

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-908
	:	(C.P.C. No. 05CR 04-2332)
Carolyn A. White,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 3, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

George A. Katchmer, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Carolyn A. White, appeals from a judgment of the Franklin County Court of Common Pleas dismissing her petition for postconviction relief. For the following reasons, we affirm.

{¶ 2} In May 2006, following a jury trial, appellant was convicted of aggravated burglary, kidnapping, carrying a concealed weapon, and possession of criminal tools. The trial court sentenced appellant to prison terms totaling 19 years and six months. Appellant pursued a direct appeal to this court, and we affirmed. *See State v. White*, 10th

Dist. No. 06AP-607, 2007-Ohio-3217. Subsequently, the Supreme Court of Ohio declined to review her discretionary appeal, and the United States District Court for the Southern District of Ohio dismissed her federal habeas petition.

{¶ 3} On September 9, 2011, over five years after her conviction, appellant filed a petition for postconviction relief in the trial court, claiming she received ineffective assistance of counsel based on her attorney's alleged failure to investigate issues relating to her competency. She asserted that the petition was timely because she had previously used "mind-altering medications" that prevented her from concentrating and caused "memory gaps." Appellant claimed that she acted promptly to file the petition after "regaining her mental stability."

{¶ 4} The state filed an answer and motion to dismiss the petition. The state argued, inter alia, that the petition was untimely, that no exceptions allowed untimely filing, and that appellant failed to present evidentiary documentation sufficient to support a claim of ineffective assistance of counsel.

{¶ 5} The trial court denied and dismissed appellant's petition in a decision and entry filed September 22, 2011. After reviewing the petition and attached documents, the trial court found that appellant's affidavit failed to set forth specific operative facts to warrant a hearing. Specifically, the trial court determined that appellant's ineffectiveness claim lacked merit and was barred by res judicata. According to the trial court, the record did not support appellant's claim that her trial counsel failed to pursue and investigate the issues regarding her competency. The trial court did not address the timeliness of the petition.

{¶ 6} In an appeal from the trial court's judgment, appellant advances the following assignment of error for our consideration:

THE TRIAL COURT ERRED IN DENYING AN
EVIDENTIARY HEARING ON APPELLANT'S PETITION
FOR POST-CONVICTION RELIEF.

{¶ 7} Appellant's sole assignment of error argues that the trial court erred by denying and dismissing her petition for postconviction relief without a hearing. The state presents several arguments in response, but we will begin by addressing the state's

threshold argument regarding whether the trial court had jurisdiction to entertain the petition.

{¶ 8} Petitions for postconviction relief are authorized by R.C. 2953.21. "A postconviction 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). The mere filing of a petition does not automatically entitle the petitioner to a hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282 (1999), citing *State v. Cole*, 2 Ohio St.3d 112 (1982). Instead, "the trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing." *Id.* at 113.

{¶ 9} A trial court lacks jurisdiction to entertain a petition filed beyond the times established in R.C. 2953.21(A)(2) and 2953.23. *State v. Anderson*, 10th Dist. No. 11AP-236, 2011-Ohio-6667, ¶ 13; *State v. James*, 10th Dist. No. 11AP-246, 2011-Ohio-6457, ¶ 14; *State v. Soulivong*, 10th Dist. No. 11AP-12, 2011-Ohio-3601, ¶ 9. R.C. 2953.21(A)(2) mandates that, unless one of the exceptions in R.C. 2953.23(A) applies, a petition "shall 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."

{¶ 10} Here, it is undisputed that appellant filed her petition well beyond the time frame established in R.C. 2953.21(A). The transcript was filed in her direct appeal in September 2006, causing the 180-day filing deadline to occur in March 2007. Because appellant did not file her petition until September 2011, four years and six months later, the trial court lacked jurisdiction to entertain her petition unless appellant could prove that filing was permitted by one of the exceptions in R.C. 2953.23(A).

{¶ 11} The exception in R.C. 2953.23(A)(1) applies if "the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief" or if the petitioner presents claims arising out of new United States Supreme Court decisions that apply retroactively on collateral review. R.C. 2953.23(A)(1)(a). In either scenario, the petitioner must prove "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." R.C. 2953.23(A)(1)(b). R.C. 2953.23(A)(2) contains another exception for claims of actual innocence based on DNA testing.

{¶ 12} Appellant's petition did not invoke the exception for new United States Supreme Court decisions or the exception for actual innocence based on DNA testing. Though not entirely clear, the petition seemed to invoke the unavoidable prevention exception by alleging that appellant's use of "mind-altering medications" prevented her from concentrating and caused "memory gaps." In her affidavit, however, appellant admits taking herself off all medications in September 2009, at which time she became "able to concentrate and be able to contact an attorney." (Appellant's affidavit, ¶ 17.) Thus, even if we were to agree that appellant's claimed concentration and memory problems resembled the type of unavoidable prevention described in R.C. 2953.23(A)(1)(a), appellant was still required to explain why her petition was not filed until September 2011—two years after she apparently regained her concentration and became able to contact an attorney. Appellant's petition contains no such explanation.

{¶ 13} Nor do the medical records attached to the petition establish unavoidable prevention. The majority of the records were readily available to appellant before trial. Although the affidavit of Dr. Robb M. Snider was prepared in August 2011, Dr. Snider relied exclusively on medical records that were in existence in February 2005—over a year before appellant's trial. Moreover, Dr. Snider concluded only that appellant's state of mind "could have been altered by her abuse of alcohol and/or her use of medications." (Affidavit of Dr. Snider, ¶ 9.) This conclusion is nothing new when compared to the medical records existing at the time of appellant's trial. Even the 2006 documents from appellant's initial assessment with the Ohio Department of Rehabilitation and Correction reveal that appellant was aware of her conviction and actively awaiting the outcome of her direct appeal.

{¶ 14} Regardless, even if appellant could demonstrate unavoidable prevention, her petition did not establish "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." R.C. 2953.23(A)(1)(b). None of the documentation attached to the petition supported a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the trial court noted, the record indicates that appellant's trial counsel had appellant examined by a psychologist and could have decided not to further pursue a mental health theory as a

matter of trial strategy. Appellant's petition fails to demonstrate otherwise. The affidavit of Dr. Snider did not conclude within a reasonable degree of medical certainty that appellant was incompetent or legally insane.

{¶ 15} Under these circumstances, we find that appellant has not satisfied any of the exceptions in R.C. 2953.23(A) that would allow filing beyond the time specified in R.C. 2953.21(A). Although timeliness was not addressed in the trial court's decision to dismiss appellant's petition, we may nevertheless consider this jurisdictional question on appeal. See *James* at ¶ 14 (the jurisdictional limitations in R.C. 2953.21(A)(2) and 2953.23(A) may not be waived or forfeited); see also *State v. Gaddis*, 8th Dist. No. 77058 (Oct. 12, 2000) ("Even though the court did not rely on timeliness as a basis for dismissing the petition, we affirm the denial of the motion."). Moreover, the state challenged the timeliness of the petition below and was permitted to reassert its timeliness challenge on appeal. See App.R. 3(C)(2) (permitting an appellee to "defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court"). Because appellant's postconviction petition was untimely under R.C. 2953.21(A)(2) and 2953.23(A), the trial court lacked jurisdiction and was required to dismiss the petition.

{¶ 16} Accordingly, appellant's assignment of error is overruled. Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and FRENCH, J., concur.
