

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-22
RICHARD KING	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas Case No. CR2004-0327

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: July 30, 2009

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX
Muskingum County Prosecutor
27 N. 5th Street
Zanesville, Ohio 43701

ROBERT L. SMITH 0039297
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

RICHARD KING, Pro Se
Inmate Number 489-103
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Delaney, J.

{¶1} Defendant-Appellant, Richard King, appeals from the Muskingum County Court of Common Pleas Entry denying his “Petition to Vacate or Set Aside Judgment of Conviction or Sentence.”

STATEMENT OF THE CASE AND FACTS

{¶2} Appellant was indicted on one count of pandering obscenity involving a minor, a felony of the second degree, in violation of Ohio R.C. 2907.321(A)(1) and sixty-one counts of pandering obscenity involving a minor, felonies of the third degree, in violation of R.C. 2907.321(A)(5). Appellant pled not guilty to all counts contained in the indictment. On January 24, 2005, the state filed a motion to amend the indictment. The trial court granted the motion and amended counts two through sixty-two of the indictment to felonies of the fourth degree.

{¶3} At trial, Detective John Chapman of the Clinton County Sheriff's office testified that while working undercover online, an individual under the screen name “BigD2000” contacted him via instant messenger and sent him a sexually explicit photograph of a juvenile. Detective Chapman testified as to the list of email addresses which originated with an email from the screen name “Daddy2youngun.” It was determined that the screen name “Daddy2youngun” was an account registered in the name of Appellant’s wife, Ashley Lancaster at the address of 1841 Ridge Avenue, Zanesville, Ohio.

{¶4} Detective Randy Ritchason of the Zanesville Police Department testified that he obtained a search warrant and seized the computer, some floppy disks and CDs from the residence.

{¶5} At trial, Special Agent William Brown, of the Social Security Administration, testified he found explicit images of juveniles on the computer's hard drive, floppy discs and CDs near the computer in the residence.

{¶6} Police Officer Larry Brockelhurst testified concerning Appellant's prior conviction in 1997 for illegal use of a minor in nudity oriented material and pandering sexually oriented material involving a minor. Appellant objected to the testimony. The objection was overruled, and the trial court gave a limiting instruction to the jury.

{¶7} Following the conclusion of evidence, the jury found Appellant guilty on sixty-one counts of the indictment. The remaining count was dismissed.

{¶8} On February 28, 2005, the trial court conducted a classification hearing finding Appellant to be a sexual predator and a habitual sex offender. The trial court sentenced Appellant to 36½ years in prison.

{¶9} Appellant timely appealed his conviction, sexual predator classification and sentence.

{¶10} By Judgment Entry and Opinion dated January 19, 2006, this Court affirmed the trial court's actions as to the errors raised in assignments I, II and III but remanded with instructions as to assignment of error IV which alleged error in sentencing. *State v. King*, 5th Dist. No. CT05-17, 2006-Ohio-226. Appellant filed a timely appeal of the decision to the Ohio Supreme Court. On May 24, 2006, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. *State v. King* (2006), 109 Ohio St.3d 1482, 847 N.E.2d 1226.

{¶11} On March 8, 2006, the trial court resentenced appellant to 36½ years incarceration. On November 13, 2006, this Court affirmed Appellant's sentence. *State v. King*, 5th Dist. No. 06-20, 2006-Ohio-6566. The Ohio Supreme Court declined to accept Appellant's appeal of that decision. *State v. King* (2007), 114 Ohio St.3d 1508, 2007-Ohio-4285.

{¶12} Additionally, on October 20, 2005, Appellant filed a petition for post-conviction relief in the trial court. On March 6, 2006, the trial court denied Appellant's post conviction petition. Represented by new counsel, Appellant filed a timely appeal of the trial court's decision to this Court. On May 30, 2007, this Court affirmed the trial court's decision dismissing Appellant's petition for post-conviction relief. *State v. King*, 5th Dist. No. CT2006-0021, 2007-Ohio-2810.

{¶13} On July 21, 2006, Appellant filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, which was denied. *King v. Wolfe* (S.D. Ohio), 2007 WL 666626.

{¶14} On August 15, 2006, Appellant filed a Motion for a New Trial claiming newly discovered evidence. On January 9, 2007, the trial court denied Appellant's motion. On September 28, 2007, this Court affirmed the trial court's decision denying Appellant's motion for new trial. *State v. King*, 5th Dist. No. 2007-CA-0004, 2007-Ohio-5297.

{¶15} On October 8, 2008, Appellant filed a "Motion For Relief From Judgment" pursuant to Civ.R. 60(B). On October 15, 2008, the trial court, in a one sentence Entry, summarily denied Appellant's motion. Appellant appealed the trial court's denial of his

motion and on January 29, 2009, this court denied the appeal, finding that his arguments were barred by res judicata and that they were substantively without merit.

{¶16} Appellant then filed a “Petition to Vacate or Set Aside Judgment of Conviction or Sentence” on March 13, 2009. On March 27, 2009, he filed a motion for evidentiary hearing. The State responded on March 30, 2009, and Appellant filed a motion to amend/supplement his post-conviction petition on March 31, 2009. On April 6, 2009, Appellant then filed a reply to the State’s response. On April 8, 2009, the trial court issued an entry denying Appellant’s motion. Appellant continued to file papers in this matter, filing a “Motion to Correct Record and Reconsideration” on April 23, 2009, and a “Reply to State’s Response to Defendant’s Motion to Correct Record and Reconsideration.” On April 27, 2009, the trial court denied Appellant’s motion. It is from the April 9, 2009, entry denying his post-conviction petition that Appellant now files his latest appeal.

{¶17} Appellant raises four Assignments of Error:

{¶18} “I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND VIOLATED HIS UNITED STATES CONSTITUTIONAL FOURTEENTH AMENDMENT RIGHT WHEN IT DENIED APPELLANT A HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF.

{¶19} “II. THE DEFENDANT’S SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WAS VIOLATE [SIC] WHEN TRIAL COUNSEL FAILED TO PRESENT WITNESSES THAT STATE THEY WERE THE PERPETRATOR OF THESE CRIMES AND PROVES APPELLANT’S ACTUAL INNOCENCE.

{¶20} “III. THE DEFENDANT’S SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO PRESENT EXCULPATORY EVIDENCE TO THE JURY THAT HE HAD IN HIS POSSESSION.

{¶21} “IV. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S PETITION WHEN APPELLANT HAD UNDER ANY PROPER STANDARD, ESTABLISHED “ACTUAL INNOCENCE” AND A “MISCARRIAGE OF JUSTICE” AND THIS COURT MUST USE THE STANDARD SET FORTH IN SCHLUP V. DELO 115 S. CT. 851 [SIC].”

I, II, III, & IV

{¶22} In Appellant’s assignments of error, he asserts various errors that he claims were committed by the trial court and trial counsel in his latest attempt to thwart his 2004 convictions.

{¶23} Appellant’s “Petition to Vacate or Set Aside Judgment of Conviction or Sentence” is a successive post-conviction petition.

{¶24} R.C. 2953.21 governs the filing of post-conviction petitions as follows:

{¶25} “(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and

upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶26} “(b) As used in division (A)(1)(a) of this section, “actual innocence” means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

{¶27} “(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. 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.

{¶28} * * *

{¶29} “(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.”

{¶30} Having had several prior opportunities to litigate all of the claims that Appellant sets forth in his latest motion, Appellant's most recent round of arguments are barred under the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The *Perry* court explained the doctrine as follows:

{¶31} “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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 of conviction or on an appeal from that judgment.”

{¶32} As such, Appellant's only remaining avenue for airing his arguments falls under R.C. 2953.23. When dealing with a successive post-conviction petition, R.C. 2953.23 allows the filing of such a petition in the following limited circumstances:

{¶33} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶34} “(1) Both of the following apply:

{¶35} “(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 prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.

{¶36} “(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶37} “(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony

offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.”

{¶38} Appellant has not argued, nor would it be appropriate to do so, that the results of DNA testing establish by clear and convincing evidence, his actual innocence under R.C. 2953.23(A)(2).

{¶39} Moreover, he has failed to establish, under R.C. 2953.23(A)(1) that he was either (a) unavoidably prevented from the discovery of facts upon which he relies to present his claim for relief or that the U.S. Supreme Court has recognized a new federal or state right that applies retroactively to a person in his situation, and that (b) by clear and convincing evidence, but for the constitutional error at trial, no reasonable factfinder would have found him guilty.

{¶40} Appellant has not asserted, nor would it be a valid argument, that the U.S. Supreme Court has recognized a new federal or state right that applies retroactively to a person in Appellant’s situation. Thus, he must establish, by clear and convincing evidence that but for a constitutional error committed at trial, no reasonable factfinder would have found him guilty of the offenses he was convicted of and that he was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

{¶41} Appellant has failed to meet his burden that he was unavoidably prevented from discovery of the facts upon which he relies. The evidence that he claims will establish his actual innocence rely on affidavits of his father and his ex-wife

as well as evidence that he claims he became aware of 18 months after his conviction. We find it implausible that Appellant would not have known about a meeting between his father, ex-wife and attorney where his ex-wife allegedly confessed to opening pornographic emails until recently. Moreover, Appellant's ex-wife filed an affidavit stating that she was not in a meeting with Appellant's father and Appellant's attorney and stated that she did not open pornographic emails in said affidavit.

{¶42} Additionally, Appellant's trial attorney submitted an affidavit wherein he denied that Ashley ever told him that she downloaded the pornographic materials found on Appellant's computer. The only person who claims that this conversation actually existed was Appellant's father, who has a bias towards his son and an interest in seeing him released from prison. We do not find this to be credible evidence, nor does it fall into the category of facts that Appellant was unavoidably prevented from the discovery of pursuant to R.C. 2953.23.

{¶43} We also summarily reject Appellant's claim that counsel withheld exculpatory evidence and that Appellant was unavoidably prevented from discovery of the facts. Appellant argues that he was not privy to an AOL internet account data sheet regarding his computer. Since the computer was Appellant's, he could not have been unavoidably prevented from the information contained therein, since his internet trail created the document. Moreover, he concedes that the document that he complains about was given to his counsel by the State during discovery. See, e.g., *State v. Bates*, 10th Dist. No. 07AP-753, 2008-Ohio-1422 (holding that potentially exculpatory photographs possessed by defense counsel prior to trial are not "newly discovered").

{¶44} Additionally, Appellant failed to meet his initial burden of providing with his petition evidence demonstrating a cognizable claim of constitutional error. Thus, Appellant has failed to satisfy the condition in R.C. 2953.23(A)(1)(b) that he would not have been convicted but for constitutional error at trial.

{¶45} Based on the foregoing, we find that Appellant has failed to set forth any claims that are not barred by res judicata or that would justify an oral or evidentiary hearing. Appellant has failed to meet his burden and therefore, we do not find that the trial court erred in denying Appellant a hearing. The trial court properly denied Appellant's motion, as it was either barred by res judicata or did not meet the requirements of R.C. 2953.23.

{¶46} Appellant's assignments of error are overruled and the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
RICHARD KING	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-22
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS