

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2009-T-0068
- vs -	:	
MICHAEL H. GOODMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 04 CR 804.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael H. Goodman, PID: 520-070, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Michael H. Goodman appeals from the judgment of the Trumbull County Court of Common Pleas, denying his “Motion: To Vacate Sentence and Void Conviction.” Finding no error, we affirm.

{¶2} In 2006, Mr. Goodman was sentenced to terms of imprisonment totaling thirty-four and one-half years, following his convictions, after jury trial, for numerous crimes arising from a series of armed robberies he committed in autumn of 2004. *State*

v. Goodman, 11th Dist. No. 2006-T-0130, 2007-Ohio-6252, at ¶2-15 (“*Goodman I*”). Mr. Goodman appealed; and, this court affirmed. *Id.* at ¶71. The Supreme Court of Ohio declined a discretionary appeal. *State v. Goodman*, 117 Ohio St.3d 1477, 2008-Ohio-1841.

{¶3} April 22, 2009, Mr. Goodman filed the motion subject of this appeal. In it, he alleged the following: (1) trial counsel was ineffective for failing to recognize errors in the indictment, resulting in “structural error” at trial; (2) appellate counsel was ineffective for failing to assign as error the foregoing ineffectiveness of trial counsel; (3) that due to the ineffectiveness of trial and appellate counsel, both the trial court, and this court, lacked jurisdiction to entertain his case.

{¶4} June 10, 2009, the trial court filed its judgment entry, denying Mr. Goodman’s motion. The judgment entry provides, in relevant part:

{¶5} “The Defendant was convicted of multiple criminal offenses by way of jury verdict on August 21, 2006. This Court sentenced Defendant on October 31, 2006. The Defendant now files this pleading requesting the Court vacate the sentence and void the conviction. The Defendant claims ineffective assistance of counsel.

{¶6} “Upon review of Defendant’s submission it is apparent that his claims are those that could have been submitted on appeal or in a request for post conviction relief.

{¶7} “The Defendant’s claims in this form and at this time are found to be not well taken and his request for relief is denied.”

{¶8} June 26, 2009, Mr. Goodman filed this appeal, assigning four errors:

{¶9} “[1.] THE TRUMBULL COUNTY COMMON PLEAS COURT, GENERAL TRIAL DIVISION, PREJUDICED THE DEFENDANT-APPELLANT (HEREIN AFTER (sic) APPELLANT), BY DENYING HIS “MOTION: TO VACATE SENTENCE AND VOID CONVICTION,” WITHOUT A HEARING. THIS IS A VIOLATION OF THE APPELLANT’S “DUE PROCESS AND EQUAL PROTECTION RIGHTS,” AS GUARANTEED IN THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.’ U.S.C.A. CONST. AMEND(S): ¶5, ¶14.

{¶10} “[2.] TRIAL COUNSEL: JAMES DENNY, WAS CONSTITUTIONALLY INEFFECTIVE IN HIS REPRESENTATION OF THE APPELLANT DURING TRIAL. HIS DEFICIENCY IN HIS PERFORMANCE PREJUDICED THE APPELLANT. THEREFORE, THE APPELLANT MEETS BOTH PRONGS OF: STRICKLAND v. WASHINGTON, 466 U.S. 688, ***[.]’

{¶11} “[3.] APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO ARGUE THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE INEFFECTIVENESS OF TRIAL COUNSEL (‘PREDICTED (sic) ON TRIAL COUNSEL’S FAILURE TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE,’) TURNS, OF COURSE, ON WHETHER APPELLATE COUNSEL WOULD HAVE BEEN INEFFECTIVE, ABSENT THE DEFAULT BELOW, FOR FAILING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE.’

{¶12} “[4.] THE TRUMBULL COUNTY COMMON PLEAS COURT LACKED SUBJECT MATTER JURISDICTION, BECAUSE OF A STRUCTURAL ERROR, THAT

TRIAL AND APPELLATE COUNSEL FAILED TO CHALLENGE ON THE SUFFICIENCY OF THE EVIDENCE AND ELEMENTS OF THE CHARGES IN THE INDICTMENT. THUS, APPELLANT IS PROCEDURALLY EXCUSED.’ ***”

{¶13} Initially, we must classify Mr. Goodman’s motion, in order to determine the standard of review. The trial court treated it as *sui generis*. We note the following from the Supreme Court of Ohio’s recent decision in *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, at ¶12:

{¶14} “Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ***, citing *State v. Reynolds* (1997), 79 Ohio St.3d 158, ***. In *Reynolds*, we concluded that a motion styled ‘Motion to Correct or Vacate Sentence’ met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1), because it was ‘(1) filed subsequent to (the defendant’s) direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.’ *Id.* at 160, ***. The Civ.R. 60(B) motion filed by Schlee was filed subsequent to his direct appeal, claimed a denial of constitutional rights, and sought reversal of the judgment rendered against him. We conclude, therefore, that the Civ.R. 60(B) motion filed by Schlee could have been filed as a petition for postconviction relief.” (Parallel citations omitted.)

{¶15} Similarly, the motion subject of this appeal postdated Mr. Goodman’s direct appeal; it claimed his constitutional right to counsel was violated; and, demanded that the judgment against him be reversed. Consequently, we treat this appeal as one from a petition for postconviction relief. *Schlee* at ¶12.

{¶16} We review a trial court’s determination whether to grant or deny a petition for postconviction relief for abuse of discretion. *State v. Appenzeller*, 11th Dist. No. 2007-L-175, 2008-Ohio-6982, at ¶19. “The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Regarding this standard, we recall the term “abuse of discretion” is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶17} R.C. 2953.21, entitled “Petition for postconviction relief,” provides at division (A)(2): “[e]xcept as otherwise provided in section 2953.23 of the Revised Code, a petition *** 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 ***[.]” The record in Mr. Goodman’s direct appeal was filed with this court March 12, 2007; the motion subject of this appeal was filed April 22, 2009 – more than a year and one-half out of rule. Consequently, we must look to the exceptions to the one hundred eighty day limit for filing a petition set forth at R.C. 2953.23 to determine if Mr. Goodman’s was timely.

{¶18} R.C. 2953.23 provides, in relevant part:

{¶19} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court *may not* entertain a petition filed after the expiration of the period prescribed in division (A) of that section *** unless division (A)(1) or (2) of this section applies:

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

{¶21} “(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 ***, 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.

{¶22} “(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 ***[.]” (Emphasis added.)

{¶23} Consequently, pursuant to the mandatory language of R.C. 2953.23(A), the trial court was without power to entertain Mr. Goodman’s petition, unless the errors alleged met the standards set forth at R.C. 2953.23(A)(1).

{¶24} The essence of Mr. Goodman’s arguments underlying each assignment of error is that his trial counsel failed to recognize that his indictment was fatally flawed, due to failure to allege therein a mens rea on the five counts of aggravated robbery for which Mr. Goodman was convicted. Mr. Goodman contends this led to “structural error,” at his trial. See, e.g., *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624.

{¶25} First, we observe that Mr. Goodman’s argument is substantively wrong. He was indicted and convicted for aggravated robbery pursuant to R.C. 2911.01(A)(1). There is no requirement to charge a mens rea regarding the deadly weapon element of aggravated robbery pursuant to R.C. 2911.01(A)(1), which is Mr. Goodman’s objection to his indictment. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, at ¶32-33; *State v. Williams*, 11th Dist. No. 2008-T-0101, 2009-Ohio-1435, at ¶26-28.

{¶26} Second, Mr. Goodman cannot meet the criteria for filing an untimely petition for postconviction relief pursuant to R.C. 2953.23(A)(1)(a). He points to no facts he was “unavoidably prevented” from discovering previously. If his indictment was flawed, that was evident at the time. And the United States Supreme Court has not recognized any new federal or state right which Mr. Goodman seeks to assert.

{¶27} We believe the foregoing analysis is dispositive of the first, second, and fourth assignments of error. A trial court cannot hold hearing on an untimely petition it may not even consider. Trial counsel is not ineffective for failing to assert a non-existent error, which error, if it did exist, was evident at the time of trial, providing no basis for an untimely petition for postconviction relief. Neither the trial court, nor this court, were deprived of jurisdiction of Mr. Goodman’s case due to non-existent structural error in *Goodman I*, which error, again, could have been asserted on direct appeal if it did exist. These assignments of error lack merit.

{¶28} By his third assignment of error, Mr. Goodman contends that appellate counsel for his direct appeal was ineffective for failing to argue ineffective assistance of trial counsel. Claims regarding ineffective assistance of appellate counsel are not cognizable in postconviction relief proceedings, and must be raised by way of an application for reopening filed pursuant to App.R. 26(B). *State v. Love*, 11th Dist. No. 2007-L-030, 2007-Ohio-6256, at ¶18. The third assignment of error lacks merit.

{¶29} The assignments of error lacking merit, the judgment of the Trumbull

County Court of Common Pleas is affirmed.

{¶30} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.