

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities ii

Explanation of Why This Case Does Not Involve A Substantial Constitutional
Question And Is Not A Case Of Public Or Great General Interest 1

Statement of the Case & Facts 1

Law & Argument 3

RESPONSE TO FIRST AND SECOND PROPOSITIONS OF LAW

 I. The Trial Court properly denied Appellant’s petition for
 post-conviction relief 3

Conclusion 6

Proof of Service 6

TABLE OF AUTHORITIES

CASES:

Herrera v. Collins (1993), 506 U.S. 390.....5

State v. Cooney, 73 Ohio St.3d 411, 412, 1995 Ohio 3284

State v. Flowers (November 12, 1998), 9th Dist. No. 2842-M.....3

State v. Furcron (February 17, 1999), 9th Dist. No. 93CA0070893

State v. Powell (1993), 90 Ohio App.3d 2605

State v. Smith (2001), 91 Ohio St.3d 14912

State v. Smith (June 28, 2000), 9th Dist. No. 99CA007387.....1

State v. Smith, 111 Ohio St.3d 1413, 2006 Ohio 14132

State v. Smith, 9th Dist. No. 05CA008772, 2006 Ohio 2045.....2

State v. Smith, 9th Dist. Nos. 07CA009220, 07CA009252, 2008 Ohio 35892

State v. Turner, 4th Dist. No. 01CA2786, 2001 Ohio 2636.....5

State v. Waites (December 20, 1996), 11th Dist. No. 95-L-085.....4

State v. Watson (1998), 126 Ohio App.3d 316.....5

State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686.....5

RULES & STATUTES:

R.C. 2911.01(A)(1).....1

R.C. 2913.51(A).....1

R.C. 2923.01(A).....1

R.C. 2923.12(A).....1

R.C. 2923.24(A).....1

R.C. 2923.32(A)(1).....1

R.C. 2953.212, 3, 4, 5
R.C. 2953.21(A)(2).....3
R.C. 2953.23(A)(1).....3
R.C. 2953.23(A)(1)(b)3

**EXPLANATION OF WHY THIS CASE DOES NOT
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. The decision of the Ninth Judicial District Court of Appeals to affirm the denial of Appellant's petition for post conviction relief created no injustice as Appellant's arguments were addressed by existing case law.
2. No issue or substantial constitutional question exists in the Appellant's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest so as to warrant the exercise of this Court's jurisdiction.

STATEMENT OF THE CASE AND FACTS

On April 28, 1998, Appellant was indicted by the Lorain County Grand Jury on one (1) count of Engaging in a Pattern of Corrupt Activity, a violation of R.C. 2923.32(A)(1), a felony of the first degree; one (1) count of Conspiracy to commit Aggravated Robbery, a violation of R.C. 2923.01(A)/2911.01(A)(1), a felony of the first degree; one (1) count of Carrying a Concealed Weapon, a violation of R.C. 2923.12(A), a felony of the fourth degree; one (1) count of Receiving Stolen Property, a violation of R.C. 2913.51(A), a felony of the fifth degree; and one (1) count of Possession of Criminal Tools, a violation of R.C. 2923.24(A), a felony of the fifth degree and five (5) firearm specifications.

On May 17, 1999, a jury trial commenced before the Honorable Lynett McGough of the Lorain County Court of Common Pleas. On May 25, 1999, the jury returned a guilty verdict as to all counts in the indictment.

On May 26, 1999, Appellant was sentenced to a total sentence of fifteen (15) years incarceration. On June 21, 1999, Appellant filed notice of appeal with this Honorable Court. On June 28, 2000, the Ninth District Court of Appeals affirmed Appellant's conviction and sentence. See State v. Smith (June 28, 2000), 9th Dist. No. 99CA007387.

On March 12, 2001, Appellant filed for leave to file a discretionary appeal with this Honorable Court. This Court declined to accept Appellant's matter for appeal. State v. Smith (2001), 91 Ohio St. 3d 1491.

On June 20, 2005, Appellant filed a Motion to Vacate and Reconstruct Sentence. On July 7, 2005, the trial court denied Appellant's motion. The Court of Appeals for the Ninth District affirmed the trial court's denial of the Appellant's first untimely petition for post conviction relief. State v. Smith, 9th Dist. No. 05CA008772, 2006-Ohio-2045, discretionary appeal not allowed by State v. Smith, 111 Ohio St. 3d 1413, 2006 Ohio 1413.

On June 7, 2007, Appellant filed a second Motion to Vacate and Reconstruct Sentence in which he petitioned the trial court to grant post conviction relief pursuant to R.C. 2953.21. The trial court denied Appellant's Motion on July 10, 2007. Appellant moved for Relief from Judgment on August 1, 2007, in his Motion to Recall, Alter, or Amend the Judgment from July 10, which the trial court denied on August 22, 2007.

On August 6, 2007, Appellant again appealed to the Ninth District Court of Appeals due to the trial court's denial of his June 7, 2007 petition for post conviction relief in case number 07CA009220. After the trial court denied Appellant's motion for relief from judgment on August 22, 2007, Appellant filed another appeal in Ninth District Court of Appeals case number 07CA009252. The appellate court consolidated these two (2) cases on October 26, 2007. On July 21, 2008, the Ninth District Court of Appeals affirmed the decisions of the trial court. See State v. Smith, 9th Dist. Nos. 07CA009220, 07CA009252, 2008 Ohio 3589.

On August 29, 2008, Appellant filed his Notice of Appeal and Memorandum In Support of Jurisdiction with this Honorable Court. Appellee now responds and urges this Court to decline jurisdiction over the instant matter.

LAW & ARGUMENT

RESPONSE TO FIRST & SECOND PROPOSITIONS OF LAW

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S PETITION FOR POST-CONVICTION RELIEF.

Appellant contends that the trial court erred when it denied his petition for post-conviction relief as the trial court did not issue findings of fact and conclusions of law and because the petition contained legally sufficient grounds for relief. Appellant's assertions lack merit.

R.C. 2953.21(A)(2) provides that a petition for post conviction relief shall be filed no later than one hundred eighty (180) days after the transcript was filed in the direct appeal.

R.C. 2953.23(A)(1)(a) provides:

Whether a hearing is held or 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 both of the following apply:

(a) 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.

(b) 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.

RC. 2953.23(A)(1)(b) requires the petitioner to show by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted***

Where the above exceptions do not apply, a trial court is precluded from entertaining the petition. State v. Flowers (November 12, 1998), 9th Dist. No. 2842-M; State v. Furcron (February 17, 1999), 9th Dist. No. 93CA007089.

It is clear from the docket that the instant petition has been filed outside of the one hundred and eighty (180) day time frame after the transcript was filed in Appellant's direct appeal. As such, Appellant needed to meet one (1) of the two (2) grounds established in R.C. 2953.21 in order for the trial court to have jurisdiction over the petition. Appellant did not meet this burden.

Appellant failed to demonstrate that he was unavoidably prevented from the discovery of facts upon which he must rely to present his claim for relief. It is well settled that a petitioner cannot allege ineffective assistance of appellate counsel as grounds for post-conviction relief. State v. Waites (December 20, 1996), 11th Dist. No. 95-L-085, citing State v. Cooley, 73 Ohio St. 3d 411, 412, 1995 Ohio 328. Appellant also failed to demonstrate that the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in his situation, and that his petition asserts a claim based on that right. Finally, Appellant was required to demonstrate that but for the alleged error, no reasonable factfinder would have convicted him of the offenses, something he cannot prove.

Since the trial court had no jurisdiction to entertain Appellant's petition for post-conviction relief, it was not required to issue findings of fact and conclusions of law. As such, Appellant's first and second propositions of law were without merit. This was properly recognized by the appellate court that ruled accordingly.

Appellant also contends that his petition for post conviction relief should have been granted, excluding the obvious jurisdictional defects, because he is actually innocent of a firearm specification attached to the underlying charge in count one (1) of the indictment. Assuming, *arguendo*, that the trial court had jurisdiction to address Appellant's claim, Appellant's claim of actual innocence fails as well.

R.C. 2953.21, Ohio's post conviction relief statute, is only available for denials or infringements of constitutional rights that render a judgment void or voidable. State v. Turner, 4th Dist. No. 01CA2786, 2001 Ohio 2636. See also State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686. It is manifest from the terms of the statute that two (2) elements are of fundamental importance: the violation upon which the petitioner relies to establish his right to relief must be of constitutional dimension, and it must have occurred at the time the petitioner was tried and convicted of a criminal offense. State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686. The absence of either element in a given case is, in law, fatal to a post conviction claim. State v. Weaver (December 31, 1997), 9th Dist. No. 97CA006686, citing, State v. Powell (1993), 90 Ohio App. 3d 260.

A claim of "actual innocence" is not a constitutional claim or right that would render a judgment void or voidable; thus it does not establish grounds for a petition for post-conviction relief. Id., citing, Herrera v. Collins (1993), 506 U.S. 390; State v. Watson (1998), 126 Ohio App. 3d 316. Actual innocence is normally contested at trial and direct appeal on the basis of the weight or sufficiency of admissible evidence. State v. Turner, 4th Dist. No. 01CA2786, 2001 Ohio 2636. It does not form the basis for a collateral attack. Id.

Since Appellant's claim of actual innocence was not properly before the trial court in the petition for post conviction relief, assuming, *arguendo*, that the trial court had jurisdiction to address Appellant's claim, the trial court properly denied the petition. The Ninth District Court of Appeals properly affirmed the denial of the petition based on overwhelming precedent. As such, Appellant's first and second propositions of law are without merit.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court decline jurisdiction over the instant matter.

Respectfully Submitted,

DENNIS P. WILL, #0038129
Prosecuting Attorney
Lorain County, Ohio

By:

Brendan Mackin

BRENDAN J. MACKIN, #0065940
Assistant Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389

PROOF OF SERVICE

A copy of the foregoing Response of Appellee was sent by regular U.S. Mail to Scott Smith, Appellant Pro Se, #473-364, Richland Correctional Institution, 1001 Olivesburg Road, P.O. Box 8107, Mansfield, Ohio 44901, this 20th day of September, 2008.

Brendan Mackin

Brendan J. Mackin
Assistant Prosecuting Attorney