions are, therefore, what is a "trial transcript" and when was it filed in the court of appeals in Everette's direct appeal.

{¶ 18} R.C. 2953.21 does not define the phrase "trial transcript." See *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967, ¶2 (Moyer, C.J., concurring in dismissal). However, App.R. 9(A) defines the "record on appeal," which includes the "transcript of proceedings, if any."[1] Specifically, App.R. 9(A) provides:

{¶ 19} "The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording[2] of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R.

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[1]In his concurrence in the dismissal of the appeal in *Hollingsworth*, Chief Justice Moyer commented that "trial transcript" is not synonymous with "record on appeal" under R.C. 2953.21. He stated that an argument that "trial transcript" means "the record on appeal" for purposes of a petition for post-conviction relief would be reasonable "if it were not inconsistent with the plain words of R.C. 2953.21(A)(2) which expressly provides that the limitations period begins when the *trial transcript* is filed." (Emphasis in original) *Hollingsworth* at ¶2. See, also, *State v. Villa*, Lorain App. No. 08CA9484, 2009-Ohio-5055.

[2]Because the record reflects that "videotapes" were filed, we need not

9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

{¶ 20} "In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." (Footnote added.)

{¶ 21} In its amicus curiae brief, the Ohio Public Defender asserts that App.R. 9(A) establishes that a written transcript, certified by the court reporter, is the transcript of proceedings and, thus, when the written transcript is filed, that filing triggers the 180-day time limitation. Specifically, the Ohio Public Defender relies on the sentence that reads: "When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings."

{¶ 22} However, the second sentence of App.R. 9(A) explicitly states that a videotape recording of the trial proceedings constitutes the transcript of proceedings and that it need not be transcribed into written form in order to be filed. App.R. 9(A) further states that, when the proceedings are videotaped, counsel must reduce the portions of the videotaped transcript necessary for appellate review into written form, certify the accuracy of the written transcript, and append the written transcripts to the brief.

{¶ 23} In contrast, proceedings recorded by means other than videotape must be reduced to written form. The sentence following the requirement for non-videotaped proceedings (i.e., the sentence upon which the Ohio Public Defender primarily relies) then

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discuss use of the DVD or CD format.

states that the written form is the transcript of proceedings. Reading App.R. 9(A) as a whole, the provision that the written form is the transcript of proceedings applies solely when a non-videotaped proceeding (e.g., audio only, shorthand, stenotype) is reduced to written form, not to all circumstances when a written transcript is produced.

{¶ 24} Although the burden to produce the necessary written transcripts of videotaped proceedings falls on counsel, most written transcripts are produced, upon counsel's request, by a court reporter or other professional transcriptionist and not by counsel himself or herself. The mere fact that a court reporter or transcriptionist, at counsel's request, has produced a written transcript of a videotaped proceeding and has certified its accuracy, as required by App.R. 9(A), does not render that written transcript the official transcript of proceedings.

{¶ 25} Turning to when the "trial transcript" was filed in Everette's case, a summary of the relevant dates in Everette's case is useful to our discussion:

June 18, 2008	Guilty verdict
July 16, 2008	Notice of appeal and praecipe for transcript
August 26, 2008	Videotapes of trial filed
August 28, 2008	App.R. 11(B) notification that "transcript of proceedings" were filed on August 26, 2008
October 15, 2008	Written transcripts filed
April 8, 2009	Petition for post-conviction relief filed
October 30, 2009	Direct appeal decided

{¶ 26} In Everette's case, the videotaped proceedings were filed on August 26, 2008.

Although written transcripts were prepared and filed at the request of Everette's trial and appellate counsel in order to support his assignments of error on direct appeal, the videotaped transcript remained the transcript of proceedings. Accordingly, the 180-day time period for filing Everette's petition for post-conviction relief began to run on August 26, 2008, and expired on February 23, 2009.

{¶ 27} Everette and the Ohio Public Defender cite to *Jamison* and *Carson* as examples of cases in which we referred to the date when the written transcripts were filed as opposed to the filing of the videotaped recordings. We acknowledge that we have, on occasion (including in *Jamison* and *Carson*), cited to the date that the written transcripts were filed as the date from which we determined whether a petition was untimely under R.C. 2953.21. However, in citing to the dates that the written transcripts were filed in *Jamison* and *Carson*, we did not state that the 180-day period always began to run with the filing of the written transcripts. Nor did we discuss whether the filing of the written transcripts, as opposed to the videotaped transcripts, always represented the proper starting date under R.C. 2953.21. Such a discussion would have been inconsequential in *Carson*, considering that Carson filed his petition more than three years after we affirmed his conviction.

{¶ 28} In *Jamison*, we noted that Jamison's petition was filed 182 days after the filing of the written transcript; however, because Jamison's petition was barred by res judicata, we did not reach the timeliness of his petition. Accordingly, we had no need to discuss – and did not discuss – whether Jamison's time began to run with the filing of the written transcript or the unmentioned previously-filed videotaped transcript.

{¶ 29} However, in *State v. Carver*, Montgomery App. No. 22407, 2008-Ohio-5516,

we expressly held that videotapes of the proceedings constitute the transcript of proceedings, per App.R. 9(A), and that the 180-day period within which to petition for post-conviction relief began on the date when the videotapes were filed in the court of appeals. Id. at ¶6. We have found no cases that have expressly addressed the issue before us and held to the contrary.

{¶ 30} Finally, the Ohio Public Defender asserts that the videotaped recordings are not the transcript of proceedings, because the videotapes were certified as "a correct and complete mechanically reproduced transcript" by the trial court's judicial assistant, not by a court reporter.

{¶ 31} App.R. 9(B) requires the transcript, whether in written or videotape form, to be certified as correct by the "reporter," not the "court reporter." The Rule defines the reporter as "the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems." App.R. 9(B).

{¶ 32} In many courtrooms, audio and/or video recording devices have replaced traditional stenographic reporters. Where trial court proceedings are memorialized solely through video recording devices, it is not uncommon for judicial assistants to be responsible for maintaining, copying, and filing the electronic media for the trial court. Stated differently, the judicial assistant is the "reporter" who certifies the accuracy of the electronically-recorded transcript and files it. In such situations, written transcripts can be prepared by private transcriptionists, whether arranged by counsel directly or through the court, as well as by a "court reporter" on the court's staff.

{¶ 33} In this case, the videotaped transcript was certified as correct by the trial court's judicial assistant. We see no violation of App.R. 9(B).

{¶ 34} Because Everette's time for filing his petition for post-conviction relief began on August 26, 2008, Everette's petition for post-conviction was untimely filed. The trial court did not err in dismissing his petition.

{¶ 35} The assignment of error is overruled.

III

{¶ 36} Everette's second assignment of error states:

{¶ 37} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE U.S. CONSTITTUTION [sic]"

{¶ 38} In light of our disposition of Everette's first assignment of error, his second assignment of error is overruled as moot.

IV

{¶ 39} The judgment of the trial court will be affirmed.

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FAIN, J. and DONOFRIO, J., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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