

[Cite as *State v. Brown*, 2010-Ohio-4391.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 96
v.	:	T.C. NO. 06CR0402
DAVID A. BROWN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 17th day of September, 2010.

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DAVID A. BROWN, #A535-491, Madison Correctional Institution, 1851 St. Rt. 56, P. O. Box 740, London, Ohio 43140
Defendant-Appellant

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FROELICH, J.

{¶ 1} David A. Brown appeals, pro se, from a judgment of the Clark County Court of Common Pleas, which denied his motion for leave to file a delayed petition for post-conviction relief. For the following reasons, the judgment of the trial court will be affirmed.

{¶ 2} In October 2006, Brown pled guilty to eleven counts of illegal use of a minor in nudity-oriented material and one count of unlawful sexual conduct with a minor. In exchange for his plea, numerous other charges were dismissed. He was sentenced to an aggregate term of fifteen years of imprisonment. Brown appealed, and the transcript was filed with this court in January 2007. We affirmed his conviction. *State v. Brown*, Clark App. No. 2006-CA-114, 2008-Ohio-3610.

{¶ 3} On August 7, 2009, Brown filed a pro se Motion for Leave to File a Delayed Post Conviction Petition. On September 4, 2009, the trial court dismissed the petition, concluding that Brown had failed to establish grounds for consideration of an untimely petition for post-conviction relief.

{¶ 4} Brown appeals, asserting five “arguments” in his brief. These arguments relate to errors that Brown alleges occurred in the investigation of his case or in the trial court proceedings prior to his conviction. Brown’s arguments do not relate to the trial court’s determination that he had not established a proper basis for the untimely consideration of his petition. This determination is the holding from which Brown appeals, and he must establish that the trial court erred in reaching that conclusion before he will be entitled to consideration of his other arguments.

{¶ 5} R.C. 2953.21(B) and R.C. 2953.23(A)(1) provide that a trial court may not consider a petition for post-conviction relief filed more than 180 days after the filing of the transcript in the court of appeals unless two conditions are satisfied:

{¶ 6} “(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 [R.C. 2953.21 (A)(2)] 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.

{¶ 7} “(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 ***.”

{¶ 8} Both conditions must be satisfied. R.C. 2953.23(A)(1); *State v. Foti*, Lake App. No. 2006-L-138, 2007-Ohio-887, ¶34. “The burden of establishing an R.C. 2953.23(A) exception is upon the petitioner.” *State v. Poindexter* (Aug. 29, 1997), Hamilton App. No. C-960780.

{¶ 9} Brown set forth several arguments in his petition: that the prosecutor failed to disclose exculpatory evidence to the defense related to the search of Brown's house; that defense counsel was ineffective and failed to investigate his case; that there was no physical evidence to support many of the charges against him, that “tainted and inadmissible evidence” affected his sentence, and that counsel misrepresented the terms of his plea agreement.¹ He also stated in his petition that he “recently uncovered newly discovered exculpatory evidence withheld

¹We note that Brown presents a much more detailed argument in his appellate brief than he did in his petition for post-conviction relief. We also note that Brown has attached affidavits to his brief that were not presented in the trial court. We cannot consider evidence on appeal that was not before the trial court. See *State v. Ishmail* (1978), 54 Ohio St.2d 402.

by the prosecution.”² He asserted, very generally, that he had been unavoidably prevented from discovering at an earlier date the facts upon which his petition was based, and that the evidence would have affected the outcome of his case.

{¶ 10} The trial court was “not persuaded that any of these allegations could not have been discovered within the first six (6) months” after Brown entered his plea and filed the transcript in the appeal and concluded that there was “no credible suggestion” that Brown was prevented from discovering these claims. Further, the trial court concluded that Brown had failed to show that any of the alleged newly discovered evidence would have changed the outcome of the case. The court noted that Brown had pled guilty and that some of the claims raised by Brown were specifically addressed with him by the trial court at the plea hearing. Because a trial court may not entertain a petition for postconviction relief that is filed late unless the petitioner meets the two-pronged test set forth in R.C. 2953.23(A), and having found that Brown satisfied neither prong, the trial court dismissed Brown’s petition.

{¶ 11} The record supports the trial court’s conclusions. Brown failed to allege facts, let alone demonstrate, that he was “unavoidably prevented” from discovering the facts upon which he relied and, even assuming he had been unable to discover those facts at an earlier date, he made no showing that the evidence would have affected the outcome of his case. Brown failed to satisfy the requirements of R.C. 2953.23(A) for the consideration of an untimely petition, and

²According to Brown’s response to the State’s motion in opposition to the petition for post-conviction relief, much of this evidence related to a search of his house, which officers were present for the search, and how it was executed.

the trial court did not err in dismissing Brown's petition.

{¶ 12} Because Brown did not provide justification for his untimely petition, we cannot consider the other arguments raised in his brief.

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

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DONOVAN, P.J. and GRADY, J., concur.

Copies mailed to:

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Hon. Richard P. Carey