

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2009-222
	:	
v.	:	On Appeal from the
	:	Medina County Court of Appeals,
William O'Neal,	:	Ninth Appellate District,
	:	Case No. 08-CA0028-M
Defendant-Appellant.	:	

Motion of Appellant William O'Neal for Reconsideration of the Denial of Jurisdiction of his First Proposition of Law

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FILED

MAY 18 2009

CLERK OF COURT
 SUPREME COURT OF OHIO

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Proposition of Law No. I:

When a trial court’s original judgment is vacated on appeal, collateral challenges must be filed within the statute of limitations for the subsequent, valid judgment..... 1

Introduction. 1

Because of the conflicting rulings of the courts of appeals, a defendant loses the right to file a postconviction petition if he wins a direct appeal challenging his sentence. 1

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Motion of Appellant William O'Neal for Reconsideration of the Denial of Jurisdiction of his First Proposition of Law

Proposition of Law No. I:

When a trial court's original judgment is vacated on appeal, collateral challenges must be filed within the statute of limitations for the subsequent, valid judgment.

Introduction.

When a court of appeals vacates a criminal sentence, a postconviction petition is not ripe until after the statute of limitations has run. That makes no sense. But that is the effect of the conflicting rulings of the various appellate districts. This Court should put an end to this absurd and legally incorrect result by reconsidering its 5-2 decision not to accept the first proposition of law. State v. O'Neal, --- Ohio St.3d ---, 2009-Ohio-2045 (Moyer, C.J., and Lundberg Stratton, J., dissenting).

This Court should accept this case on the first proposition of law, reverse the decision of the court of appeals, and remand this case to the trial court to decide the merits of the petition, which was discussed in Mr. O'Neal's second proposition of law.

Because of the conflicting rulings of the courts of appeals, a defendant loses the right to file a postconviction petition if he wins a direct appeal challenging his sentence.

The court below held that the statute of limitations began running when the transcript was filed in his initial appeal.¹ By itself, such a holding would be error, but not remarkable. If such a ruling were consistently applied, a defendant would need only file his claims against the initial judgment entry of

¹ State v. O'Neal, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572, Apx. at A-1.

conviction. Accordingly, in its memorandum in response, the State suggests that there was no conflict because no court of appeals had yet ruled that the statute of limitations starts running when a transcript is filed in the second appeal.²

The State's argument asks this Court to put blinders on and to ignore that other districts prohibit the filing of postconviction petitions *until after the resentencing entry has been journalized*.³ Those districts have dismissed petitions filed against the second judgment as violations of the statute of limitations.⁴ The Fifth District, uniquely, has created a Catch-22 by adopting both conflicting positions in the same case—a defendant's challenge to the first judgment entry is barred as "premature,"⁵ but a challenge to a subsequent judgment entry is barred by the statute of limitations.⁶

The court below is on the wrong side of the conflict because a postconviction petition challenges a "judgment," not a "conviction" or a "sentence."

The Eleventh and Twelfth Districts are correct; the Eighth and Ninth Districts are wrong; and the Fifth District was correct when it ruled that the petition filed against the initial judgment was not ripe, but incorrect when it ruled that the petition filed against the second judgment was untimely. A

² State's Memorandum at 7.

³ State v. Hancock (Feb. 6, 2006), 12th Dist. No. CA2005-03-040 ("Entry of Dismissal"), Apx. at A-8; State v. Roberts, 11th Dist. No. 2005-T-0034, 2007-Ohio-5616, Apx. at A-9.

⁴ State v. O'Neal, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572, Apx. at A-1; State v. Casalicchio, 8th Dist. No. 89555, 2008-Ohio-2362, at ¶22, Apx. at A-16.

⁵ State v. Gross, 5th Dist. No. CT2002-0037, 2003-Ohio-6295, at ¶21, Apx. at A-21.

⁶ State v. Gross, 5th Dist. No. CT2006-0006, 2006-Ohio-6941, at ¶34, Apx. at A-27.

postconviction petition challenges a “judgment,” not a “conviction.” R.C. 2953.21(A). When the first judgment is vacated for any reason, there is nothing left for a defendant to challenge. When the trial court files a second judgment, the statute of limitations to challenge that judgment begins when the judgment is entered. If an appeal is filed from the judgment, the deadline is 180 days from when the transcript is filed. If an appeal is not filed, the deadline is 180 days from when the notice of appeal could have been filed from that judgment.

Accordingly, Mr. O’Neal does not assert, as the State asserts, that a second judgment “restarts the clock” because the clock has never run against that the resentencing judgment. State’s Memorandum at 7, emphasis supplied. The General Assembly chose to start the clock running each time the trial court files a “judgment[.]” Mr. O’Neal only asks this Court to enforce the law as written.

After a successful sentencing appeal, is a second postconviction petition jurisdictionally required or jurisdictionally prohibited?

Even if this Court believed that the Eighth and Twelfth Districts were correct, this Court should take this case so that trial courts in the Fifth, Eleventh and Twelfth Districts will once again rule on petitions filed timely against the initial judgment entry of sentence. When a court of appeals vacates a sentence on direct appeal, litigants and trial courts need to know whether a second petition is jurisdictionally required or jurisdictionally prohibited.

Even under the correct decisions of the Eleventh and Twelfth Districts, postconviction petitions face significant time limits.

In this case, the court of appeals ruled that, since the legislature sought to put a limit on postconviction petitions, the deadline for challenging the first judgment must somehow apply to all future judgments. As explained above, that holding puts policy over the clear language of the statute, but it also gets the policy wrong. The rule of the Eleventh and Twelfth District puts clear time limits on postconviction challenges, and those limits begin to run when the trial court enters the challenged judgment.

The holdings of the Eighth and Ninth Districts will create confusion in both civil and criminal cases.

The question of when filing deadlines begin in cases with vacated judgments affects more than postconviction petitions. It affects all collateral challenges in civil and criminal cases. Do the deadlines in Civil Rule 60(B) begin with the original judgment entry or when a trial court issues a new judgment after a successful appeal? Or a new trial motion under Civil Rule 59? When is a new trial motion due under Criminal Rule 33? The conflicting court of appeals decisions leave all these questions unanswered and threaten to undermine the finality of judgments.

Litigants need to know when to file a postconviction petition, or any other collateral challenge. The conflict among the districts makes collateral challenges premature until they are barred by the statute of limitations. That makes no sense, and makes it impossible for any litigant to get judicial review on a single, timely petition.

Conclusion.

It is both absurd and legally incorrect to argue that a postconviction petition is not ripe until after the statute of limitations has run. Under the clear language of R.C. 2953.21, a postconviction petition challenges a “judgment[,],” so when an initial judgment is vacated, a postconviction petition can be timely filed against the new, valid judgment.

This Court should accept jurisdiction to decide when a collateral challenge should be filed in cases in which the original judgment is invalid.

Respectfully submitted,

Office of the Ohio Public Defender



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CERTIFICATE OF SERVICE

I certify a copy of the foregoing has been sent by regular U.S. mail, postage-prepaid, to Russell Hopkins, Assistant Medina County Prosecutor, 72 Public Square, Medina, Ohio 44256 on this 18th day of May, 2009.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Appellant William O'Neal

#290799

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 Plaintiff-Appellee, : Case No. 2009-222
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 v. : On Appeal from the
 : Medina County Court of Appeals,
 William O'Neal, : Ninth Appellate District,
 : Case No. 08-CA0028-M
 Defendant-Appellant. :

APPENDIX TO

**Motion of Appellant William O'Neal for Reconsideration of the
Denial of Jurisdiction of his First Proposition of Law**

State v. O'Neal, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572.....A-1
State v. Hancock (Feb. 6, 2006), 12th Dist. No. CA2005-03-040A-8
State v. Roberts, 11th Dist. No. 2005-T-0034, 2007-Ohio-5616A-9
State v. Casalicchio, 8th Dist. No. 89555, 2008-Ohio-2362.....A-12
State v. Gross, 5th Dist. No. CT2002-0037, 2003-Ohio-6295A-19
State v. Gross, 5th Dist. No. CT2006-0006, 2006-Ohio-6941A-22

LEXSEE

STATE OF OHIO, Appellee v. WILLIAM B. O'NEAL, Appellant

C.A. No. 08CA0028-M

**COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT,
MEDINA COUNTY**

2008 Ohio 6572; 2008 Ohio App. LEXIS 5483

December 15, 2008, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO. CASE No. 04 CR 0547.

State v. O'Neal, 2008 Ohio 1325, 2008 Ohio App. LEXIS 1169 (Ohio Ct. App., Medina County, Mar. 24, 2008)

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant inmate pled guilty to kidnapping, felonious assault, carrying a concealed weapon, and illegal possession of a firearm in a liquor permit premises. He was sentenced to 13 years in prison. His sentence was reversed. On remand, the Medina County Court of Common Pleas (Ohio) entered a judgment that complied with Crim. R. 32(C). The sentence was affirmed. He filed a petition for postconviction relief, which was denied. The inmate appealed.

OVERVIEW: The inmate argued that the trial court erred by denying his petition for postconviction relief as untimely. The appellate court held that the trial court did not abuse its discre-

tion when it dismissed the inmate's postconviction relief petition as untimely under R.C. 2953.21. Although the trial court erroneously counted 180 days from the date of resentencing, the petition was properly denied as untimely. The time limit for the petition ran from the original appeal from the conviction. The petition was filed two years after the expiration of the time to file an appeal and was thus, clearly untimely. Further, the inmate did not argue that he met any of the requirements to file an untimely petition under R.C. 2953.23(A). He did not allege that he was unavoidably prevented from discovering facts upon which his petition was based, or that after the 180-day time limit expired, the U.S. Supreme Court recognized a new federal or state right that retroactively applied to him. The inmate did not allege nor demonstrate that either of those conditions would have prevented him from being convicted. Thus, the trial court did not have jurisdiction to consider his untimely petition.

OUTCOME: The judgment of the trial court was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

[HN1]An appellate court reviews the denial of a petition for postconviction relief for an abuse of discretion. An abuse of discretion is more than an error of judgment; rather it necessitates a finding that the trial court was unreasonable, arbitrary, or unconscionable in its ruling.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Procedures > Time Limitations

[HN2]Pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed no later than 180 days after the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence, or, if no direct appeal is taken, 180 days after the expiration of the time to file an appeal. App. R. 3(A) & 4(A).

Criminal Law & Procedure > Appeals > General Overview

[HN3]A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof.

Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN4]Resentencing under Foster does not restart the clock for a postconviction relief petition.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN5]If were determined that the time for filing a defendant's postconviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post convictions 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.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Procedures > Time Limitations

[HN6]The time limit for a postconviction relief petition runs from the original appeal from the conviction.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Procedures > General Overview

[HN7]Under R.C. 2953.21, there is no connection between the status of the postconviction relief petition and the status of the appeal. Indeed, the time period for filing a postconviction relief petition runs even if no appeal is filed.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN8]R.C. 2953.23(A) provides certain factors that, if present, would except a petition from the prescribed filing time. Pursuant to R.C. 2953.23(A)(1), a court has no jurisdiction to hear an untimely filed petition for postconviction relief unless both of the following apply: (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 R.C.

2953.21(A)(2) 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; and (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.

COUNSEL: Appearances: WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, for Appellee.

JUDGES: CARLA MOORE, Judge. CARR, P. J., DICKINSON, J., CONCUR.

OPINION BY: CARLA MOORE

OPINION

DECISION AND JOURNAL ENTRY

MOORE, Judge.

[*P1] Appellant, William O'Neal, appeals the judgment of the Medina County Court of Common Pleas. This Court affirms.

[*P2] On October 13, 2004, Appellant, William O'Neal ("O'Neal"), was involved in the shooting of Tina Harrell at Christie's Cabaret in Brunswick, Ohio. Harrell survived the shooting, and O'Neal was indicted on several counts including: (1) two counts of attempted murder; (2) three counts of kidnapping; (3) one count of felonious assault; (4) one count of carrying a concealed weapon; (5) one count of illegal possession of a firearm in a liquor permit premises;

and (6) eight firearm specifications. O'Neal initially pled not guilty to all of the charges.

[*P3] On May 17, 2005, O'Neal withdrew his not guilty plea and pled guilty to the following charges: (1) two counts of kidnapping pursuant to R.C. 2905.01(A)(2); [**2] (2) one count of kidnapping pursuant to R.C. 2905.01(A)(3); (3) one count of felonious assault pursuant to R.C. 2903.11(A)(1); (4) one count of felonious assault pursuant to R.C. 2903.11(A)(2); (5) one count of carrying a concealed weapon pursuant to R.C. 2923.12(A)(2); and (6) one count of illegal possession of a firearm in a liquor permit premises pursuant to R.C. 2923.121(A). All of the charges except for the carrying a concealed weapon charge also contained firearm specifications to which O'Neal pled guilty. The trial court sentenced O'Neal to a total prison term of 13 years.

[*P4] On April 9, 2006, this Court affirmed O'Neal's conviction, but reversed his sentence pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470. See *State v. O'Neal*, 9th Dist. No. 05CA0076-M, 2006 Ohio 1904. Following re-sentencing, on May 14, 2007, this Court dismissed O'Neal's appeal for lack of a final, appealable order. See *State v. O'Neal*, 9th Dist. No. 06CA0056-M, 2007 Ohio 2266. Upon remand, the trial court entered a judgment entry that complied with Crim.R. 32(C). On May 22, 2007, O'Neal filed a notice of appeal from the nunc pro tunc journal entry. On March 24, 2008, this Court affirmed the trial [**3] court's judgment and sentence. See *State v. O'Neal*, 9th Dist. No. 07CA0050-M, 2008 Ohio 1325.

[*P5] On October 31, 2007, O'Neal filed a motion for post-conviction relief ("PCR"), challenging both his conviction and sentence. The trial court denied O'Neal's petition as untimely. O'Neal timely appealed from this judgment entry, asserting two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE COURT ERRED IN DENYING [O'NEAL'S] PETITION FOR POST CONVICTION RELIEF, FOR FAILURE TO TIMELY FILE SAID PETITION, AS REQUIRED BY R.C. 2953.21(A)(2)."

[*P6] In his first assignment of error, O'Neal contends that the trial court erred in denying his petition for PCR for failure to timely file, as required by R.C. 2953.21(A)(2). We disagree.

[*P7] [HN1]An appellate court reviews the denial of a petition for PCR for an abuse of discretion. *State v. Stallings*, 9th Dist. No. 21969, 2004 Ohio 4571, at P5. An abuse of discretion is more than an error of judgment; rather it necessitates a finding that the trial court was unreasonable, arbitrary or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P8] [HN2]Pursuant to R.C. 2953.21(A)(2), a petition for PCR must be filed no later than 180 days after [**4] the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence, or, if no direct appeal is taken, 180 days after the expiration of the time to file an appeal. See App.R. 3(A) & 4(A).

[*P9] In its order denying O'Neal's PCR petition as untimely, the trial court found that O'Neal's PCR petition was due on December 9, 2006. The trial court erroneously counted 180 days from June 9, 2006 - the date on which the trial court re-sentenced O'Neal. While we disagree with the trial court's reasoning regarding the deadline for O'Neal's PCR petition, as we further explain herein, we agree with its finding that the petition was untimely. See *Co Le'Mon*,

L.L.C. v. Host Marriott Corp., 9th Dist. No. 05CA008797, 2006 Ohio 2685, at P17, quoting *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92, 1994 Ohio 37, 637 N.E.2d 306 ("It is well established in Ohio that [HN3]a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof"). "The trial court's ultimate judgment in this case was correct, and it is the court's ultimate judgment we are affirming in this Opinion." *Abdalla's Tavern v. Dept. Of Commerce, Div. Of State Fire Marshal*, 7th Dist. No. 02 JE 34, 2003 Ohio 3295, at P83. [**5]

[*P10] O'Neal contends that the trial judge erred in finding that his PCR petition was untimely. He argues that the trial court should have used the filing date for the transcripts filed in his most recent appeal, not the filing date from any of his first three appeals which were filed prior to the trial court's compliance with this Court's May 14, 2007 decision. See *State v. O'Neal*, 9th Dist. No. 06CA0056-M, 2007 Ohio 2266. He asserts that, without a proper final judgment, there could be no proper appeal or petition for PCR because any PCR petition filed before the trial court complied with Crim.R. 32(C) would have been premature.

[*P11] O'Neal cites *State v. Tripodo* (1977), 50 Ohio St.2d 124, 363 N.E.2d 719, in support of his assertion that each of his previous notices of appeal was premature because they were never made mature by the entry of a final, appealable judgment. We find the within matter factually distinguishable from *Tripodo*. In contrast to this matter, *Tripodo* did not involve a PCR petition and therefore, the Court did not consider the interplay of final, appealable orders and PCR petitions.

[*P12] We are persuaded by the Eighth District Court of [**6] Appeals decision in a factually similar case. In *State v. Casalicchio*, 8th Dist. No. 89555, 2008 Ohio 2362, at P22, the Eighth District held that [HN4]resentencing under Foster does not "restart the clock" for a

PCR petition. Specifically, the *Casalicchio* court explained:

"The Tenth District was faced with a petitioner's post-conviction relief petition filed after he was resentenced pursuant to a remand in his first appeal. See *State v. Laws*, 10th Dist. No. 04AP-283, 2004 Ohio 6446. It explained that '[w]hile R.C. 2953.21(A)(2) does not specifically address the present situation, we are guided by the purpose of the amendments to R.C. 2953.21(A)(2) [limiting the time to file to 180 days] and the case law interpreting it. *** [HN5][I]f we were to determine that the time for filing a defendant's post-conviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post convictions 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.' Id. at P6.

"The Tenth District held, 'under the circumstances of this case, the time limits [**7] of R.C. 2953.21(A)(2) began to run at the time defendant's transcript was filed in his first appeal. The transcript in defendant's initial appeal was filed on January 28, 1998 and *** [h]is petition therefore was due on July 27, 1998. Defendant, however, filed his petition for post-conviction relief on April 1, 2002. As a result, his petition was untimely. The trial court properly recognized it lacked jurisdiction to entertain defendant's untimely petition unless defendant satisfied the

mandatory jurisdictional requirements set forth in R.C. 2953.23(A).' (Internal citations omitted). Id. at P7." *Casalicchio*, supra, at P24-25.

The prevailing case law indicates that [HN6]the time limit for a PCR petition runs from the original appeal from the conviction.

[*P13] O'Neal filed the transcript of the docket and journal entries from his appeal of his conviction and sentence on September 7, 2005. See *State v. O'Neal*, 9th Dist. No. 05CA0076-M, 2006 Ohio 1904. Therefore, the time limitation period for PCR began to run on that date. When the trial court imposed his "second" sentence at the resentencing hearing and later filed a corrected judgment entry after this Court dismissed O'Neal's appeal in Case No. [**8] 06CA0056-M for lack of a final, appealable order, "it [did] not serve to restart the clock for postconviction relief purposes as to any claims attacking his underlying conviction." *Casalicchio*, supra, at P26, quoting *State v. Gross*, 5th Dist. No. CT2006-0006, 2006 Ohio 6941, at P34. His motion for PCR was filed on October 31, 2007- two years after the expiration of the time to file an appeal -and was therefore, clearly untimely.

[*P14] Further, a review of R.C. 2953.21 reflects that [HN7]there is no connection between the status of the PCR petition and the status of the appeal. Indeed, the time period for filing a PCR petition runs even if no appeal is filed.

[*P15] [HN8]R.C. 2953.23(A) provides certain factors that, if present, would except a petition from the prescribed filing time. Pursuant to R.C. 2953.23(A)(1), a court has no jurisdiction to hear an untimely filed petition for post-conviction relief unless both of the following apply:

"(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 [**9] 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.

"(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."

[*P16] O'Neal did not argue in his PCR petition that he met any of the requirements to file an untimely petition under R.C. 2953.23(A). Further, O'Neal did not allege that he was unavoidably prevented from discovering facts upon which his petition is based, or that after the 180-day time limit expired, the U.S. Supreme Court recognized a new federal or state right that retroactively applied to him. O'Neal has not alleged nor demonstrated that either of those conditions would have prevented him from being convicted. Accordingly, the trial court [**10] did not have jurisdiction to consider his untimely petition under this statute. See *State v. Childs* (Feb. 16, 2000), 9th

Dist. No. 19757, 2000 Ohio App. LEXIS 522; *Laws*, supra.

[*P17] Thus, we conclude that, under the specific facts presented herein, the trial court did not abuse its discretion when it dismissed O'Neal's petition as untimely. O'Neal's first assignment of error is not well taken.

ASSIGNMENT OF ERROR II

"THE COURT ERRED IN DENYING [O'NEAL'S] CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS, UNDER ARTICLE I, §1 AND §16 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEEN [SIC] AMENDMENTS TO THE UNITED STATES CONSTITUTION."

[*P18] In his second assignment of error, O'Neal contends that the trial court erred in denying his constitutionally guaranteed right to due process. In light of our disposition of O'Neal's first assignment of error, we need not address his second assignment of error.

III.

[*P19] O'Neal's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, [**11] to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE

FOR THE COURT

CARR, P. J.

DICKINSON, J.

CONCUR

IN THE COURT OF APPEALS FOR WARREN COUNTY, OHIO

STATE OF OHIO,

COURT OF APPEALS
WARREN COUNTY
FILED

CASE NO. CA2005-03-040

Appellee,

FEB 9 2006

ENTRY OF DISMISSAL

-vs-

TIMOTHY HANCOCK,

James L. Spaeth, Clerk
LEBANON OHIO:

Appellant.

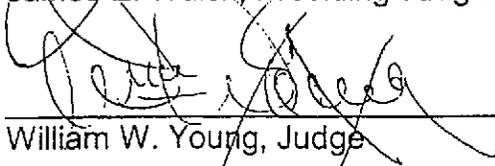
The above cause is before the court pursuant to appellant's appeal of the decision of the Warren County Court of Common Pleas, denying his petition for postconviction relief. In appellant's three assignments of error, he argues the trial court erred in denying his petition without allowing him to conduct discovery, without granting him funds to employ an expert, and without permitting him an evidentiary hearing.

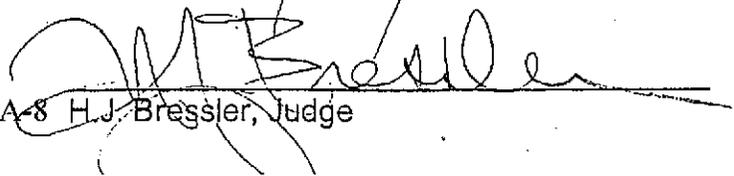
Based on the Ohio Supreme Court's decision in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, in which the Court affirmed appellant's conviction and vacated his death sentence, appellant's assignments of error in this appeal are premature, and not ripe for review. See *State v. Gross*, Muskingum App. No. CT2002-0037, 2003-Ohio-6295.

Upon due consideration of the foregoing, the above-captioned matter is hereby DISMISSED, costs to appellant.

IT IS SO ORDERED.


James E. Walsh, Presiding Judge


William W. Young, Judge


A-8 H.J. Bressler, Judge

LEXSEE

STATE OF OHIO, Plaintiff-Appellee, vs DONNA ROBERTS, Defendant-Appellant.

CASE NO. 2005-T-0034

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

2007 Ohio 5616; 2007 Ohio App. LEXIS 4956

October 19, 2007, Decided

PRIOR HISTORY: [**1]

Civil Appeal from the Court of Common Pleas, Case No. 01CR 793.

State v. Roberts, 110 Ohio St. 3d 71, 2006 Ohio 3665, 850 N.E.2d 1168, 2006 Ohio LEXIS 2174 (2006)

DISPOSITION: Appeal dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant inmate sought review of a judgment from the Trumbull County Court of Common Pleas (Ohio), which granted the State's motion to dismiss the inmate's original and amended petitions for postconviction relief (PCR) pursuant to R.C. 2953.21. The inmate had been convicted of aggravated murder, aggravated burglary, and aggravated robbery.

OVERVIEW: The convictions against the inmate arose from the shooting death of her former husband. The trial court adopted the jury's recommendation to impose the death sentence for the aggravated murder, and it also imposed

terms of imprisonment on her. The inmate immediately filed an appeal and while it was still pending, she filed her original and amended PCR petitions. The trial court's dismissal of the PCR petitions was based on the fact that either the inmate had failed to present any evidentiary materials in support of her claim, the claim was barred by res judicata, or the allegations in the claim were insufficient to warrant PCR. On appeal, the court noted that during the pendency of this appeal, the direct appeal of the inmate's convictions and sentences resulted in an affirmance of her convictions. However, the imposition of the death penalty was vacated and the matter was remanded to the trial court for further proceedings. The decision had the effect of vacating the final judgment in the criminal matter, and of nullifying the trial court decision regarding the PCR petitions under § 2953.21(A). Accordingly, there was no final order to appeal from.

OUTCOME: The court dismissed the appeal.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Trials > Entry of Judgments

[HN1]As a basic proposition, a final judgment has not been issued in a criminal case unless a trial court has journalized a formal entry which, inter alia, contains a statement of the verdict and the imposition of sentence.

Criminal Law & Procedure > Trials > Entry of Judgments

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN2]In relation to the submission of a postconviction petition, R.C. 2953.21(A) provides that a person may file such a petition when he has been convicted of a criminal offense and can justifiably claim that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. Section 2953.21 further provides that, as part of the petition for relief, a person can request a trial court to set aside the underlying judgment or sentence. In light of these provisions, a petition for postconviction relief is not properly before the trial court for consideration unless a valid final judgment exists as to the entire criminal proceeding; i.e., not only must there be a formal entry which sets forth the verdict against the defendant, but the imposed sentence must also be delineated.

COUNSEL: Dennis Watkins, Trumbull County Prosecutor, Warren, OH (For Plaintiff-Appellee).

David L. Doughten, Cleveland, OH (For Defendant-Appellant).

JUDGES: TIMOTHY P. CANNON, J. DIANE V. GRENDALL, J., MARY JANE TRAPP, J., concur.

OPINION BY: TIMOTHY P. CANNON

OPINION

MEMORANDUM OPINION

TIMOTHY P. CANNON, J.

[*P1] The instant appeal stems from a judgment of the Trumbull County Court of Common Pleas, issued on February 11, 2005. In that judgment, the trial court granted the state's motion to dismiss the original and amended petitions for postconviction relief of appellant, Donna Roberts. As the grounds for its determination, the trial court held that appellant was not entitled to go forward on each of her five claims because either: (1) she had failed to present any evidentiary materials in support of the claim; (2) the claim was barred under res judicata; or (3) the allegations in the claim were insufficient to warrant postconviction relief.

[*P2] Our review of the trial record indicates that appellant was convicted of two counts of aggravated murder, one count of aggravated burglary, and one count of aggravated robbery. Each of these charges were predicated [**2] upon the shooting death of her ex-husband, Robert Fingerhut. In June 2004, the jury returned a verdict in which it recommended that appellant be given the death penalty for the aggravated murder. The trial court subsequently adopted the recommendation and imposed a sentence of death, as well as two separate ten-year sentences for the remaining two offenses.

[*P3] Immediately following her conviction, appellant pursued an appeal to the Supreme Court of Ohio. While that appeal was pending, appellant filed her original and amended petitions for postconviction relief before the trial court. As was noted above, the trial court entered judgment against appellant as to both petitions in March 2005, and this appeal was then filed with this court.

[*P4] During the pendency of the instant appeal, the Supreme Court rendered its decision concerning the propriety of the trial proceedings in the underlying criminal case. Although appellant's conviction was upheld in all respects, the Supreme Court concluded that two errors had occurred during the penalty phase of the trial. Thus, the Supreme Court vacated the imposition of the death penalty and remanded the case to the trial court for further proceedings. See [**3] *State v. Roberts*, 110 Ohio St.3d 71, 2006 Ohio 3665, 850 N.E.2d 1168.

[*P5] [HN1]As a basic proposition, a final judgment has not been issued in a criminal case unless the trial court has journalized a formal entry which, inter alia, contains a statement of the verdict and the imposition of sentence. *State v. Ginocchio* (1987), 38 Ohio App.3d 105, 526 N.E.2d 1366. As a result, when the Supreme Court released the *Roberts* opinion, its holding had the obvious effect of vacating the final order in the underlying case. That is, even though a proper final judgment was released at one point in appellant's criminal case, such a judgment does not exist at this time.

[*P6] [HN2]In relation to the submission of a postconviction petition, R.C. 2953.21(A) provides that a person may file such a petition when he has been convicted of a criminal offense and can justifiably claim that "there was such a denial or infringement of [his] rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, ***." The statute further provides that, as part of the petition for relief, the person can request the trial court to set aside the underlying "judgment or sentence ***." In light of these provisions, this [**4] court holds that a petition for postconviction relief is not properly before the trial court for consideration unless a valid final judgment exists as to the entire criminal proceeding; i.e., not only must there be a formal entry which sets forth

the verdict against the defendant, but the imposed sentence must also be delineated.

[*P7] Given the interplay between the existence of a final judgment and the filing of a proper petition for postconviction relief, it logically follows that when the Supreme Court vacated appellant's sentence, its ruling also had the effect of nullifying all of the proceedings in regard to her original and amended postconviction petitions. This would include the trial court's judgment granting the state's motion to dismiss appellant's two petitions. Hence, this court ultimately concludes that the instant appeal is no longer properly before us because the appealed judgment is not a final appealable order at this time.

[*P8] As an aside, this court would also indicate that, although the scope of the Supreme Court's remand was somewhat limited, it is feasible that the new proceedings before the trial court could lead to additional constitutional claims which could only be [**5] raised in a postconviction petition. Therefore, if we were to allow the appeal to proceed, appellant might be required to file a new postconviction petition which, in turn, could lead to a second appeal. In light of the possibility of needless confusion, logic dictates that the interests of appellant and appellee would be better served if the postconviction process was started anew once the trial court has rendered a new final judgment in the criminal proceeding.

[*P9] Since a proper final judgment as to appellant's postconviction petitions does not exist at this time, this court lacks the requisite jurisdiction to go forward with this appeal. Accordingly, it is the sua sponte order of this court that the instant appeal is hereby dismissed for lack of jurisdiction.

DIANE V. GRENDALL, J.,
 MARY JANE TRAPP, J.,
 concur.

LEXSEE

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. JOSEPH
CASALICCHIO, DEFENDANT-APPELLANT**

No. 89555

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DIS-
TRICT, CUYAHOGA COUNTY**

2008 Ohio 2362; 2008 Ohio App. LEXIS 2007

May 15, 2008, Released

SUBSEQUENT HISTORY: Discretionary appeal not allowed by State v. Casalicchio, 2008 Ohio 5467, 2008 Ohio LEXIS 2989 (Ohio, Oct. 29, 2008)

PRIOR HISTORY: [**1]

Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-443464. State v. Casalicchio, 2008 Ohio 1081, 2008 Ohio App. LEXIS 954 (Ohio Ct. App., Cuyahoga County, Mar. 13, 2008)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate was convicted of intimidation and sentenced. His sentence was reversed. On remand, he was again sentenced to five years in prison. He appealed. Prior to that decision, he filed a petition of postconviction relief under R.C. 2953.21. The Cuyahoga County Court of Common Pleas (Ohio) denied the petition as untimely. The conviction was affirmed. The inmate and the State filed motions to reconsider the appeal, which were granted.

OVERVIEW: The inmate argued that the trial court erred when it denied his petition for post-conviction relief. The appellate court held that the trial court did not abuse its discretion when it dismissed the inmate's petition as untimely. Although his first sentence was void, and thus, he should have been put in the same position as if there had been no judgment, his "void" sentence did not restart the clock to extend his time to file a postconviction relief petition. The time limitation period for postconviction relief began to run on the date that the inmate's transcript of proceedings from his conviction and sentence was filed in his first direct appeal. Further, the inmate only asserted that he timely filed the petition under R.C. 2953.21. He did not argue that it met any of the requirements to file an untimely petition under R.C. 2953.23(A). And, he did not submit any evidence supporting his contention that the prosecutor withheld exculpatory evidence, or show how he was unavoidably prevented from discovering the alleged evidence, or how it would have changed the outcome of his guilty conviction. Thus, the trial court did not have jurisdiction to consider the untimely petition.

OUTCOME: The judgment of the trial court was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN1]R.C. 2953.21(A)(2) provides that a petition for postconviction relief shall be filed no later than 180 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. If no appeal is taken, the petition shall be filed no later than 180 days after the expiration of the time for filing the appeal.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

[HN2]Since a postconviction relief proceeding is a collateral civil attack on a judgment, the judgment of a trial court is reviewed under the abuse of discretion standard. An abuse of discretion is more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Criminal Law & Procedure > Sentencing > Imposition > Pronouncement

Criminal Law & Procedure > Sentencing > Supervised Release

[HN3]When a defendant is not informed about the imposition of post-release control at his sentencing hearing, the sentence imposed by the trial court is void. The effect of determining that a judgment is void is well established. It is as though such proceedings had never oc-

curred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

[HN4]A void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Criminal Law & Procedure > Sentencing > Resentencing

Criminal Law & Procedure > Sentencing > Supervised Release

[HN5]In cases in which a defendant is convicted of, or pleads guilty to, an offense for which post-release control is required but not properly included in the sentence, the sentence is void and the State is entitled to a new sentencing hearing in order to have post-release control imposed on the defendant unless the defendant has completed his sentence.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN6]If it were determined that the time for filing a defendant's postconviction petition did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post-convictions 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.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN7]A trial court lacks jurisdiction to entertain a defendant's untimely petition for postconviction relief unless the defendant satisfies the mandatory jurisdictional requirements set forth in R.C. 2953.23(A).

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN8]When a trial court imposes a defendant's "second" sentence at a resentencing hearing on remand, it does not serve to restart the clock for postconviction relief purposes as to any claims attacking the defendant's underlying conviction.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN9]When a postconviction relief petition is untimely, a trial court may still entertain it if the petitioner meets one of the two conditions set forth in R.C. 2953.23(A).

COUNSEL: FOR APPELLANT: Robert L. Tobik, Cuyahoga County Public Defender, BY: John T. Martin, Assistant County Public Defender, Cleveland, Ohio.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Matthew E. Meyer, Assistant Prosecuting Attorney, Cleveland, Ohio.

JUDGES: BEFORE: Boyle, J., McMonagle, P.J., and Dyke, J. CHRISTINE T. MCMONAGLE, P.J., CONCURS; ANN DYKE, J., DISSENTS WITH SEPARATE OPINION.

OPINION BY: MARY JANE BOYLE

OPINION

JOURNAL ENTRY AND OPINION

BOYLE, M.J., J.:

[*P1] This court originally released an opinion in the present appeal on March 13, 2008. See *State v. Casalicchio*, 8th Dist. No. 89555, 2008 Ohio 1081. Seven days later, the Supreme Court released *State v. Simpkins*, 117 Ohio St. 3d 420, 2008 Ohio 1197, 884 N.E.2d 568. Based on *Simpkins*, both the state and defendant-appellant, Joseph Casalicchio, moved this court to reconsider our original decision. We agree to do so now.

[*P2] This appeal stems from a judgment of the Cuyahoga County Court of Common Pleas, which denied Casalicchio's petition for postconviction relief.

[*P3] The procedural background of this case is extensive and relevant to this matter. In March 2004, a jury found Casalicchio [**2] guilty of intimidation. The facts set forth at trial established that Casalicchio had hired Hell's Angels to kill Judge Kathleen Sutula of the Cuyahoga County Court of Common Pleas after she had sentenced him to prison in an unrelated case.

[*P4] In April 2004, the trial court sentenced Casalicchio to five years in prison. Casalicchio appealed his conviction and sentence. See *State v. Casalicchio*, 160 Ohio App.3d 522, 2005 Ohio 1750, 828 N.E.2d 121 ("*Casalicchio I*"). This court affirmed Casalicchio's conviction, but vacated his sentence because the trial court failed to inform him at his sentencing hearing that he could be subject to postrelease control upon his release. *Id.* at P30-32. We remanded the case for resentencing. *Id.*

[*P5] On February 14, 2006, upon remand, the trial court sentenced Casalicchio to five years in prison and informed him that he may receive postrelease control upon his release from prison. Two weeks later, the Ohio Supreme Court released its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845

N.E.2d 470. Casalicchio then appealed his sentence in March 2006. See *State v. Casalicchio*, 8th Dist. No. 87902, 2007 Ohio 161 ("*Casalicchio II*").

[*P6] In *Casalicchio II*, Casalicchio argued that the trial [**3] court erred because it sentenced him under an unconstitutional statutory provision. Pursuant to *Foster*, this court agreed, vacated his sentence, and remanded for resentencing for a second time. *Casalicchio II* at P6-11.

[*P7] On November 6, 2006, prior to this court's release of *Casalicchio II* (on January 18, 2007), Casalicchio filed a petition for postconviction relief. He maintained that his petition was timely filed because his first sentence was void and a nullity. In the petition, he alleged that the prosecutor withheld exculpatory evidence. It is the denial of this petition that is the subject of the instant appeal.

[*P8] The trial court denied the petition on February 9, 2007. It determined that Casalicchio's petition was untimely because he filed it beyond the 180-day time limit set forth in R.C. 2953.21(A)(2).¹ The court reasoned that under this provision, 180 days began to run from the date the trial transcript from the judgment of conviction and sentence was filed in Casalicchio's direct appeal.²

1 [HN1]R.C. 2953.21(A)(2) provides that "a petition [for post-conviction relief] shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the [**4] court of appeals in the direct appeal of the judgment of conviction or adjudication ***. If 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."

2 The transcript of proceedings from Casalicchio's conviction and sentence was filed in this court in his direct appeal on June 28, 2004.

[*P9] It is from this judgment that Casalicchio appeals, raising the following three assignments of error:

[*P10] "[1.] The trial court erroneously dismissed the petition for post-conviction relief as untimely filed.

[*P11] "[2.] Assuming, arguendo, that the trial court addressed the merits of the petition, it failed to make adequate findings of fact and conclusions of law.

[*P12] "[3.] The petition for post-conviction relief should not be dismissed on the basis of *res judicata*."

[*P13] [HN2]Since a postconviction relief proceeding is a collateral civil attack on a judgment, the judgment of the trial court is reviewed under the abuse of discretion standard. *State v. Gondor*, 112 Ohio St. 3d 377, 2006 Ohio 6679, at P58, 860 N.E.2d 77. An abuse of discretion is more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable. [**5] *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

[*P14] In his first assignment of error, the only assignment affected by *Simpkins* and the motions for reconsideration, Casalicchio relies on *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961, to argue that because his first sentence did not properly include postrelease control, it was void and therefore, a nullity. Casalicchio maintains that because his first sentence was a nullity, his conviction became "real" and "final" only when his second sentence was imposed, and his time to file a postconviction relief petition began to run then. Thus, Casalicchio contends that his postconviction relief petition was timely because he filed it within 180 days from the time the transcript of his resentencing hearing was filed in his second appeal, on May 9, 2006.

[*P15] In our original opinion, we determined that the question raised here, whether a

"void" sentence restarts the clock to file a petition for post-conviction relief, was one of first impression for this court. We reviewed *Bezak* in light of a later Supreme Court case, *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, 873 N.E.2d 306.

[*P16] In *Bezak*, the Supreme Court held that since *Bezak* [HN3]"was not informed about the imposition [**6] of postrelease control at his sentencing hearing, the sentence imposed by the trial court is void." Id. at P12. It then reasoned that, "[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." Id., quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223.

[*P17] In *Payne*, the Supreme Court explained the difference between a sentence that is "void" from one that is "voidable." Id. at P27-30. It stated, [HN4]"[a] void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. *** Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously." (Internal citations omitted.) *Payne* at P27.

[*P18] Based on the Supreme Court's opinion in *Payne*, we determined that *Payne* implicitly overruled *Bezak*. We reasoned, albeit erroneously, that *Payne* indicated the Supreme Court's retreat from *Bezak* when it had labeled a sentence "void" -- since the trial court had the authority to impose the sentence, but improperly exercised that authority. [**7] Based on that reasoning, we held that a sentence that does not properly include postrelease control is "voidable," not void. And we concluded that since Casalicchio's sentence was not "void" or a "nullity", it did not restart the clock to file a postconviction relief petition.

[*P19] As we indicated, seven days after we released our original opinion, the Supreme Court issued its decision in *Simpkins*. We agree with the state and Casalicchio that the holding in *Simpkins* contradicted our reasoning in this matter.

[*P20] In *Simpkins*, the Supreme Court held that [HN5]"[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Id. at the syllabus.

[*P21] The Supreme Court recognized in *Simpkins* that it has "not always used these terms [void and voidable] as properly and precisely as possible." Id. at P11. But relying on stare decisis and the need "to foster predictability and continuity," especially in "areas of the law that [**8] are in flux" such as sentencing law, it followed its prior holding of *Bezak*. Id. at P22; fn. 2.³

3 It is interesting to note that in *Payne*, Justice Cupp relied on the same principles in his dissent. He stated that he welcomed and approved of the Court's "needed clarification of when a sentence is void and when it is merely voidable, and the legal consequences of each." Id. at P36 (Cupp, J., dissenting). He disagreed, however, with the Court modifying the "sweeping resentencing mandate of Foster," because he believed that "[c]onsistency in this matter, as in all criminal cases, is desirable." Id. at P37; 42 (Moyer, C.J. joined in the dissent).

[*P22] Nonetheless, the outcome here is the same. We commend Casalicchio's reasoning that since his first sentence without postrelease control was "void" and "a mere nullity," as set forth in *Bezak* and reaffirmed in

Simpkins, then his conviction did not become "real" and "final" until his second sentence was imposed. Because if his first sentence was void and he should be put in "the same position as if there had been no judgment," then it would logically follow that the only way to place him in "the same position" would be to extend his time to file [**9] a post-conviction relief petition. ⁴ Despite our admiration for Casalicchio's contention, however, we still conclude that his "void" sentence did not "restart the clock" to extend his time to file a post-conviction relief petition.

4 A month after *Bezak* was released, a First District judge forewarned, "[o]ur Supreme Court has declared these sentences void. So now we have perhaps hundreds of inmates serving void sentences. What might happen next?" *State v. Bond*, 1st Dist. No. C-060611, 2007 Ohio 4194 (Painter, J., concurring).

[*P23] Prior to *Bezak*, *Payne*, and *Simpkins*, under R.C. 2953.21(A)(2), petitioners had 180 days from the time their transcript was filed in the court of appeals in their direct appeal (or from the time it would have been filed had they timely appealed) to file a petition for post-conviction relief. Nothing in those decisions affects this provision in any way.

[*P24] The Tenth District was faced with a petitioner's post-conviction relief petition filed after he was resentenced pursuant to a remand in his first appeal. See *State v. Laws*, 10th Dist. No. 04AP-283, 2004 Ohio 6446. It explained that "[w]hile R.C. 2953.21(A)(2) does not specifically address the present situation, we [**10] are guided by the purpose of the amendments to R.C. 2953.21(A)(2) [limiting the time to file to 180 days] and the case law interpreting it. *** [HN6][I]f we were to determine that the time for filing a defendant's post-conviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post-convictions

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." *Id.* at P6.

[*P25] The Tenth District held, "under the circumstances of this case, the time limits of R.C. 2953.21(A)(2) began to run at the time defendant's transcript was filed in his first appeal. The transcript in defendant's initial appeal was filed on January 28, 1998 and *** [h]is petition therefore was due on July 27, 1998. Defendant, however, filed his petition for post-conviction relief on April 1, 2002. As a result, his petition was untimely. The trial court properly recognized [HN7]it lacked jurisdiction to entertain defendant's untimely petition unless defendant satisfied the mandatory jurisdictional requirements set forth in R.C. 2953.23(A)." (Internal citations [**11] omitted.) *Id.* at P7.

[*P26] Casalicchio appealed his conviction and sentence in *Casalicchio I*. The transcript of proceedings for *Casalicchio I* was filed in this court on June 28, 2004. Therefore, the time limitation period for postconviction relief began to run on that date. [HN8]When the trial court imposed his "second" sentence at the resentencing hearing, "it [did] not serve to restart the clock for postconviction relief purposes as to any claims attacking his underlying conviction." *State v. Gross*, 5th Dist. No. CT2006-0006, 2006 Ohio 6941, at P34. See, also, *State v. Simmons*, 11th Dist. Nos. 2006-L-265 and 2006-L-276, 2007 Ohio 4965.

[*P27] [HN9]When a postconviction relief petition is untimely, a trial court may still entertain it if the petitioner meets one of the two conditions set forth in R.C. 2953.23(A). Petitioner's claim, that the prosecutor withheld exculpatory evidence, could fall under R.C. 2953.23(A)(1) (if he showed that he "was unavoidably prevented from" discovering the exculpatory evidence and he "shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found [him] guilty").

[*P28] In his petition, however, Casalicchio only asserted [**12] that he *timely* filed it under R.C. 2953.21. He did not argue that it met any of the requirements to file an untimely petition under R.C. 2953.23(A). And Casalicchio did not submit any evidence with his petition supporting his contention that the prosecutor withheld exculpatory evidence, or show how he was unavoidably prevented from discovering the alleged evidence, or how it would have changed the outcome of his guilty conviction. Thus, not having met any of the requirements under R.C. 2953.23, the trial court did not have jurisdiction to consider his untimely petition under this statute. See *Laws*, supra.

[*P29] Thus, we conclude that the trial court did not abuse its discretion when it dismissed Casalicchio's petition as untimely. Casalicchio's first assignment of error is not well taken.

[*P30] In the second assignment, Casalicchio argues that if this court construes a statement made by the trial court as a decision on the merits, then we should reverse the trial court because it did not make proper findings of fact and conclusions of law.⁵ However, we concluded in the first assignment that the petition was untimely filed; therefore, the trial court did not have jurisdiction to address the merits [**13] of Casalicchio's petition. Therefore, this assignment has been rendered moot by our handling of the first assignment.

⁵ The trial court made one statement that was not related to the timeliness issue: "It is important to note that the Defendant's Petition raises no issue concerning resentencing, only, the jury trial. All those issues were or could have been presented on the appeal that was already heard and decided."

[*P31] In his third assignment, Casalicchio argues that the trial court erred when it dismissed his petition because it was barred by res judicata. Again, as we concluded in the first

assignment, that is not why the trial court dismissed Casalicchio's petition. Therefore, this assignment has also been rendered moot by our disposition of the first assignment.

[*P32] Accordingly, the judgment of the Cuyahoga County Court of Common Pleas is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY [**14] JANE BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, P.J.,
CONCURS;

ANN DYKE, J., DISSENTS WITH
SEPARATE OPINION

DISSENT BY: ANN DYKE

DISSENT

ANN DYKE, J., DISSENTING:

[*P33] I respectfully dissent. I would find that, even if the time for filing the petition for postconviction relief began to run in connection with the first appeal, the trial court should have entertained the petition pursuant to the conditions set forth in R.C. 2953.23(A). In this matter, the defendant raised the issue that "despite his protestations to the contrary, [Videll] Schumpert was given favorable consideration after his testimony with respect to another case in which he was the defendant." The defense should have been afforded a hearing in order to explore the issue raised associated with the state's use of this informant.

LEXSEE

STATE OF OHIO, Respondent-Appellee -vs- TONY R. GROSS, Petitioner-Appellant

Case No. CT2002-0037

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT,
MUSKINGUM COUNTY**

2003 Ohio 6295; 2003 Ohio App. LEXIS 5638

November 18, 2003, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal not allowed by State v. Gross, 102 Ohio St. 3d 1410, 2004 Ohio 1763, 806 N.E.2d 562, 2004 Ohio LEXIS 790 (2004)

US Supreme Court certiorari denied by Gross v. Ohio, 543 U.S. 888, 125 S. Ct. 165, 160 L. Ed. 2d 149, 2004 U.S. LEXIS 5167 (2004)

PRIOR HISTORY: **[**1] CHARACTER OF PROCEEDING:** Civil appeal from Muskingum County Court of Common Pleas, Case No. CR-94-0140.

State v. Gross, 1999 Ohio App. LEXIS 2500 (Ohio Ct. App., Muskingum County, May 24, 1999)

DISPOSITION: Appeal dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged a judgment by the Muskingum County Court of Common Pleas (Ohio) that denied his two postconviction petitions without evidentiary hearings, without appointment of counsel, without experts, and without discovery.

OVERVIEW: Appellant was convicted in 1996 of two counts of capital murder and four counts of aggravated robbery with a death sentence imposed by the trial court. Subsequently, the Ohio Supreme Court affirmed the convictions, vacated the death sentence, and remanded for resentencing. The appellate court held that Ohio Rev. Code Ann. § 2953.21(A)(1) provided that postconviction petitions were to be filed in the court that imposed sentence. However, because resentencing had not taken place, appellant's appeal was premature.

OUTCOME: The appeal was dismissed.

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > Void Judgments
Criminal Law & Procedure > Postconviction Proceedings > General Overview
[HN1]See Ohio Rev. Code Ann. § 2953.21(A)(1), (2).

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN2] Ohio Rev. Code Ann. § 2953.21(A)(1) provides that postconviction petitions shall be filed in the court that imposed sentence.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN3] While 2953.21(A)(1) grants the right to file a postconviction petition to one convicted of a criminal offense, it fixes the jurisdiction in the court that imposed sentence.

COUNSEL: COUNSEL FOR RESPONDENT-APPELLEE: D. MICHAEL HADDOX, Muskingum County Prosecuting Attorney, Zanesville, OH.

COUNSEL FOR PETITIONER-APPELLANT: DAVID H. BODIKER, Ohio Public Defender, RANDALL L. PORTER, Columbus, OH.

JUDGES: Hon. Sheila G. Farmer, P.J., Hon. Julie A. Edwards, J., Hon. John F. Boggins, J. Boggins, J., Farmer, P.J. and Edwards, J., concur.

OPINION BY: John F. Boggins

OPINION

Boggins, J.

[*P1] This is an appeal from a denial of Appellant's two post conviction Petitions without evidentiary hearings, without appointment of counsel, without experts and without discovery.

[*P2] The facts behind this appeal are stated at length in the prior appeal of *State v. Gross* (1999) CT96-055, 1999 Ohio App. LEXIS 2500, 1999WL333233, Muskingum County, which are included by reference.

[*P3] Suffice it to state that Appellant was convicted in 1996 of two counts of capital

murder and four counts of aggravated robbery with a death sentence recommended by the jury and imposed by the Court.

[*P4] While this Court affirmed the convictions and sentence in such prior appeal, [**2] the Ohio Supreme Court affirmed the convictions, vacated the death sentence and remanded for resentencing. The resentencing has not taken place.

[*P5] There are eight Assignments of Error:

[*P6] "ASSIGNMENT OF ERROR NO. I: THE TRIAL COURT ISSUED INADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN REGARD TO TONY GROSS' PETITIONS FOR POST-CONVICTION RELIEF.

[*P7] "ASSIGNMENT OF ERROR NO. II: THE ACTIONS OF THE TRIAL COURT AND POST-CONVICTION COUNSEL DEPRIVED PETITIONER OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

[*P8] "ASSIGNMENT OF ERROR NO. III: THE TRIAL COURT ERRED WHEN IT OVERRULED PETITIONER'S MOTIONS FOR FUNDS TO EMPLOY EXPERTS.

[*P9] "ASSIGNMENT OF ERROR IV. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S POST-CONVICTION PETITIONS WITHOUT FIRST AFFORDING HIM THE OPPORTUNITY TO CONDUCT DISCOVERY.

[*P10] "ASSIGNMENT OF ERROR V. THE TRIAL COURT ERRED WHEN IT RULED THAT PETITIONER'S CONSTITUTIONAL CLAIMS WERE BARRED BY RES JUDICATA.

[*P11] "ASSIGNMENT OF ERROR VI. THE TRIAL COURT ERRED IN DENYING THE MERITS, OR IN THE ALTERNATIVE FACTUAL DEVELOPMENT, AS TO THE CAUSES OF ACTIONS CONTAINED IN

TONY GROSS' FIRST POST-CONVICTION PETITION.

[**3] [*P12] "ASSIGNMENT OF ERROR NO. VII. THE TRIAL COURT ERRED IN DENYING FACTUAL DEVELOPMENT FOR THE CAUSES OF ACTION CONTAINED IN PETITIONER'S PRO SE POST-CONVICTION PETITION.

[*P13] "ASSIGNMENT OF ERROR NO. VIII. THIS COURT IMPROPERLY DENIED PETITIONER'S APPOINTMENT OF COUNSEL IN HIS APPEAL TO THIS COURT."

[*P14] We will address each of the eight Assignments of Error simultaneously as each are premature.

[*P15] R.C. 2953.21(A)(1) and (2) provide:

[*P16] [HN1]"Petition for postconviction relief.

[*P17] "(A)(1) 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 his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States 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.

[*P18] "(2) A petition under [**4] 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 the date on which the trial transcript is filed in the supreme court if the direct appeal involves a sentence of death. If 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."

[*P19] Section (A)(1) [HN2]provides that post conviction petitions shall be filed in the court that imposed sentence.

[*P20] [HN3]While the statute in subsection (A)(1) grants the right to file such petition to one convicted of a criminal offense, it fixes the jurisdiction in the court which imposed sentence.

[*P21] Therefore, each Assignment of Error is premature and each is denied at this time and this appeal is dismissed.

By: Boggins, J.

Farmer, P.J. and

Edwards, J., concur

LEXSEE

STATE OF OHIO, Plaintiff-Appellee -vs- TONY R. GROSS, Defendant-Appellant

Case No. CT2006-0006

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT,
MUSKINGUM COUNTY**

2006 Ohio 6941; 2006 Ohio App. LEXIS 6852

December 20, 2006, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal not allowed by State v. Gross, 113 Ohio St. 3d 1468, 2007 Ohio 1722, 864 N.E.2d 654, 2007 Ohio LEXIS 858 (2007)

Magistrate's recommendation at, Habeas corpus proceeding at, Request denied by, Motion granted by, Motion denied by Gross v. Jackson, 2008 U.S. Dist. LEXIS 37095 (S.D. Ohio, May 6, 2008)

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas, Criminal Case No. CR94-0140.

State v. Gross, 1999 Ohio App. LEXIS 2500 (Ohio Ct. App., Muskingum County, May 24, 1999)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was convicted of two counts of capital murder and four counts of armed robbery. The Muskingum County Court of Common Pleas (Ohio) sentenced him to death, which was reversed on appeal. On remand, he was sentenced to 30

years to life. Subsequently, defendant filed a petition for postconviction relief, which was dismissed without a hearing. Defendant appealed.

OVERVIEW: Defendant argued that the trial court erred in dismissing his petition for postconviction relief without holding a hearing. The appellate court held that the trial court correctly found that defendant's petition was untimely filed. R.C. § 2953.21(A) clearly afforded defendant 180 days from the date the trial transcripts were filed in his first direct appeal or no later than 180 days after the expiration of time for filing the appeal. Because the trial transcript was filed in the appellate court before its decision affirming defendant's conviction and sentence on May 24, 1999, his petition for postconviction relief was clearly untimely. The fact that defendant was resentenced on January 10, 2005, did not serve to restart the clock for postconviction relief purposes as to any claims attacking his underlying conviction. Even if it did, the petition would still have been untimely. Defendant's appeal of the trial court's resentencing was voluntarily dismissed. Any extension of time to file the transcript therein was of no import in computing the timeliness of the instant postconviction relief petition.

OUTCOME: The judgment of the trial court was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

[HN1]In reviewing a trial court's denial of a petition for postconviction relief, absent a showing of abuse of discretion, an appellate court will not overrule the trial court's finding if it is supported by competent and credible evidence. In order to find an abuse of discretion, the appellate court must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN2]A petition for postconviction relief 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 of the petitioner's criminal conviction. Although designed to address claimed constitutional violations, the postconviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. A petition for postconviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN3]See R.C. § 2953.21.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN4]A criminal defendant who seeks to challenge his conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. Pursuant to R.C. § 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief. A trial court's decision to grant or deny the petitioner an evidentiary hearing is left to the sound discretion of the trial court.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN5]See R.C. § 2953.21(A).

COUNSEL: For Plaintiff-Appellee: D. MICHAEL HADDOX, RONALD L. WELCH, Muskingum County Prosecuting Office, Zanesville, Ohio

For Defendant-Appellant: TONY R. GROSS, PRO SE, Lebanon, Ohio

JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John F. Boggin, J. concur.

OPINION BY: Hoffman

OPINION

Hoffman, P.J.

[*P1] Petitioner-appellant Tony R. Gross appeals the January 5, 2006 Judgment Entry of the Muskingum County Court of Common Pleas dismissing his petition for post-

conviction relief. Respondent-appellee is the State of Ohio.

STATEMENT OF THE CASE

[*P2] On August 12, 1996, a jury found appellant guilty on two counts of capital murder and four counts of armed robbery. On August 21, 1996, the jury recommended a sentence of death. On September 4, 1996, the trial court accepted the jury's recommendation and imposed a sentence of death.

[*P3] On May 24, 1999, this court affirmed appellant's conviction and sentence. On October 30, 2002, the Ohio Supreme Court affirmed the conviction on all counts, but vacated the death penalty and remanded [**2] the matter to the trial court for resentencing.

[*P4] On December 9, 2004, the trial court sentenced appellant to thirty years to life in prison, to run consecutive to all other sentences. Via Judgment Entry of January 10, 2005, the trial court entered judgment reflecting the sentence. Appellant filed an appeal on January 4, 2005.

[*P5] On February 17, 2005, the trial court appointed appellate counsel, and counsel requested an extension of time to submit a brief. Via an Order of February 28, 2005, this Court granted counsel until April 11, 2005 to submit a brief and through March 21, 2005 to supplement the record with transcripts. On April 1, 2005, appellant voluntarily dismissed the appeal.

[*P6] Appellant filed a post-conviction petition on August 26, 2005, and an amended post-conviction brief, instantaner on November 10, 2005.

[*P7] On January 5, 2006, the trial court dismissed appellant's post-conviction petition, without hearing. Appellant now appeals, assigning as error:

[*P8] "I. THE TRIAL COURT WRONGFULLY DISMISSED THE POST PETITION

FOR BEING FILED OUT-OF-TIME ON CLEARLY ERRONEOUS FACTS AND ALLOWED THEM TO SERVE AS BASIS FOR THE DISMISSAL.

[*P9] [**3] "II. THE TRIAL COURT ABUSED IT'S DISCRETION BY DISMISSING THE POST CONVICTION PETITION FOR BEING FILED OUT-OF-TIME IN DISREGARD OF THE RECORD, STATE STATUTE, AND THIS COURT'S PRIOR ORDER.

[*P10] "III. THE TRIAL COURT ABUSED IT'S DISCRETION BY PREDICATING AND TAKING ADVANTAGE OF THE INTOLERABLE ACCESS TO LEGAL SERVICES AND MATERIALS WHEN IT DISMISSED THE POST CONVICTION PETITION FOR BEING FILED OUT-OF-TIME WHEN THE VERY CAUSES FOR IT'S "HELD" LATE FILING DATE WERE CITED IN THE PETITION'S 20TH CLAIM FOR RELIEF.

[*P11] "IV. THE TRIAL COURT ERRORED/ABUSED IT'S DISCRETION BY HOLDING CLAIMS 1-19 OF THE POST CONVICTION PETITION HAD BEEN PREVIOUSLY RAISED AND AFFIRMED ADOPTING THE STATE'S DEFENSE, WITHOUT A PER SE REVIEW TO ENFORCE THE IMPLIED APPLICATION OF RES JUDICATA.

[*P12] "V. THE TRIAL COURT ERRORED/ABUSED IT'S DISCRETION BY ALLOWING THE STATE TO PARTICIPATE IN THE POST CONVICTION PROCEEDINGS BY IT'S HOLDING THAT THE RULES APPLICABLE TO IT'S PARTICIPATION WERE BUT DIRECTORY AND NOT MANDATORY; WHEREBY MAKING MOOT, RETROACTIVELY, THE APPELLANT'S MOTION FOR SUMMARY JUDGEMENT [SIC].

[*P13] "VI. THE TRIAL COURT ERRORED/ABUSED IT'S DISCRETION BY

DISMISSING AND DISALLOWING [**4] THE APPELLANT ANY DISCOVERY, SCIENTIFIC OR MEDICAL EXPERTS, EVIDENTIARY HEARING, COUNSEL OR RIGHT TO DEPOSE WITNESSES."

[*P14] All six of appellant's assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

[*P15] Appellant argues the trial court erred in dismissing his petition for post-conviction relief without holding a hearing.

[*P16] [HN1] In reviewing a trial court's denial of appellant's petition for post-conviction relief, absent a showing of abuse of discretion, we will not overrule the trial court's finding if it is supported by competent and credible evidence. *State v. Mitchell* (1988), 53 Ohio App.3d 117, 120, 559 N.E.2d 1370. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P17] [HN2] A petition for post-conviction relief 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 [**5] record of the petitioner's criminal conviction. Although designed to address claimed constitutional violations, the post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 1999 Ohio 102, 714 N.E.2d 905; *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 1994 Ohio 111, 639 N.E.2d 67. A petition for post-conviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the peti-

tion. *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819.

[*P18] R.C. Section 2953.21 governs petitions for post-conviction relief, stating, in pertinent part:

[*P19] [HN3]"(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 [**6] 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 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.

[*P20] " * * *

[*P21] "(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 [**7] stated in the petition is waived.

[*P22] " * * *

[*P23] "(C) The court shall consider a petition that is timely filed under division (A)(2)

of this section even if a direct appeal of the judgment is pending. *Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief.* In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

[*P24] " * * *

[*P25] "(E) *Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the [**8] issues even if a direct appeal of the case is pending.* If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court."

[*P26] (Emphasis added.)

[*P27] [HN4]A criminal defendant who seeks to challenge his conviction through a petition for post-conviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St. 3d 279, 282, 714 N.E.2d 905, 1999 Ohio 102. "Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Id.* at paragraph

two of the syllabus. A trial court's decision to grant or deny the petitioner an evidentiary hearing is left to the sound discretion of the trial court. *See id.* at 284, 714 N.E.2d 905 (stating the [**9] post-conviction relief statute "clearly calls for discretion in determining whether to grant a hearing").

[*P28] As set forth in the statement of the case, *supra*, appellant filed a direct appeal from his sentence following the Supreme Court's remand for resentencing on January 4, 2005. The Judgment Entry from which appellant appeals was filed on January 10, 2005. Appellant voluntarily dismissed the appeal on April 1, 2005.

[*P29] R.C. 2953.21(A) provides:

[*P30] [HN5]"(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 [**10] for filing the appeal."

[*P31] (Emphasis added.)

[*P32] The trial court concluded appellant's appeal after resentencing was a nullity due to his voluntary dismissal of the same. R.C. 2953.21 required appellant file his post-conviction petition within 180 days after the expiration of the time for filing an appeal, or August 10, 2005. The trial court found appellant filed his petition on November 10, 2005, beyond the permissible time. Accordingly, the trial court dismissed the appeal.

[*P33] Appellant maintains his petition for post-conviction relief was filed on August 22,

2005, not November 10, 2005, the date he filed an amended post-conviction brief, *instanter*. Appellant asserts the trial court disregarded its February 28, 2005 order extending the time deadline for appellant to supplement the record on his direct appeal. Including this extension, appellant contends the deadline for his filing a petition for post-conviction relief was September 13, 2005, not August 10, 2005.

[*P34] We disagree with appellant's argument. As set forth above, 2953.21(A) clearly afforded appellant 180 days from the date the trial transcripts were filed [**11] in his first *direct appeal* or no later than 180 days after the expiration of time for filing the appeal. Because the trial transcript was filed in this Court before our decision affirming appellant's conviction and sentence on May 24, 1999,¹ appellant's petition for post-conviction relief is clearly untimely. The fact appellant was resentenced on January 10, 2005, does not serve to restart the clock for post-conviction relief purposes as to any claims attacking his underlying conviction. Assuming, *arguendo*, it did restart the clock, appellant's petition would still be untimely. Appellant's appeal of the trial court's resentencing was voluntarily dismissed. Any extension of time to file the transcript therein is of no import in computing the timeliness of the instant post-conviction relief petition. Because no transcript had been filed before appellant voluntarily dismissed that appeal, we treat the procedural posture to be the functional equivalent of no appeal having been taken. Pursuant to R.C. 2953.21(A), appellant had 180 days after the expiration of the time for filing his notice of appeal (February 10, 2005). We compute this time to be August 10, 2005, at [**12] the latest. Accordingly, the trial court correctly found appellant's petition untimely filed.

1 Even under the present version of R.C. 2953.21 which accommodates the new procedure of direct review of capital death penalty cases by the Ohio Supreme Court, bypassing review in the court of

appeals, the trial transcript was filed in the Ohio Supreme Court prior to its decision affirming appellant's conviction on October 30, 2002.

[*P35] Having so found, we find it unnecessary to address the trial court's alternative reason for dismissing appellant's petition.

[*P36] Appellant's assignments of error are overruled.

[*P37] The judgment of the trial court is affirmed.

By: Hoffman, P.J. Farmer, J. and Boggins, J. concur.

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

Hon. JOHN F. BOGGINS

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the January 5, 2006 Judgment Entry of the Muskingum County Court of Common Pleas is affirmed. Costs assessed [**13] to appellant.

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

HON. JOHN F. BOGGINS