

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-09-085
 :
 - vs - : OPINION
 : 1/31/2011
 :
 JAMES B. STRUNK, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 05CR22451

Rachel A. Hutzal, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

James B. Strunk, 517-604, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, defendant-appellant, pro se

HENDRICKSON, J.

{¶1} Defendant-appellant, James B. Strunk, appeals a decision of the Warren County Court of Common Pleas denying his motion for relief from a forfeiture judgment.

For the reasons outlined below, we affirm the decision of the trial court.

{¶2} In March 2006, appellant was convicted on two counts of receiving stolen property in violation of R.C. 2913.51(A), a fifth-degree felony; three counts of money laundering in violation of R.C. 1315.55(A)(5), a third-degree felony; and one count of

engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a first-degree felony. In a decision rendered on March 21, 2006, the trial court sentenced appellant to an aggregate prison term of ten years, fined him \$8,000, and ordered that his 1999 Chevrolet Silverado truck be forfeited to the state.

{¶13} This court affirmed appellant's convictions on direct appeal. *State v. Strunk*, Warren App. No. CA2006-04-046, 2007-Ohio-683. In August 2010, appellant filed a Civ.R. 60(B) motion for relief from the forfeiture judgment. The trial court denied the motion, reasoning that the Ohio Rules of Civil Procedure did not apply to appellant's criminal case. The court further opined that, even if the civil rules did apply, appellant's motion for relief was untimely. Finally, the court noted that appellant did not raise the forfeiture issue on direct appeal.

{¶14} Appellant timely appeals the trial court's denial of his motion for relief, raising one assignment of error.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT DENIED THE MOTION TO RELIEF FROM JUDGEMENT PURSUANT TO CIVIL RULE 60(B)(5), BY MAKING A RULING THAT IGNORES OHIO STATUTORY REQUIREMENTS AND OHIO SUPREME COURT PRECEDENCE." [SIC]

{¶17} Appellant maintains that he was entitled to relief from the forfeiture judgment because it was void. In particular, appellant protests that the indictment did not contain a specification of forfeiture regarding the truck in derogation of R.C. 2981.04(A)(1). Appellant also insists that the language of Civ.R. 60(B) does not limit the application of the rule to civil proceedings.

{¶18} As stated, one of the bases cited by the trial court for denying appellant's motion for relief was the inapplicability of the Ohio Rules of Civil Procedure to criminal

proceedings. This proposition has been advanced by a number of courts, albeit incorrectly. See, e.g., *State v. Johnson*, Richland App. No. 01-CA-88, 2002 WL 110571 at *1, 2002-Ohio-254; *State v. Israfil* (Nov. 15, 1996), Montgomery App. No. 15572, 1996 WL 665006 at *1. The Ohio Supreme Court definitively declared that "the plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶10. Therefore, the civil rules may be invoked where appropriate to fill a void in the rules of criminal procedure in a criminal case. See *id.*

{¶19} We must consider whether appellant was justified in resorting to Civ.R. 60(B) in the present matter. This inquiry would be answered in the affirmative if the Ohio Rules of Criminal Procedure failed to provide a mechanism by which appellant could raise his forfeiture argument. See *Schlee* at ¶10. However, we find that the present matter is governed by Crim.R. 35. That rule establishes the procedure for filing a petition for postconviction relief (PCR), which is what appellant's Civ.R. 60(B) motion amounted to.

{¶10} The *Schlee* court ruled that "[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged." *Schlee* at ¶12. A motion qualifies as a PCR petition if it (1) is filed after a defendant's direct appeal, (2) claims a denial of the defendant's constitutional rights, (3) seeks to render the judgment void, and (4) asks the trial court to vacate the judgment. *Id.*, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304. When faced with such a motion, it is not necessary to look to the Ohio Rules of Civil Procedure as applied by Crim.R. 57(B). Rather, Crim.R. 35 sufficiently prescribes a detailed, specific procedure for filing PCR petitions pursuant to R.C. 2953.21. See *State*

v. Ross, ___ Ohio St.3d ___, 2010-Ohio-6282, ¶42. See, also, *Schlee* at ¶11.

{¶11} When reviewing the four *Reynolds* elements, it is clear that appellant's Civ.R. 60(B) motion for relief from judgment qualified as a PCR petition, regardless of the misdirected caption. The motion was filed after appellant's direct appeal, claimed a denial of his constitutional due process rights, sought to render the forfeiture judgment void, and asked the court to vacate the forfeiture judgment. See *Reynolds* at 160. Furthermore, appellant's Civ.R. 60(B) motion did not exist "independently" from a PCR petition as contemplated by Crim.R. 35 and R.C. 2953.21. *Schlee* at ¶13. See, also, *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶14 (ruling that postsentence motions to withdraw guilty or no contest pleas and PCR petitions exist "independently" of one another and therefore may not be recast by a trial court). Accordingly, in order to adjudge the propriety of appellant's Civ.R. 60(B) motion by the proper criteria, we may properly recast the motion as a PCR petition. *Schlee* at ¶12.

{¶12} In order to be timely, R.C. 2953.21(A)(2) dictates that a PCR petition must be filed no later than 180 days after the date on which the trial transcript is filed with the court of appeals in the direct appeal. Appellant's direct appeal was filed on April 12, 2006 and the trial transcripts were filed on June 26, 2006. This court affirmed appellant's convictions on February 20, 2007. Appellant filed the instant motion on August 5, 2010, clearly outside the applicable time period.

{¶13} In accordance with R.C. 2953.23(A)(1), a court may entertain an untimely PCR petition if the petitioner demonstrates one of the following prerequisites: (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 the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner satisfies his burden to show one of these two conditions, he must then

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).

{¶14} In the present matter, appellant failed to argue the existence of either of the prerequisites for entertaining an untimely PCR petition. That is, appellant neglected to argue that he was unavoidably prevented from discovering facts necessary for his claim for relief or that a newly-recognized federal or state right has been recognized and applies retroactively to persons in his position. Hence, appellant did not satisfy the R.C. 2953.23(A)(1) exceptions to the timeliness requirement and the trial court lacked jurisdiction to consider the merits of his petition. *State v. King*, Clermont App. No. CA2005-07-064, 2006-Ohio-747, ¶7.

{¶15} We conclude that the trial court properly denied appellant's motion for relief from judgment, although for the wrong reason. The court was incorrect in basing its denial on the purported inapplicability of the Ohio Rules of Civil Procedure to appellant's criminal case. Nonetheless, a proper decision by a lower court that is based upon improper grounds is not cause for reversal. *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶46. In fact, a reviewing court is without authority to reverse a correct judgment simply because it was reached for the wrong reason. *Id.* Accordingly, while the trial court should have recast appellant's motion as a PCR petition, we uphold the denial of the motion as a correct judgment. See *id.* See, also, *State v. Weisenbarger*, Preble App. No. CA2001-08-014 at 3, 2002-Ohio-291.

{¶16} Appellant's sole assignment of error is overruled.

{¶17} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.