

[Cite as *State v. Wells*, 2010-Ohio-3238.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 5
v.	:	T.C. NO. 07CR40
CHRISTOPHER C. WELLS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 9th day of July, 2010.

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FROELICH, J.

{¶ 1} Christopher C. Wells appeals from a judgment of the Champaign County Court of Common Pleas, which denied his petition for post-conviction relief, without a hearing, as untimely. For the following reasons, the trial court’s judgment will be affirmed.

I

{¶ 2} Wells, a home remodeler and general contractor, was convicted of one count of theft by deception and one count of theft beyond the scope of consent, both fourth degree felonies, stemming from Wells's failure to perform exterior renovations to the home of Daniel Walter ("Walter") and Cheryl Dixon Walter ("Dixon"). The trial court sentenced Wells to three years of community control and a \$150 fine on each count, to be served concurrently. The court also awarded restitution in the amount of \$13,689.21 to Walter and Dixon.

{¶ 3} Wells filed a direct appeal from his convictions and sentence. Upon review, we found that Wells's convictions for theft by deception and theft beyond the scope of consent based on a \$9,689.21 check were against the manifest weight of the evidence, and we reversed those convictions. We affirmed Wells's convictions to the extent that they were based on a June 4, 2006, check for \$4,000 (having to do with exterior brickwork). We ordered that the trial court's judgment be modified to reflect that Wells's convictions constitute a fifth degree felony, pursuant to R.C. 2913.02(B)(2), and to reduce the restitution to Walter and Dixon to \$4,000. *State v. Wells*, Champaign App. No. 2008 CA 6, 2009-Ohio-908.

{¶ 4} On July 31, 2009, Wells, with new counsel, filed a petition for post-conviction relief. He argued that his trial counsel had failed to interview and call several witnesses at trial who could have testified that Walter and Dixon knew that Wells had not yet purchased the exterior brick, that they were aware that Snyder Brick and Block was providing bricks for the exterior brick work on their home, and that Walter had been informed that Wells was in the hospital in June

2006. With respect to the timeliness of his petition, Wells stated that he did not learn of his attorney's failure to interview and call these witnesses until after trial and sentencing, and his appellate counsel did not discuss post-conviction remedies with him. Wells indicated that he "did not discover that he had such rights until after retaining present counsel." Wells supported his petition with his own affidavit and affidavits from potential witnesses Nia Comeau, Jim Roberts (an employee of Snyder Brick and Block), Terry Harvel (a subcontractor for Wells on the Walters' job), and Keith Stevens.

{¶ 5} The State moved for summary judgment on Wells's petition, arguing that the petition was untimely and that he did not show circumstances which would excuse his untimeliness. The State further argued that the testimony of Wells's potential witnesses would have been cumulative of the evidence offered by Wells at trial and, thus, Wells did not demonstrate ineffective assistance of counsel. The State asserted that Wells was not entitled to a hearing on his petition, and the State was entitled to judgment as a matter of law.

{¶ 6} In his reply memorandum, Wells asserted that it was "disingenuous of the State to claim that this testimony would be merely duplicative." He argued that corroboration of his testimony by third parties would have "strongly influenced the outcome" of his case. He further argued that his untimeliness should be excused, because he asked his appellate counsel about his outside-the-record complaints against his trial counsel and was misled by his appellate counsel about his rights.

{¶ 7} On December 8, 2009, the trial court granted the State's motion for summary judgment and dismissed Wells's petition for post-conviction relief. The

court found that Wells's petition was untimely, and Wells was not entitled to tolling or an extension of the statutory deadline. The court found that Wells was not unavoidably prevented from discovering the facts upon which he relied, that he had not identified a new right or asserted a claim based on a new right, and that he had not shown that, but for alleged constitutional error, no reasonable factfinder would have convicted him. The trial court noted that "all of the information was available to Defendant during the course of his trial. Defendant thus was not unavaoidably prevented of the facts upon which he now relies." Having determined that the petition was untimely, the trial court did not address the merits of Wells's petition.

II

{¶ 8} In his sole assignment of error, Wells claims that the trial court erred in denying his petition for post-conviction relief without a hearing.

{¶ 9} "A post[-]conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. See, also, *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶48. 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). Wells filed a direct appeal of his conviction, and the transcript of proceedings was filed in this Court in May 2008. Wells' petition for post-conviction relief was filed in July 2009, which was more than seven months after the 180-day deadline set forth in R.C. 2953.21(A)(2).

{¶ 10} The trial court lacks jurisdiction to consider an untimely 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. 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.* “The phrase ‘unavoidably prevented’ means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence.” *State v. McDonald*, Erie App. No. E-04-009, 2005-Ohio-798, ¶19. 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).

{¶ 11} In addressing a petition for post-conviction relief, a trial court has a gatekeeping role as to whether a defendant will receive a hearing. *Gondor* at ¶51.

A trial court may dismiss a petition for postconviction relief without a hearing “where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, paragraph two of the syllabus; *Gondor* at ¶51.

{¶ 12} We review the trial court’s dismissal of Wells’s petition for an abuse of discretion. See *Gondor* at ¶52.

{¶ 13} Wells asserts that he did not discover that his trial attorney had failed to interview his witnesses and had dismissed them without calling them as

witnesses, without his approval or knowledge, until after his trial and sentencing. Wells further states that his appellate counsel would not discuss post-conviction remedies with him, and appellate counsel did not begin to research post-conviction relief until four months after the deadline for filing such a petition had passed. Wells argues that he reasonably followed his appellate counsel's advice and, consequently, his failure to file a timely petition should be excused.

{¶ 14} We find no merit to Wells's argument that he was unaware of his trial attorney's failure to call various witnesses on his behalf until after trial and sentencing. Wells stated in his affidavit that he provided his trial attorney with a witness list on or about September 4, 2007, and he requested that his attorney interview and subpoena these witnesses to testify on his behalf at trial. Once Wells's trial attorney indicated that he had no further witnesses on Wells's behalf during the trial, Wells knew which individuals on his witness list his attorney had failed to call to testify. Moreover, Wells's affidavit indicates that he was aware of each person's potential testimony and of the import of that testimony. Although Wells may not have known that his trial attorney had failed to interview all or some of these people, in addition to failing to call them as witnesses, Wells knew at the time of his trial that their testimony had not been presented to the court. Accordingly, we agree with the trial court that Wells was not unavoidably prevented from discovering the facts upon which he relies to present his claim for post-conviction relief.

{¶ 15} Wells further argues that his untimeliness should be excused, because none of his attorneys informed him about post-conviction relief or of the

time restrictions for filing a petition. With respect to his knowledge of post-conviction relief procedures, Wells stated in his affidavit:

{¶ 16} “25. I retained Attorney Bradley Baldwin in November 2007 to represent me as an appellate attorney because I felt that [trial counsel] was not adequate. I met with Attorney Baldwin several times through the appeals process.

{¶ 17} “a) I asked attorney Baldwin to represent me in appealing my convictions from the trial Court and to advise me in seeking other remedies.

{¶ 18} “b) Attorney Baldwin stated that the only relief that I had at this time was through the Court of Appeals and that there were certain timelines that needed to be met.

{¶ 19} “c) I asked if I could appeal or seek other remedies for ineffective counsel from my trial attorney ***

{¶ 20} “26. Attorney Baldwin’s response to my complaints of ineffective counsel was that all he could do was address the information that was presented during the trial and included in the transcripts; and that he was limited as to the number of pages in the appeal package.

{¶ 21} “27. At no time during my meetings with Attorney Baldwin or Attorney Talebi [trial counsel], was there any mention of Post Conviction Relief (PCR). This term was explained to me after the appellate Court decision by Attorney George A. Katchmer. Had I been aware of PCR and its time restrictions, I would have pursued this in parallel with my appeal.”

{¶ 22} Nita Comeau indicated in her affidavit that she was present during all of the meetings between Wells and Mr. Baldwin, his appellate counsel. Comeau

stated that “Post Conviction Relief was not addressed until March of 2009 when Mr. Baldwin said, ‘I’ll have to research it.’”

{¶ 23} In order to satisfy the exception in R.C. 2953.23(A)(1)(a), Wells was required to demonstrate that he was unavoidably prevented from discovering the “facts upon which the petitioner must rely to present the claim.” (Emphasis added.)

R.C. 2953.23(A)(1)(a). We have held that a defendant’s lack of knowledge of Ohio’s post-conviction relief process, even due to the failure of his attorneys to notify him of such, does not satisfy R.C. 2953.23(A)(1)(a). *State v. Samson*, Champaign App. No. 2009 CA 38, 2010-Ohio-1918, ¶128. See, also, *State v. Theisler*, Trumbull App. No. 2009-T-0003, 2009-Ohio-6862, ¶19-20 (stating that the defendant’s assertion that he was not informed of post-conviction relief procedures by his attorney did not satisfy the exception to the timeliness requirement); *State v. Halliwell* (1999), 134 Ohio App.3d 730, 735 (stating “[t]he fact that [defendant’s] counsel never advised him of the time limitations for filing a petition for postconviction relief also does not show he was ‘unavoidably prevented from discovering the facts upon which the petitioner must rely to present the claim for relief.’”). As we stated in *State v. Rideau*, Montgomery App. No. 18624, 2001-Ohio-1536:

{¶ 24} “R.C. Chapter 2953 explicitly provides for the remedy of post-conviction relief and is available to anyone. Nothing prevented [defendant] or his appellate counsel from finding the remedy in the revised code. That fact that neither [defendant] nor his appellate counsel searched the revised code for such a remedy or realized that they had a right to file a petition for post-conviction relief

does not amount to undiscoverable facts. Thus, no undiscoverable facts exist to support [defendant's] petition and he cannot meet the requirements of R.C. 2953.23(A) for a trial court to consider an untimely filed petition." Id.

{¶ 25} Because Wells knew of the facts supporting his petition for post-conviction relief at the time of trial and he failed to satisfy the exception in R.C. 2953.23(A)(1)(a), the trial court did not err in finding that Wells's petition was untimely and in dismissing Wells's petition without a hearing.

{¶ 26} The assignment of error is overruled.

III

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

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Nick A. Selvaggio
George A. Katchmer
Hon. Roger B. Wilson