

[Cite as *State v. Harden*, 2010-Ohio-3343.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23617
 vs. : T.C. CASE NO. 02CR1997
 DORRIAN A. HARDEN : (Criminal Appeal from
 Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 16th day of July, 2010.

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KLINE, J., (BY ASSIGNMENT):

{¶1} Dorrian A. Harden appeals the judgment of the trial
 court, which granted summary judgment in favor of the State and
 dismissed Harden’s petition for post-conviction relief. Without
 holding an evidentiary hearing, the trial court found that Harden’s

petition was untimely and, in the alternative, res judicata barred Harden's claim. On appeal, Harden contends that the trial court erred when it failed to hold an evidentiary hearing. Because the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that Harden set forth sufficient operative facts to establish substantive grounds for relief beyond the one hundred eighty day filing deadline, we disagree. Harden further contends that the trial court erred when it found his claim (regarding the suppression of crack cocaine) barred by the doctrine of res judicata. Because the trial court made its res judicata finding in the alternative to its untimely finding, we disagree. Accordingly, we affirm the judgment of the trial court.

I

{¶ 2} On June 7, 2002, Dayton Police officers stopped a car driven by Harden because the car had expired license plates. The police officers observed Harden making furtive movements during the stop. The officers feared that Harden might be arming himself with a weapon. Thus, when Harden exited the vehicle, the officers conducted a frisk for weapons and discovered crack cocaine.

{¶ 3} The State charged Harden with possession of crack cocaine, but Harden filed a motion to suppress the crack cocaine. Harden argued that the traffic stop was pretextual and that he

was subject to racial profiling. The trial court denied the motion.

{¶4} Harden changed his plea of not guilty to a plea of no contest and was convicted of possession of crack cocaine in an amount equal to or greater than twenty-five grams but less than one hundred grams, in violation of R.C. 2925.11(A). Harden appealed the judgment of the trial court denying his motion to suppress, but this court affirmed the trial court's decision. *State v. Harden*, Montgomery App. No. 19880, 2004-Ohio-664, at ¶15.

{¶5} Harden filed a petition for post-conviction relief on July 22, 2009. The trial court denied Harden's petition without a hearing. Harden appeals and assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING, PURSUANT TO HARDEN'S PETITION FOR POST-CONVICTION RELIEF."

SECOND ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT TO THE STATE, AND DISMISSING HARDEN'S PETITION FOR POST-CONVICTION RELIEF ON THE GROUNDS OF RES JUDICATA."

{¶ 8} Harden contends that the trial court erred in dismissing his petition for post-conviction relief without an evidentiary hearing. “The post-conviction relief process is a civil collateral attack on a criminal judgment.” *State v. Wells*, Montgomery App. No. 22389, 2008-Ohio-4932, at ¶11, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. “Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant’s petition for post-conviction relief without holding an evidentiary 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.” *Calhoun* at paragraph two of the syllabus. There is no constitutional right to post-conviction review, and so any review is governed by statute. *State v. Bays*, Montgomery App. No. 2003 CA 4, 2003-Ohio-3234, at ¶20, citing *State v. Franklin*, Montgomery App. No. 19041, 2002-Ohio-2370, at ¶61.

{¶ 9} A petition for post-conviction relief must 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[.]” R.C. 2953.21(A)(2). A petitioner may file a late or successive petition only if the petitioner can establish “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."

R.C. 2953.23(A)(1)(a).

{¶ 10} "[A]buse of discretion is the most prevalent standard [of review] for reviewing the dismissal of a petition for post-conviction relief without a hearing." *State v. Hicks*, Highland App. No. 09CA15, 2010-Ohio-89, at ¶10 (surveying other Ohio courts). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} In the present case, Harden filed his petition for post-conviction relief on July 22, 2009. This Court rendered final judgment on Harden's direct appeal on February 13, 2004. Harden's petition for relief is therefore untimely, and Harden must satisfy the requirements enacted at R.C. 2953.23 in order for the courts to consider his untimely petition.

{¶ 12} Harden contends that the docket, attached to his petition, establishes operative facts sufficient to warrant a

hearing. In summary, Harden claims that the docket demonstrates that his trial counsel filed several discovery requests that were not responded to, that he was subjected to an illegal search and seizure, and that "the trial court abused its discretion by erroneously imposing an unauthorized sentence upon Harden without sufficient evidence, or, in the alternative, without proper subject-matter jurisdiction[.]" Harden's Brief at 4.

{¶ 13} However, Harden fails to demonstrate that any of these arguments rely on either a newly recognized constitutional right or newly discovered facts. Assuming that the face of the record demonstrates that the discovery requests were plainly not complied with, there does not seem to be any reason that Harden could not have relied on that issue in his direct appeal, or in a petition for relief within the time limit.

{¶ 14} Harden does seek to rely on *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527. Harden contends that this case makes it "imperative for a state prosecutor to provide favorable exculpatory evidence and/or tests to an accused upon request." Harden's Brief at 8. This is an erroneous interpretation of that case. In *Melendez-Diaz*, the United States Supreme Court considered analysts' affidavits concerning the nature of drug evidence, and the Supreme Court concluded that "the analysts' affidavits were testimonial statements, and the analysts

were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Melendez-Diaz* at 2532. In other words, *Melendez-Diaz* is a case about proof at trial, not discovery, and Harden waived his right to trial when he pleaded no contest to the indictment.

{¶ 15} Harden asserts that he was unavoidably prevented from discovering facts related to his claim that his arrest and search were unconstitutional because his retained counsel relied on different legal arguments than he wanted to rely upon. Even if we accept this as true, Harden fails to demonstrate that he could only have discovered these facts after the time limit for filing a petition for post-conviction relief had elapsed.

{¶ 16} Harden also cites *Arizona v. Gant* (2009), 129 S.Ct. 1710. Harden contends that this case is relevant to his present petition. In *Gant*, the United State Supreme Court considered its precedents concerning a search of a suspect's vehicle incident to the suspect's arrest. *Id.* at 1723-24. Here, the police discovered the relevant evidence when they patted down Harden for weapons pursuant to *Terry v. Ohio* (1968), 392 U.S. 1. The law of searches incident to lawful arrest has no application in the present case. See *State v. Tillman* (Sept. 30, 1999), Montgomery App. No. 14060 (holding that the

standards for a search incident to lawful arrest are different from those standards applicable for frisks under *Terry*).

{¶ 17} Harden also claims that the trial court lacked subject matter jurisdiction and that his conviction is not supported by sufficient evidence. However, Harden does not explain the basis of his argument for either legal issue. Indeed, his plea of no contest is an admission to the facts in the indictment and waives any argument concerning the sufficiency of the evidence. *State v. Yslas*, 173 Ohio App.3d 396, 2007-Ohio-5646, at ¶14. And there is nothing we can see in the record to demonstrate that the trial court lacked subject matter jurisdiction over the case. "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31, citing *Cardone v. Cardone* (May 6, 1998), Summit App. Nos. 18349 & 18673.

{¶ 18} Therefore, we find that Harden's petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that Harden set forth sufficient operative facts to establish substantive grounds for relief. Consequently, we find that the trial court did not abuse its discretion when it denied Harden's petition for post-conviction relief without holding an evidentiary hearing.

{¶ 19} Accordingly, we overrule Harden's first assignment of

error.

II

{¶ 20} The trial court found that Harden's petition was untimely. In the alternative, the trial court denied Harden's claim that the trial court should not have overruled his motion to suppress the crack cocaine (the subject of Harden's direct appeal) because the court determined that res judicata barred the court's consideration of that issue. Harden contends that he is arguing this ground differently in his petition for post-conviction relief, and thus, res judicata does not apply.

{¶ 21} As we stated earlier, the trial court's res judicata finding was in the alternative to its untimely finding. However, even if Harden had timely filed his petition or met one of the requirements for filing an untimely petition, we still would affirm the judgment of the trial court.

{¶ 22} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding * * * 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."

State v. Szeftcyk, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus. The sole issue in Harden's previous appeal concerned whether his

motion to suppress should have been granted. *Harden*, 2004-Ohio-664, at ¶8. The trial court below concluded that res judicata barred Harden's petition to the extent it contends that his motion to suppress was wrongfully denied. Harden does not actually address *Szefcyk* or the rule of law contained therein. And we see nothing in the record to indicate that *Szefcyk* would not apply to the present case. Harden merely claims that he wanted his attorney to argue the same legal issue in a different manner.

{¶ 23} Harden cites a case from this district for the proposition that res judicata "does not bar a petitioner from presenting claims within a direct appeal and a post-conviction petition that are argued differently." Harden's Brief at 7, citing *State v. Hennis*, 165 Ohio App.3d 66, 2006-Ohio-41. Harden's reliance on this case is misplaced. The petitioner in *Hennis* was able to again raise ineffective assistance of counsel arguments in his petition for post-conviction relief because those claims involved matters outside the record and could not have been raised on direct appeal. *Hennis* at ¶10, 20. Harden does not explain why his petition claims could not have been presented on direct appeal. Therefore, we find that the doctrine of res judicata does bar his claims, which involve the suppression of the crack cocaine.

{¶ 24} Accordingly, we overrule Harden's second assignment of error.

III

{¶ 25} Having overruled both of Harden's assignments of error, we will affirm the judgment of the trial court.

DONOVAN, P.J. And FAIN, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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