

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-96
 : (C.P.C. No. 09CR-07-3946)
 Chase M. Banks, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 21, 2012

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

Chase M. Banks, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Chase M. Banks, 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 July 2, 2009 with one count of felonious assault. The count contained two accompanying specifications, one for the use of a firearm and one for discharging a firearm from a motor vehicle. On December 16, 2010, appellant

entered an *Alford*¹ plea of guilty to the stipulated lesser-included offense of felonious assault with the accompanying specifications. The parties jointly recommended an aggregate nine-year sentence; however, the trial court imposed an aggregate sentence of ten years, comprised of four years for the felonious assault, consecutive to five years for the discharging a firearm from a motor vehicle specification, consecutive to one year for the firearm specification. Additionally, the trial court awarded 25 days of jail-time credit. A judgment entry reflecting appellant's conviction and sentence was filed on December 17, 2010. No appeal was taken.

{¶ 3} Over one year later, appellant filed, on December 20, 2011, a motion to correct sentence. In this motion, appellant argued that the trial court failed to comply with Crim.R. 11 when it accepted his plea, and further, that 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. 86 does not apply to sentences imposed prior to its effective date, the trial court denied appellant's motion via entry filed January 26, 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 failing to comply with Crim.R. 11.

[2.] Whether the trial court abused its discretion by failing to apply the proper statutes.

[3.] Whether the trial court abused its discretion in determining that House Bill 86 is not retroactive.

[4.] Whether the trial court abused its discretion in failing to merge all counts.

III. MOTION OF APPELLANT

{¶ 5} Prior to addressing appellant's assignments of error, we first address the "jurisdictional motion" filed by appellant on June 21, 2012. In this motion, appellant asks

¹ *N.C. v. Alford*, 400 U.S. 25 (1970).

this court "to determine as a matter of law and fact the statutory jurisdiction of this appellate court." (Motion, 1.) Though the precise basis of this motion is unclear, it appears that appellant is seeking dismissal because he "has determined that no jurisdictional document or record of a jurisdictional document was with the record filed in case number 12-AO-96 [sic]." (Motion, 1.) We find no merit to appellant's argument that this court lacks jurisdiction to review his appeal. Accordingly, appellant's "jurisdictional motion" is denied.

IV. ANALYSIS

{¶ 6} 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).

{¶ 7} 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).

{¶ 8} 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 December 17, 2010, and thus, pursuant to R.C. 2953.21(A)(2), appellant's time for filing a

petition for postconviction relief expired on July 15, 2011. Appellant did not file his petition until December 20, 2011. Therefore, appellant's petition was untimely.

{¶ 9} 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.

{¶ 10} 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. 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. 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. 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).

{¶ 11} 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.² *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.

V. CONCLUSION

{¶ 12} 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.

*Motion denied;
judgment affirmed.*

KLATT and CONNOR, JJ., concur.

² 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).