

[Cite as *State v. Wolfe*, 2009-Ohio-3045.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23232
Plaintiff-Appellee	:	
	:	Trial Court Case No. 93-CR-556
v.	:	
	:	(Criminal Appeal from
JAVELEN L. WOLFE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 19th day of June, 2009.

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MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JAVELEN L. WOLFE, #287-364, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Javelen Wolfe appeals from the denial of his petition for post-conviction relief. Because the trial court properly denied the petition as untimely, the judgment of the trial court is Affirmed.

I

{¶ 2} Wolfe was indicted on charges of Aggravated Murder and Aggravated Robbery, both with firearm specifications, for the February 27, 1993 murder of Todd Grills. A jury acquitted Wolfe of the Aggravated Robbery charge and found him guilty of Murder, a lesser-included offense of Aggravated Murder, along with its attendant firearm specification. Wolfe was sentenced to serve an indefinite prison term of fifteen years to life, plus three years for the specification. Wolfe appealed; we affirmed his conviction and sentence. *State v. Wolfe* (March 29, 1995), Montgomery App. No. 14420.

{¶ 3} In 1995, Wolfe filed his first petition for post-conviction relief, which was subsequently dismissed on his own motion. Wolfe filed a new petition in 1999, which the trial court dismissed as untimely. On August 13, 2008, Wolfe filed the petition for post-conviction relief with which this appeal is concerned. The trial court also dismissed this petition as untimely. Wolfe appeals from the order dismissing his 2008 petition for post-conviction relief.

II

{¶ 4} Wolfe's First Assignment of Error is as follows:

{¶ 5} "DEFENDANT-APPELLANT W[A]S PREJUDICED BY THE TRIAL COURTS FAILURE TO RESPECT THE APPELLANTS-DEFENDANTS POST-CONVICTION UNDER 'BOTH' 2953.21 AND 2953.23."

{¶ 6} Wolfe's Second Assignment of Error is as follows:

{¶ 7} “DEFENDANT-APPELLANT WAS PREJUDICED BY THE TRIAL COURTS ACTING IN BAD FAITH WHEN IT ‘ENTERTAINED’ THE DEFENDANTS-APPELLANTS ARGUMENTS WITHOUT A PROPER FINDING OF FACTS AND CONCLUSION OF LAW.”

{¶ 8} Wolfe’s Third Assignment of Error is as follows:

{¶ 9} “DEFENDANT-APPELLANT WAS PREJUDICED BY THE TRIAL ATTORNEY’S INEFFECTIVENESS FOR NOT ADDRESSING THE DEFENDANT-APPELLANTS DEFECTIVE INDICTMENT WHICH LED DOWN THE PATH OF SEVERAL OF THE DEFENDANT-APPELLANTS CONSTITUTIONAL RIGHTS BEING VIOLATED.”

{¶ 10} Effective September 21, 1995, R.C. 2953.21(A)(2) was amended to require a petition for post-conviction relief to be filed no later than 180 days after the filing of the transcript with the court of appeals on direct appeal. Because Wolfe was convicted prior to the enactment of that statute, he was given until September 23, 1996, to file his petition. See, e.g. *State v. Walker* (May 1, 1998), Montgomery App. No. 16656. Wolfe did not file his present petition until August 13, 2008, nearly twelve years after the filing deadline. Failure to file timely defeats the jurisdiction of the trial court to consider the petition unless the untimeliness is excused under R.C. §2953.23(A). *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851.

{¶ 11} Pursuant to R.C. 2953.23(A), a defendant may file an untimely or successive petition for post-conviction relief if: (1) he was unavoidably prevented from discovering the facts upon which he relies to present his claim; or (2) the United States

Supreme Court recognizes a new federal or state right that petitioner alleges applies retroactively to his case. The petitioner must also show by clear and convincing evidence that, if not for the constitutional error alleged, no reasonable factfinder could have found him guilty. *Id.*

{¶ 12} Wolfe proffered no evidence that he was unavoidably prevented from discovering the facts upon which his petition is grounded, and he made no claim that the Supreme Court has recognized a new right that applies to him. Thus, he has failed to meet the first requirement set forth in R.C. 2953.23(A). Wolfe’s failure to satisfy the first requirement is fatal, rendering the second requirement moot. Because Wolfe failed to satisfy the conditions that could excuse an untimely filing, the trial court was without jurisdiction to entertain the petition. Accordingly, the court properly dismissed the petition as untimely. Wolfe’s three assignments of error are overruled.

III

{¶ 13} All of Wolfe’s assignments of error having been overruled, we the judgment of the trial court is Affirmed.

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BROGAN and FRENCH, JJ., concur.
(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

Copies mailed to:

Mathias H. Heck
Johnna M. Shia
Javelen L. Wolfe #287-364
Hon. Michael T. Hall

