

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-P-0058
ROBERT S. VANPELT,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2012 CR 0072.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Robert S. VanPelt, pro se, PID# A643-995, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Robert S. VanPelt, appeals from the Judgment Entry of the Portage County Court of Common Pleas, dismissing his Petition to Vacate or Set Aside Judgment of Conviction or Sentence. The issue to be determined by this court is whether a postconviction petition may be dismissed when it is untimely, the defendant does not provide any basis for its lateness, and fails to present support for his

contention that the judgment was void. For the following reasons, we affirm the decision of the trial court.

{¶2} On February 21, 2012, the Portage County Grand Jury issued an Indictment, charging VanPelt with Assembly or Possession of Chemicals for the Manufacture of a Controlled Substance, a felony of the third degree, in violation of R.C. 2925.041(A) and (C); Aggravated Possession of Drugs, a felony of the fifth degree, in violation of R.C. 2925.11(A) and (C)(1)(a); two counts of Receiving Stolen Property, felonies of the fourth and fifth degrees, in violation of R.C. 2913.51; and Theft, a misdemeanor of the first degree, in violation of R.C. 2913.02.

{¶3} A Plea Hearing was held on April 9, 2012. On April 17, 2012, a Written Plea of Guilty was filed, in which VanPelt pled guilty to one count of Assembly or Possession of Chemicals for the Manufacture of a Controlled Substance, a felony of the third degree, and an amended count of Theft, a felony of the fifth degree. This plea was memorialized in a Judgment Entry on the same date. A nolle prosequi was entered on the remaining counts of the Indictment.

{¶4} Following a sentencing hearing, in a June 27, 2012 Order and Journal Entry, the court sentenced VanPelt to serve 125 days in jail, and ordered him to serve 12 months of intensive probation and 48 additional months of general probation.

{¶5} On October 5, 2012, a Motion to Modify/Revoke was filed due to VanPelt's failure to report to probation. On November 15, 2013, the court issued a Judgment Entry, granting the Motion to Modify and ordering that VanPelt serve a term of two years for Assembly or Possession of Chemicals and one year for Theft, to be served concurrently.

{¶6} VanPelt filed a Petition to Vacate or Set Aside Judgment of Conviction or Sentence on August 22, 2014, related to the November 15, 2013 Entry. He asserted, that the court's sentence was improper, essentially arguing that the court should have given him a shorter sentence, and that the court did not have authority "to act in the manner which it has."

{¶7} On August 27, 2014, the trial court issued a Judgment Entry, denying VanPelt's petition without a hearing.

{¶8} VanPelt timely appeals and raises the following assignment of error:

{¶9} "Whether or not the trial court abused its discretion when it denied the petition without any hearing or stating any reason or reasons for such denial without a hearing of the issues presented."¹

{¶10} VanPelt argues that the trial court erred in dismissing his postconviction Petition without holding a hearing and that "it failed to even consider if the issues have merit," given that the reasons for the denial of the Petition were not stated.

{¶11} The State argues that VanPelt's Petition was untimely and, therefore, the court properly dismissed the matter without a hearing.

{¶12} Although not characterized as a postconviction petition, since VanPelt filed his Petition "subsequent to the expiration of the time for filing a direct appeal," claimed a denial of constitutional rights, and sought to vacate the judgment against him, it is properly construed as a petition for postconviction relief. *State v. Weber*, 11th Dist. Lake No. 2013-L-080, 2014-Ohio-4133, ¶ 10; *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12.

1. VanPelt states his assignment of error/issues for review differently throughout his brief. We will address each of his arguments within this assignment of error.

{¶13} “[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

{¶14} Pursuant to R.C. 2953.21(A)(1)(a), “[a]ny person who has been convicted of a criminal offense * * * 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 * * * 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.” “If no [direct] appeal is taken [from the judgment], * * * the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.” R.C. 2953.21(A)(2).

{¶15} In the present case, although VanPelt does not address the timeliness issue, he did not file his Petition within the 180 day time limit. He seeks relief from the November 15, 2013 Entry sentencing him to prison following his violation of probation. He filed his Petition on August 22, 2014. His Petition was untimely by over two months.

{¶16} A court may entertain an untimely petition under certain, limited circumstances, including when the petitioner demonstrates that he was “unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, * * * the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation,” and “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.” R.C. 2953.23(A)(1)(a) and (b). VanPelt did not demonstrate that these circumstances apply in the present case, and did not set forth any arguments in support of allowing his untimely Petition.

{¶17} When dismissing a petition upon the grounds that it was untimely, the trial court is under no obligation to hold a hearing or issue findings of fact and conclusions of law. *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155, ¶ 6 (“a trial court need not issue findings of fact and conclusions of law when it dismisses an untimely petition”); *Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶ 51 (“[i]n postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing”).

{¶18} VanPelt also contends that the trial court lacked subject matter jurisdiction, rendering its judgment void, and this issue can “be raised at any time.”

{¶19} “Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits.” *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. “A person is subject to criminal prosecution and punishment in this state if * * * [t]he person commits an offense under the laws of this state, any element of which takes place in this state.” R.C. 2901.11(A)(1). Courts of common pleas have original jurisdiction in felony cases, invoked by a proper indictment. R.C. 2931.03; *Click v. Eckle*, 174 Ohio St. 88, 89, 186 N.E.2d 731 (1962).

{¶20} VanPelt provided no justification in his Petition for his contention that the judgment was void or that the court lacked subject matter jurisdiction. Instead, he

merely asserted that the court performed a “ministerial act” in sentencing him “that it is not other[wise] entitled to perform” and that “it is beyond the Court[']s judicial power to act in the particular manner in which it has, the directional provisions are forbidden and when the court is in compliance the act done under the statute is absolutely void.” Similarly, in his brief, he makes the conclusory assertion that the trial court “lacks any power, right, or authority (jurisdiction) of the subject matter to grant the relief sought by the prosecution.” He also contends that “the indictment * * * contains a charge over which the trial court has no power to grant the State,” an issue not stated in his Petition.

{¶21} From these arguments, it is entirely unclear how the court lacked subject matter jurisdiction or why the trial court should grant relief to VanPelt on this ground. Merely making conclusory statements that the trial court lacked subject matter jurisdiction does not provide grounds for VanPelt to prevail on a claim for postconviction relief, nor does it entitle him to a hearing on this issue. “A petition for postconviction relief may be dismissed without a hearing if a petitioner fails to submit evidentiary material that sets forth sufficient operative facts to demonstrate substantive grounds for relief.” (Citation omitted.) *State v. Poling*, 11th Dist. Ashtabula No. 2012-A-0002, 2012-Ohio-3039, ¶ 16; *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). Here, VanPelt failed to support any argument demonstrating substantive grounds for relief. A review of the record does not reveal any evidence to support a claim that the court lacked subject matter jurisdiction, as a complaint was filed, VanPelt was indicted for felony crimes, he entered a plea of guilty, was ordered to serve probation, violated that probation, and was sentenced to prison time accordingly.

{¶22} The sole assignment of error is without merit.

{¶23} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, dismissing VanPelt's Petition to Vacate or Set Aside Judgment of Conviction or Sentence, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.