

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

Court of Appeals No. WD-13-026
WD-13-053
WD-13-071

v.

Trial Court No. 2007CR0215

Scott Rodriguez

DECISION AND JUDGMENT

Appellant

Decided: March 28, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers and David E. Romaker, Jr. , Assistant Prosecuting
Attorneys, for appellee.

Scott Rodriguez, pro se.

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SINGER, J.

{¶ 1} This is a consolidated appeal involving three different judgments from the Wood County Court of Common Pleas. For the reasons that follow, we affirm all three judgments.

{¶ 2} Appellant, Scott Rodriguez, was convicted of trafficking in marijuana in 2007. He was sentenced to serve eight years in prison. This court affirmed his conviction in 2009. *State v. Rodriguez*, 6th Dist. Wood No. WD-08-011, 2009-Ohio-4059.

{¶ 3} On March 11, 2013, appellant filed a motion requesting public records. Specifically, appellant sought copies of certain audiotapes and police reports which he claims cast doubt on the initial stop of the vehicle, a stop which ultimately led to his arrest. The court denied his motion. Appellant filed an identical request with the trial court in September 2010, which the trial court also denied. Appellant now appeals the trial court's second denial of his motion for public records setting forth the following assignment of error:

The trial court abused its discretion when it refused to grant the defendant's request pursuant to R.C. 149.43(B)(8), which required authorization from the Judge that (sic) sentence him, and when it refused to make a finding, that the information sought was necessary to support defendant's justiciable claim.

{¶ 4} R.C.149.43(B)(8) provides:

A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or

concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

{¶ 5} Establishing a justiciable claim ordinarily involves identifying a “pending proceeding with respect to which the requested documents would be material.” *State v. Wilson*, 2d Dist. Montgomery No. 23247, 2009-Ohio-7035, ¶ 5, *State v. Gibson*, 2d Dist. Champaign No. 06CA37, 2007-Ohio-7161, ¶ 14.

{¶ 6} The trial court found, twice, that appellant did not demonstrate that the records sought were needed to support a justiciable claim. We agree. This court recently rejected similar arguments from appellant regarding alleged exculpatory evidence when we affirmed the denial of his petition for postconviction relief in *State v. Rodriguez*, 6th Dist. Wood No. WD-12-067, 2013-Ohio-5905. Moreover, appellant has not identified any *pending* proceeding to which the items he seeks would be material. Rather, he alludes to possible future proceedings which could result from his access to the records he requests. Accordingly, we find that we find that the trial court did not err in finding

that appellant did not satisfy the requirements of R.C. 149.43(B)(8). Appellant's first assignment of error is found not well-taken.

{¶ 7} In appellant's second assignment of error, he contends that the court erred in denying his "motion for leave to file a motion for a new trial based on prosecutorial misconduct, concealment of evidence affecting the defendant rights to a fair trial." Appellant based his claim on newly discovered evidence. The trial court denied his motion finding it untimely.

{¶ 8} Crim.R. 33(B) addresses timeliness when the basis of a new trial motion is newly discovered evidence:

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶ 9} Leave of court must be granted before the merits of the motion are reached. *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶ 25 (7th Dist.). The moving party must prove unavoidable delay by clear and convincing evidence in order to obtain leave. *Id.* at ¶ 26; Crim.R. 33(B). Unavoidable delay results when the

party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence. *Id.* citing, *State v. Walden*, 19 Ohio App.3d 141, 146, 1483 N.E.2d 859 (10th Dist.1984). The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387, ¶ 12

{¶ 10} Appellant filed his motion for leave to file a motion for a new trial on July 18, 2013, some five years after his conviction. In his motion, he asserts the same arguments he asserted in his petition for postconviction relief he filed in the trial court on October 31, 2012. *Rodriguez*, 6th Dist. Wood No. WD-12-067, 2013-Ohio-5905. As such, it cannot be said that appellant:

* * * had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence.

Lordi at ¶ 25.

{¶ 11} Accordingly, we find that the trial court did not err in denying appellant's motion for leave to file a motion for a new trial. Appellant's second assignment of error is found not well-taken.

{¶ 12} The final judgment at issue in this appeal is the trial court's denial of appellant's second petition for postconviction relief.

{¶ 13} Appellant asserts the following assignment of error:

The trial court abused its discretion in not properly considering the defendants postconviction petition on its face under R.C. 2953.23 nor giving proper facts findings and conclusions of law in denying the defendants post-conviction [sic] petition.

{¶ 14} When a petition for postconviction relief is a second or successive petition, R.C. 2953.23(A)(1)(a) prohibits a trial court from hearing said petition unless the petitioner either demonstrates (1) that he was “unavoidably prevented from discovering the facts upon which” he relies; or (2) that after the 180 day time limit for filing a petition for postconviction relief, “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 upon that right.”

{¶ 15} Neither of the alternative requirements exists in this case to permit consideration of the September 26, 2013 motion as a successive petition for postconviction relief under R.C. 2953.23(A)(1). Accordingly, appellant’s third assignment of error is found not well-taken.

{¶ 16} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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