

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 10-CA-12
Plaintiff-Appellee	:	
	:	Trial Court Case No. 98-CR-0034
v.	:	
	:	(Criminal Appeal from
HOWARD E. WEBB	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 27th day of August, 2010.

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AMY M. SMITH, Atty. Reg. #0081712, Clark County Prosecutor’s Office, 50 East Columbia Street, 4th Floor, Post Office Box 1608, Springfield, Ohio 45501
Attorney for Plaintiff-Appellee

HOWARD E. WEBB, #363-875, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43301-0057
Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Howard E. Webb appeals from the trial court’s judgment entry denying his *pro se* R.C. 2953.21 petition for post-conviction relief.¹

{¶ 2} Webb advances two assignments of error on appeal. First, he contends

¹Webb captioned his filing as a “Petition to Vacate or Set Aside Sentence.” (Doc. # 41). The first paragraph specifies that it is a petition for post-conviction relief brought

the trial court erred by depriving him of his right to testify at trial. Second, he claims the trial court erred at sentencing by imposing a more-than-minimum sentence without giving valid reasons.

{¶ 3} The record reflects that a Clark County jury convicted Webb in 1998 on three counts of rape and two counts of gross sexual imposition. The trial court imposed an aggregate sentence of life in prison with parole eligibility after forty years.² We affirmed on direct appeal in *State v. Webb* (Oct. 22, 1999), Clark App. No. 98CA87. Thereafter, Webb filed a lengthy pro se June 23, 2005 “Motion for Reconsideration of Sentence Pursuant to Crim.R. 32.1 and/or Motion for Post-Conviction Relief Pursuant to New Constitutional Ruling.” The trial court overruled the motion on June 30, 2005.

{¶ 4} Webb then filed his present R.C. 2953.21 petition for post-conviction relief on December 16, 2009. He raised two arguments. First, he argued that the trial court violated his constitutional rights by preventing him from testifying in his own defense. Specifically, he asserted that the trial court erred in declaring him voluntarily absent on the second day of trial and proceeding without him. Webb claimed that the trial court should have taken into account his illness and should have granted a continuance. Webb supported this argument with his own affidavit and transcript

under R.C. 2953.21.

²In his petition, Webb asserts that he received an aggregate sentence of thirty years to life in prison. The record indicates, however, that he received a sentence of forty years to life. The trial court sentenced him to life with parole eligibility after ten years on one count. On the other counts it imposed sentences of ten years, ten years, five years, and five years. It ordered all sentences to be served consecutively. The result was an aggregate sentence of forty years to life in prison. (See Doc. #39).

excerpts. Webb's second argument concerned the sentence he received. He asserted that the trial court's reasons for imposing the sentence it did were either untrue or only partially true. He also claimed the trial court violated his constitutional rights by not making valid findings to support a more-than-minimum sentence. The trial court overruled Webb's petition in a one-page entry filed on January 14, 2010.

{¶ 5} Having reviewed the record, we conclude that Webb's petition for post-conviction relief was untimely. If a defendant has filed a direct appeal from his conviction, such a petition must be filed no later than 180 days after filing of the trial transcript in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Webb filed a direct appeal from his conviction, and the transcript of proceedings was filed in this court in December 1998. Webb filed his petition for post-conviction relief on December 16, 2009, roughly eleven years later and well beyond the 180-day time limit found in R.C. 2953.21(A)(2).

{¶ 6} A "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. Tonn*, Greene App. No. 2009 CA 22, 2010-Ohio-385, ¶21. "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." *Id.*, citing R.C.

2953.23(A)(1)(b).

{¶ 7} Webb has not satisfied the foregoing requirements. His first argument concerns his sudden disappearance from the courthouse on the second day of trial. In support of his petition, Webb attached trial transcript excerpts establishing that defense counsel noted his absence and requested a continuance. The trial court denied the request and, not knowing why Webb had disappeared, declared him voluntarily absent and proceeded without him. Webb also supported the petition with his own 2009 affidavit. Therein, he attributed his disappearance to a severe bout of hypertension. Webb also insisted, without explanation, that an affidavit containing his explanation could not have been submitted earlier.

{¶ 8} Without regard to other potential deficiencies in Webb's claim, he has failed to show that he was unavoidably prevented from discovering the facts contained in his affidavit. As the State points out, Webb certainly knew he was feeling ill when he left the courthouse during his 1998 trial. He has not explained why he had to wait until 2009 to put his explanation in an affidavit. The other facts upon which Webb relies are contained in the trial transcripts and, therefore, plainly were available to him within the 180-day filing window provided by R.C. 2953.21(A)(2).

{¶ 9} As for Webb's sentencing argument, he relies exclusively on the record of proceedings below to support his claim. But again, setting aside other potential problems with Webb's argument, he plainly was not unavoidably prevented from discovering any facts in the record showing the inappropriateness of his sentence. Accordingly, the trial court properly denied his petition for post-conviction relief.

{¶ 10} Webb's assignments of error are overruled, and the judgment of the

Clark County Common Pleas Court is affirmed.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

Amy M. Smith
Howard E. Webb
Hon. Douglas M. Rastatter