

[Cite as *State v. Rainey*, 2010-Ohio-5162.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23851
v.	:	T.C. NO. 08 CR 1065
	:	
WILLIAM J. RAINEY	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

**OPINION**

Rendered on the 22<sup>nd</sup> day of October, 2010.

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Attorney for Plaintiff-Appellee

WILLIAM J. RAINEY, #589699, Lebanon Correctional Institute, P. O. Box 56, State Route 63, Lebanon, Ohio 45036  
Defendant-Appellant

FROELICH, J.

{¶ 1} William J. Rainey appeals, pro se, from a judgment of the Montgomery County Common Pleas Court, 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} In November 2008, Rainey was convicted of two counts of rape and two counts of gross sexual imposition, all of which concerned a child under the age of 13. Rainey was sentenced to an aggregate term of fifteen years to life. We affirmed Rainey's conviction on direct appeal. *State v. Rainey*, Montgomery App. No. 23070, 2009-Ohio-5873.

{¶ 3} On November 23, 2009, Rainey filed a petition for post-conviction relief, claiming that his trial counsel rendered ineffective assistance by failing to offer qualified expert medical testimony to rebut the State's expert witnesses. The State filed an Answer to the petition, denying Rainey's claims. The trial court reviewed Rainey's petition without a hearing and denied the petition as untimely.

{¶ 4} Rainey appeals from the trial court's judgment, raising four assignments of error.

## II

{¶ 5} Rainey's assignments of error state:

{¶ 6} "1. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT WHERE IT FAILED TO GRANT AN EVIDENTIARY HEARING PURSUANT TO O.R.C. §2953.21."

{¶ 7} "2. TRIAL COUNSEL ERRED TO THE PREJUDICE OF THE DEFENDANT/PETITIONER WHERE COUNSEL FAILED TO OBTAIN THE ASSISTANCE OF A QUALIFIED MEDICAL EXPERT."

{¶ 8} "3. TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT/APPELLANT WHERE IT FAILED TO INFORM DEFENDANT OF

THE REQUIRED MENS REA ELEMENT(S) TO WHICH THE STATE MUST PROVE WHICH DEHORS THE RECORD.”

{¶ 9} “4. THE TRIAL COURT DID ERROR [SIC] TO THE PREJUDICE OF THE DEFENDANT/APPELLANT WHERE IT DISALLOWED TESTIMONY OF EXCULPATORY EVIDENCE OF OTHER WRONGFUL ACTS OF THE VICTIM.”

{¶ 10} Rainey claims that the trial court erred in denying his petition for post-conviction relief without a hearing. He asserts that his trial counsel failed to obtain a qualified expert to rebut the State’s experts and that the trial court made erroneous rulings at trial.

{¶ 11} “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).

{¶ 12} Rainey filed a direct appeal of his conviction. Six CDs containing the trial and sentencing hearing were filed in this Court on November 14, 2008; written transcripts of those CDs were filed on December 23, 2008. Rainey’s petition for post-conviction relief was filed in November 23, 2009, which was after the 180-day deadline set forth in R.C. 2953.21(A)(2) had passed.<sup>1</sup>

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<sup>1</sup>We have not expressly decided whether the “trial transcript” is filed when CDs are filed or when written transcripts of those CDs are filed. See *State v.*

{¶ 13} 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). *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.

{¶ 14} In addition, the petitioner must 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). In this case, Rainey would be required to show that, if not for his trial counsel’s alleged failure to obtain medical experts, he would not have been convicted.

{¶ 15} The post-conviction relief statutes do “not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required.” *State v. Jackson* (1980), 64 Ohio St.2d 107, 110. Rather, in addressing a petition for post-conviction relief, a trial court plays a gatekeeping

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*Everette*, Montgomery App. No. 23585, 2010-Ohio-2832 (holding that the “trial transcript” was filed when the “videotapes” were filed in the direct appeal, but noting in footnote 2 that we did not need to address DVD or CD recordings). In this case, the distinction is inconsequential because, even using the date that the written transcripts were filed (as the trial court did), Rainey’s petition was filed more than 180 days after the written transcripts were filed in his direct appeal.

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* (1999), 86 Ohio St.3d 279, paragraph two of the syllabus; *Gondor* at ¶51.

{¶ 16} We review the trial court’s denial of Rainey’s petition for an abuse of discretion. *Gondor* at ¶52.

{¶ 17} In his petition, Rainey claimed that he was unavoidably prevented from discovering the facts upon which he relies due to the lack of legal assistance from a licensed attorney. As stated above, post-conviction proceedings are civil in nature, and there is no constitutional or statutory right to the appointment of counsel for petitioners. *State ex rel. Peeples v. Wilford* (1995), 72 Ohio St.3d 407; *State v. Palmer* (Sept. 28, 2001), Montgomery App. No. 18778. The lack of legal assistance from a licensed attorney does not excuse Rainey’s untimeliness.

{¶ 18} In addition, we find no merit to Rainey’s apparent argument that he was unaware of his trial attorney’s alleged failure to obtain medical experts. First, contrary to Rainey’s argument, his counsel moved for the appointment of an expert witness. The trial court granted the motion and appointed Dr. Scott Cohen, a medical doctor, as an expert witness for the defense. Both Rainey and Dr. Cohen testified at trial; Dr. Cohen addressed Rainey’s assertion that he suffers from a medical condition that causes him to release semen without sexual arousal. Regardless, once Rainey’s trial attorney indicated that he had no further witnesses

on Rainey's behalf, Rainey knew that his counsel would not be calling any additional experts to challenge the State's medical witnesses and DNA evidence. Rainey has not presented any evidence that he was unavoidably prevented from discovering the facts upon he relies in his petition, i.e., that his counsel failed to present additional expert testimony.

{¶ 19} Because Rainey 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 Rainey's petition was untimely and in dismissing his petition without a hearing.

{¶ 20} The first assignment of error is overruled.

{¶ 21} In light of our disposition of Rainey's first assignment of error, we need not address the merits of Rainey's petition, claiming that trial counsel was ineffective in failing to obtain the assistance of a qualified medical expert. The second assignment of error is overruled as moot.

{¶ 22} The arguments raised in Rainey's third and fourth assignments of error were not included in his petition and could have been raised in his direct appeal. Accordingly, these issues are not properly before us and are barred by res judicata. *State v. Goldick*, Montgomery App. No. 23690, 2010-Ohio-4394, ¶11 (recognizing that "res judicata bars any claim that was or could have been raised at trial or on direct appeal"); *Steffen*, supra. The third and fourth assignments of error are overruled.

### III

{¶ 23} The trial court's judgment will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. Mary Katherine Huffman