

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 12AP-498
 : (C.P.C. No. 08CR-8598)
 v. :
 : (REGULAR CALENDAR)
 Hassan Sidibeh, :
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 4, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Timothy Young, Ohio Public Defender, and *Dennis Pusateri*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Hassan Sidibeh, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for postconviction relief. Defendant assigns a single error:

THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S PETITION FOR POSTCONVICTION RELIEF WITHOUT CONDUCTING A HEARING TO RESOLVE COMPETING QUESTIONS OF FACT.

Because the trial court properly concluded defendant failed to provide newly discovered evidence to support his filing a petition for postconviction relief outside the time constraints of R.C. 2953.21 et seq., leaving the trial court without jurisdiction to conduct a hearing on defendant's untimely petition, we affirm.

I. Facts and Procedural History

{¶ 2} Defendant was indicted for aggravated burglary, four counts of aggravated robbery, four counts of kidnapping, and eight counts of robbery, each with a firearm specification, arising out of an October 2008 home invasion. *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712 (10th Dist.). Defendant, a juvenile when he was indicted, was bound over to the common pleas court to be tried as an adult; pursuant to jury trial, defendant was found guilty on all charges and specifications. The trial court sentenced defendant to 18 years of imprisonment.

{¶ 3} On April 12, 2010, defendant appealed his convictions, assigning nine errors, the eighth of which asserted defendant did not receive effective assistance of counsel. In its April 2011 decision in *Sidibeh*, this court overruled each of defendant's assignments of error, except the contentions in defendant's seventh assignment of error regarding a sentencing issue under R.C. 2941.25. Finding merit in that single assignment of error, this court reversed in part and remanded for resentencing. On remand, the trial court again sentenced defendant to 18 years of imprisonment.

{¶ 4} Defendant filed a petition for postconviction relief on October 5, 2011. Defendant attached to the motion an affidavit from a private investigator, as well as affidavits from family members and friends. The trial court initially concluded the petition was untimely, noting defendant failed to file the petition no later than 180 days after May 26, 2010, the date on which the trial transcript was filed in the court of appeals in defendant's direct appeal of his convictions. *See* R.C. 2953.21(A)(2). The trial court then examined the exceptions to the time constraints to determine if any applied. *See* R.C. 2953.23.

{¶ 5} The trial court decided the only possible exception was a delayed filing due to newly discovered evidence that defendant was unavoidably prevented from discovering within the 180-day time period. After examining the evidence defendant submitted to support his petition, the trial court concluded defendant was aware of and had access to all of the evidence within the 180 days specified for a timely petition. Accordingly, the trial court denied defendant's petition without a hearing.

II. Petition for Postconviction Relief – General Requirements

{¶ 6} Defendant's single assignment of error asserts the trial court should have conducted a hearing on his petition for postconviction relief, as competing questions of fact could not be resolved outside of a hearing.

{¶ 7} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58; *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 14, *discretionary appeal not allowed*, 102 Ohio St.3d 1470, 2004-Ohio-2380, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 284 (noting that postconviction relief " 'statute clearly calls for discretion in determining whether to grant a hearing' ").

A. *Timeliness under R.C. 2953.21(A)(2)*

{¶ 8} A petition for postconviction relief 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 record." *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000), *discretionary appeal not allowed*, 92 Ohio St.3d 1441 (2001). R.C. 2953.21 affords a prisoner postconviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 32; *Murphy*.

{¶ 9} Effective September 21, 1995, R.C. 2953.21 was amended to require that a petition under R.C. 2953.21(A)(1) 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 or adjudication." R.C. 2953.21(A)(2). The amendment further provides that "[i]f 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." *Id.*

{¶ 10} Defendant directly appealed from his judgment of convictions, and the transcript was filed in the court of appeals on May 26, 2010. Defendant then had 180 days

to file his petition for postconviction relief, but he did not file his petition until October 5, 2011, well past the 180-day deadline set forth in R.C. 2953.21. Because defendant's petition was untimely, the trial court was without jurisdiction to consider it. *State v. Rippey*, 10th Dist. No. 06AP-1229, 2007-Ohio-4521; *State v. Robinson*, 10th Dist. No. 06AP-368, 2006-Ohio-6649; *State v. Bivens*, 10th Dist. No. 05AP-1270, 2006-Ohio-4340, *appeal not allowed*, 112 Ohio St.3d 1442, 2007-Ohio-152.

{¶ 11} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If defendant were able to satisfy one of those two conditions, R.C. 2953.23(A) requires he also must demonstrate that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

B. *Res Judicata*

{¶ 12} Another significant restriction on Ohio's statutory procedure for postconviction relief is the doctrine of res judicata. The doctrine requires a defendant to support the error claimed in the petition with evidence outside the record created from the direct criminal proceedings. "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment." (Emphasis deleted.) *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *Perry* at paragraph nine of the syllabus. "Res judicata also implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *Hessler* at ¶ 37.

C. *Hearing*

{¶ 13} Lastly, a defendant is not automatically entitled to an evidentiary hearing on a petition. *State v. Jackson*, 64 Ohio St.2d 107, 110-13 (1980). To warrant an evidentiary hearing, the defendant bears the initial burden of providing evidence to demonstrate a cognizable claim of constitutional error. R.C. 2953.21(C); *Hessler* at ¶ 33. A trial court

may deny a defendant's petition for postconviction relief without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun* at paragraph two of the syllabus.

III. Defendant's Petition – Properly Denied

{¶ 14} Defendant contends counsel's failure to investigate, to present an alibi, and to present evidence that one of the participants in the home invasion is a look-alike for defendant amounts to ineffective assistance of counsel. Defendant asserts that had counsel investigated the issue and presented such testimony, the testimony would have supported defendant's alibi and resulted in his acquittal.

{¶ 15} To secure a hearing on his claim for postconviction relief based on the ineffective assistance of trial counsel, defendant had the initial burden of submitting evidentiary documents that together contain sufficient operative facts which, if believed, would establish (1) counsel substantially violated at least one of the attorney's essential duties to his or her client, and (2) defendant was prejudiced as a result. *Cole* at 114; *Calhoun* at 289 (noting a postconviction relief petitioner has the burden of proving counsel's ineffectiveness, since in Ohio a properly licensed attorney is presumed to be competent). "Judicial scrutiny of counsel's performance must be highly deferential * * * [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 149 (1989). Defendant's proceedings raise a number of issues that undermine the postconviction relief he seeks.

A. Timeliness Under R.C. 2953.21(A)(2)

{¶ 16} The first issue presented in defendant's appeal is whether the time for defendant to file a petition for postconviction relief began to run when the transcript was filed in his initial, direct appeal of his convictions and sentence or in relation to the more recent sentence the trial court imposed on remand.

{¶ 17} While R.C. 2953.21(A)(2) does not specifically address the present situation, the purpose of the amendments to R.C. 2953.21(A)(2) and the case law interpreting it lend some guidance. *State v. Price*, 10th Dist. No. 98AP-80 (Sept. 29, 1998), addressed an analogous situation involving a delayed appeal. Quoting the trial court, this court observed that a court's determining the time under which R.C. 2953.21(A)(2) begins to

run on the filing of a delayed appeal "nullifies the obvious intent of the General Assembly to place a time limitation on post-conviction actions." Similarly, here, if we generally were to determine that the time for filing a defendant's postconviction petition did not begin to run until the statutory deadlines are applied to his second round of sentencing, the time for filing postconviction petitions would be extended well beyond the time limits set forth in R.C. 2953.21(A)(2) to an undetermined time in the future, all contrary to the intent of the legislature. Moreover, this case lacks a factual rationale for using defendant's subsequent sentencing proceedings to start the time limitations under R.C. 2953.21(A)(2), as defendant's petition for postconviction relief concerns the proceedings related to his convictions, not his second sentencing.

{¶ 18} Accordingly, under the circumstances of this case, the timeliness of R.C. 2953.21(A)(2) began to run at the time defendant's transcript was filed in his first appeal, May 26, 2010. Due to the holiday, his petition was due on or about November 23, 2010, but defendant did not file his petition until October 5, 2011. As a result, his petition was untimely. *See also State v. Foster*, 10th Dist. No. 09AP-227, 2009-Ohio-5202.

B. Unavoidably Prevented from Discovering Pertinent Evidence

{¶ 19} Because defendant did not file within the 180 days specified in R.C. 2953.21(A), he is relegated to attempting to fall within one of the exceptions that would permit him a longer time period to file his petition. He relies on the provision that extends the time for filing a petition due to evidence defendant was unavoidably prevented from discovering. R.C. 2953.23(A)(1)(a).

{¶ 20} To support his contention, defendant filed a number of affidavits with his petition for postconviction relief. None, however, supports his claim that he was unavoidably prevented from discovering the evidence. The first is the affidavit of Jenifer Ruffing, a private investigator that defendant's attorney hired. Ruffing's affidavit states the trial transcript revealed defendant's co-defendants, Kasey Brown and Robert Vann, testified a young man named Naron directed them to target the home subject of the invasion. According to Ruffing's affidavit, "Mr. Vann indicated that there was a physical resemblance between 'Naron' and Mr. Sidibeh." (Affidavit, at ¶ 3.) The affidavit states that she procured photographs of Naron, compared them to defendant, and interviewed Naron Williams, who told her defendant was not with Brown and Vann on the night of the invasion. Williams' sister confirmed that information.

{¶ 21} Ruffing's affidavit does not advance defendant's petition. All parties acknowledge that Naron Williams' name was mentioned during the course of trial, and Ruffing indicated it took her only a couple of hours to locate Williams. With that information, the trial court did not abuse its discretion in concluding defendant could have discovered, within the timeframe of R.C. 2953.21, the information now submitted.

{¶ 22} Defendant also submitted his own affidavit to support his petition and in it stated he was at his family's home at the time of the invasion. He avers that he "did not testify that's where [he] was because [his] attorney never asked [him], nor did he tell [him] that was a matter of importance." (Sidibeh affidavit, at ¶ 2.) Even if that statement be true, it does not explain why defendant could not have presented the same information within the 180-day timeframe the statute proscribes.

{¶ 23} Similarly, at or around the time of trial, defendant knew of the information in the remaining affidavits submitted from members of defendant's family or friends. Because all the affiants were well-known to defendant, defendant could have submitted their affidavits in a timely fashion. Indeed, nothing in the affidavits suggests anything about the affiants or the information contained in the affidavits that unavoidably prevented defendant from discovering the evidence within 180 days of filing the transcript in his direct appeal. Accordingly, defendant failed to demonstrate that his petition falls under the time exception set forth in R.C. 2953.23. *See State v. Brandy*, 10th Dist. No. 06AP-926, 2007-Ohio-1505 (concluding family members who were privy to facts are not newly discovered witnesses).

C. Res Judicata Bars Some Issues

{¶ 24} The second issue adverse to defendant's petition is res judicata. To the extent defendant claims ineffective assistance of counsel based on matters contained within the record, res judicata bars our considering those matters in a postconviction relief petition. As the trial court noted, defendant was allowed to present alibi evidence, and to the extent defendant's petition premises its ineffective assistance argument in part on matters in the record, res judicata bars those arguments. Although his petition also contests the extent to which counsel presented the alibi defense, and includes information not presented at trial, defendant had or could have had access to, and was aware of or could have known of, the affidavit evidence at or around the time of trial. R.C. 2953.23.

{¶ 25} Lastly, to the extent defendant contends he was unavoidably prevented from discovering the evidence due to the state's failure to investigate Naron Williams, the authority defendant cites does not support his contentions. *See King v. Bell*, 378 F.3d 550, 552-53 (concluding the prosecution can cause equitable tolling of a statute of limitations where the parties and court modified filing schedule but state failed to produce voir dire transcripts under its control); *State v. Snyder*, 2d Dist. No. 03CA0067, 2004-Ohio-4265 (determining documents in the state's hands and subject to records request could toll the time for filing an R.C. 2953.21 petition).

{¶ 26} Unlike either of those cases, defendant had equal access to Naron Williams and the information he may have had. Because Williams was mentioned during the trial, defendant had the independent means to investigate whether Williams could offer any testimony helpful to defendant, and defendant could have submitted that evidence in a timely petition. Defendant did not. Accordingly, his contentions concerning the state's inaction as the cause for his delay are unpersuasive.

{¶ 27} In the end, defendant presented nothing suggesting an exception to the 180-day time limit set forth in R.C. 2953.21. Having failed to do so, the trial court was not required to conduct a hearing to determine that it lacked jurisdiction to consider defendant's petition. Accordingly, defendant's single assignment of error is overruled.

IV. Disposition

{¶ 28} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and McCORMAC, JJ., concur.

McCORMAC, retired of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
