

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-817
 : (C.P.C. No. 98CR-03-1288)
 Jason L. Stewart, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for
appellee.

Jason L. Stewart, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Jason L. Stewart, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court denied his motion for post-conviction relief.

{¶2} On October 5, 1998, appellant pleaded guilty to two counts of aggravated murder with specification pursuant to R.C. 2908.01; one count of kidnapping pursuant to R.C. 2905.01; and one count of burglary pursuant to R.C. 2911.12. The trial court followed the recommended sentence, and sentenced appellant to life imprisonment

without parole for 25 years as to the aggravated murder counts, which merged for sentencing, three years as to the kidnapping count, and three years as to the burglary count, with the kidnapping and burglary counts running concurrently to each other and consecutively to the aggravated murder counts, for a total prison sentence of 28 years to life. Appellant did not directly appeal the judgment.

{¶3} On June 12, 2009, appellant filed a motion to vacate, set aside, and correct sentence, pursuant to R.C. 2953.21, alleging his trial counsel was ineffective for not objecting to the court's violations of Crim.R. 11(C)(3) and R.C. 2945.06. The trial court denied his motion on August 11, 2009, finding it to be untimely filed. Appellant appeals the judgment of the trial court and asserts the following two assignments of error:

[I.] Ineffective Assistance of Counsel for failure to object to a violation of Criminal Rule 11 Section (C)(3,4)[.]

[II.] Trial court acted in error by misapplying 2953.21 (180 day time limit) to undermine the legality of 2945.06 being a jurisdictional matter that cannot be waived.

{¶4} We will address appellant's second assignment of error first. The trial court found appellant's petition was untimely filed, as appellant did not file his petition within 180 days, pursuant to R.C. 2953.21(A)(2), and he did not meet the exception to the 180-day time limit in R.C. 2953.23(A)(1). The appropriate standard of review used by an appellate court when reviewing a trial court's decision to dismiss a petition for post-conviction relief without an evidentiary hearing involves a mixed question of law and fact to determine whether the petition states substantive grounds for relief; thus, the trial court's decision on factual issues is reviewed using a manifest weight standard of review,

whereas the trial court's decision on legal issues is reviewed de novo. *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, ¶9.

{¶5} In the present case, the trial court found that appellant's petition was untimely. R.C. 2953.21(A)(2) provides: "If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, 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(C) further provides in part: "The court shall consider a petition that is timely filed under division (A)(2) of this section."

{¶6} In the present case, the judgment on appellant's conviction was filed October 7, 1998. Appellant did not file a direct appeal of his conviction and sentencing, and it is clear he did not file his petition for post-conviction relief within 180 days after the expiration of the time for filing the appeal.

{¶7} R.C. 2953.21(A)(2) provides an exception to the 180-day limitation, as found in R.C. 2953.23. R.C. 2953.23(A)(1) provides that a court may entertain a petition filed after the expiration of 180 days if both of the following apply: (a) either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period described in R.C. 2953.21(A)(2), 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; and (b) the petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted.

{¶8} Here, appellant failed to meet the requirements of R.C. 2953.23(A)(1). As for R.C. 2953.23(A)(1)(a), appellant was not unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief. Appellant claimed in his petition that his trial counsel was ineffective for failing to object to a violation of Crim.R. 11(C)(3), which requires a panel of three judges to accept a plea of guilty to a charge of aggravated murder with specifications, and a violation of R.C. 2945.06, which provides that, in cases where a defendant pleads guilty to aggravated murder, a court composed of three judges must examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

{¶9} However, these facts were known to and discoverable by appellant at the time of the trial court's original judgment and sentence, and appellant was not unavoidably prevented from discovering these facts and presenting them to the court in a timely manner. Furthermore, appellant does not claim that the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in appellant's situation, and his petition did not assert any claims based upon any such rights.

{¶10} We also note that, because the evidence was known to appellant as of the time of the original judgment, appellant's claims could have been raised on direct appeal, and they are barred under the doctrine of res judicata. See *State v. Scudder* (1998), 131 Ohio App.3d 470, 475 (because appellant's claims could have been raised on direct appeal, appellant's petition for post-conviction relief was also barred under the doctrine of res judicata). Therefore, insomuch as appellant neither filed his petition within the 180-day period provided for in R.C. 2953.21, nor satisfied the first prong of R.C. 2953.23(A)(1), the

petition was not timely. Thus, as we have found the trial court did not err in denying appellant's petition because it was untimely filed, appellant's first and second assignments of error are overruled.

{¶11} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and CONNOR, J., concur.
