

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : 12AP-346
 : (C.P.C. No. 09CR-12-7855)
 Jose I. Espinal, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Jose I. Espinal, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Jose I. Espinal, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to correct sentence. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was indicted on December 31, 2009 with three counts of rape. On January 5, 2011, appellant entered a plea of guilty to two counts of rape in violation of R.C. 2907.02. Appellant was sentenced to the jointly recommended sentence totaling 11 years of incarceration. A judgment entry reflecting appellant's conviction and sentence was filed on January 5, 2011. No timely appeal was taken. However, on September 21,

2011, appellant sought leave from this court to file a delayed appeal, and said request was denied on November 25, 2011.

{¶ 3} On February 13, 2012, appellant filed a motion to correct sentence. In this motion, appellant argued he was entitled to have his sentence corrected in accordance with 2011 Am.Sub.H.B. No. 86, which amended Ohio's criminal sentencing laws. Stating that H.B. No. 86 does not apply to sentences imposed prior to its effective date, the trial court denied appellant's motion via entry filed March 27, 2012.

II. ASSIGNMENTS OF ERROR

{¶ 4} This appeal followed and appellant brings the following four assignments of error for our review:

[1.] Whether the trial court abused its discretion by applying improper sections of the revised code.

[2.] Whether the trial court abused its discretion in failing to merge both counts as mandated by law.

[3.] Whether the trial court abused its discretion under the abuse of discretion standard.

[4.] Whether the trial court abused its discretion in ruling House Bill 86 is not retroactive.

III. ANALYSIS

{¶ 5} We construe appellant's motion to correct sentence as a petition for postconviction relief. *State v. Timmons*, 10th Dist. No. 11AP-895, 2012-Ohio-2079, ¶ 6, citing *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997); *State v. McAllister*, 10th Dist. No. 06AP-843, 2007-Ohio-1816, ¶ 6 (vaguely titled motion to correct or vacate sentence should be construed as a motion for postconviction relief under R.C. 2953.21); *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586, ¶ 11 (claim for denial of rights and seeking to void judgment and vacate sentence filed after the time for direct appeal had passed properly construed as a petition for postconviction relief).

{¶ 6} The postconviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained" in the trial court record.

State v. Murphy, 10th Dist. No. 00AP-233 (Dec. 26, 2000). Postconviction review is not a constitutional right but, rather, is a narrow remedy which affords a petitioner no rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999).

{¶ 7} R.C. 2953.21(A) establishes the time limitations for filing a petition for postconviction relief. If no appeal is taken, "the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal." R.C. 2953.21(A)(2). Because appellant did not file a direct appeal from his convictions, appellant had to file a petition for postconviction relief no later than 180 days after the time for a direct appeal from his convictions expired. Appellant was sentenced on January 5, 2011, and thus, pursuant to R.C. 2953.21(A)(2), appellant's time for filing a petition for postconviction relief expired on August 3, 2011. Appellant did not file his petition until February 13, 2012. Therefore, appellant's petition was untimely.

{¶ 8} A trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless a petitioner demonstrates that one of the exceptions in R.C. 2953.23(A) applies. *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8; *State v. Raines*, 10th Dist. No. 03AP-1076, 2004-Ohio-2524, ¶ 5. The exception in R.C. 2953.23(A)(1)(a) 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 "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." R.C. 2953.23(A)(2) contains another exception for claims of actual innocence based on DNA testing.

{¶ 9} Appellant has made no attempt to argue, much less establish, that any of the exceptions applied to his petition. With regard to R.C. 2953.23(A)(1), appellant did not allege that he was unavoidably prevented from discovering the facts upon which he relies in his petition or that his claim was based on a new federal or state right recognized by the United States Supreme Court that could be retroactively applied to his case. Though H.B. No. 86 went into effect on September 30, 2011, this does not assist appellant in meeting the timeliness requirement of R.C. 2953.21 because H.B. No. 86 is neither a pronouncement by the United States Supreme Court nor a type of fact to which R.C. 2953.23(A)(1)(a) refers. *Timmons* at ¶ 9 (meeting the requirement of R.C.

2953.23(A)(1)(a) requires a decision from the United States Supreme Court); *State v. Lee*, 10th Dist. No. 99AP-668 (June 8, 2000) (enactment of legislation is not a fact contemplated by R.C. 2953.23(A)(1)(a), therefore, S.B. No. 2 could not be used as a basis to meet time requirements for postconviction relief). Further, R.C. 2953.23(A)(1) does not allow a trial court to consider an untimely petition to challenge a sentence brought by a non-capital petitioner. *State v. Mangus*, 10th Dist. No. 06AP-1105, 2009-Ohio-6563, ¶ 12, citing *State v. Searcy*, 10th Dist. No. 06AP-572, 2006-Ohio-6993, ¶ 8. Finally, there is no indication that DNA results establish appellant's actual innocence. R.C. 2953.23(A)(2).

{¶ 10} Because appellant failed to establish the applicability of an exception that would allow the trial court to consider his untimely petition, the trial court lacked jurisdiction to entertain his petition for postconviction relief.¹ *Mangus* at ¶ 13, citing *State v. Russell*, 10th Dist. No. 05AP-391, 2006-Ohio-383, ¶ 10. Accordingly, the trial court did not err in denying appellant's petition, though technically the petition should have been dismissed for lack of jurisdiction. *State v. Elkins*, 10th Dist. No. 10AP-6, 2010-Ohio-4605, ¶ 17 (though the postconviction petition should have been dismissed for lack of jurisdiction, no error in denying the same); *Mangus* at ¶ 13 (affirming denial of postconviction petition though it should have been dismissed for lack of jurisdiction); *State v. Holton*, 4th Dist. No. 06CA28, 2007-Ohio-2251, ¶ 19.

IV. CONCLUSION

{¶ 11} Our disposition of the jurisdictional issue renders moot appellant's assignments of error, which address the merits of his petition. *Elkins* at ¶ 17; *Mangus* at ¶ 14; *Hollingsworth* at ¶ 11. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.

¹ 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 *State v. White*, 10th Dist. No. 11AP-908, 2012-Ohio-1969, ¶ 15; *State v. James*, 10th Dist. No. 11AP-246, 2011-Ohio-6457, ¶ 14 (the jurisdictional limitations in R.C. 2953.21(A)(2) and 2953.23(A) may not be waived or forfeited); *State v. Gaddis*, 8th Dist. No. 77058 (Oct. 12, 2000) (though the trial court did not rely on timeliness and dismiss the petition, denial of the motion for postconviction relief was affirmed).