[Cite as *State v. Reese*, 2009-Ohio-5874.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23410
vs.	:	T.C. CASE NO. 03CR1665
KELLY C. REESE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 6th day of November, 2009.

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GRADY, J.:

{¶ 1} Defendant, Kelly Reese, appeals from a final judgment denying Defendant's R.C. 2953.32 petition for post-conviction relief.

{¶ 2} Defendant was convicted in 2003 of aggravated robbery with a firearm specification, kidnapping with a firearm

specification, breaking and entering, and attempted safecracking. He was sentenced according to law. We affirmed Defendant's convictions and sentences on direct appeal. *State v. Reese*, Montgomery App. No. 20246, 2004-Ohio-6674.

{¶ 3} Defendant filed a petition for post-conviction relief on February 11, 2009. As grounds for relief, Defendant argued that his indictment was defective for failing to allege a mens rea element for offenses of which he was convicted, relying on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). The trial court dismissed the petition without a hearing, on multiple findings. Defendant appeals.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PETITION FOR POST-CONVICTION RELIEF SINCE THE INADEQUACY OF AN INDICTMENT VIOLATES BOTH OHIO STATE LAW AND DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND THE FAILURE TO RAISE THIS ISSUE CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶ 5} Judicial decisions are best rendered on the narrowest basis available. Applying that rule, we find, as the trial court did, that Defendant's petition is barred because it was not timely filed.

{¶ 6} When a direct appeal is taken from a criminal conviction, a petition for postconviction relief must be filed no later than one hundred and eighty days after the date on which the trial transcript was filed in the court of appeals. R.C. 2953.21(A)(2). Defendant filed a direct appeal from his convictions. The transcript of his trial proceedings was filed on February 3, 2004. The petition Defendant filed on February 11, 2009, five years later, was clearly untimely.

{¶ 7} The time bar imposed by R.C. 2953.21(A) is jurisdictional. *State v. Harden*, Montgomery App. No. 20803, 2005-Ohio-5580. In order to confer jurisdiction on the common pleas court to consider an untimely petition, the petitioner must make at least one of two alternative showings: that he "was unavoidably prevented from discovering the facts upon which the petition must rely to present the claim for relief, or, subsequent to [the filing deadline] 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." R.C. 2953.23(A)(1)(a).

{¶ 8} Defendant's claim relies on *Colon I* and *II*. He argues that he was prevented from discovering that claim before those cases were decided. However, he was not unavoidably prevented from discovering the <u>facts</u> upon which his *Colon* claim relies, which

was an alleged defect in his indictment, because that fact was apparent from the face of the indictment when it issued, which was long before the deadline for filing Defendant's R.C. 2953.21 petition.

{¶ 9} Neither does the alternative ground for relief in R.C. 2953.23(A)(1)(a) apply. The decisions in *Colon I and II* were not rendered by the Unites States Supreme Court, but by the Supreme Court of Ohio. Furthermore, that court held that the relief those holdings allowed is not retroactive. *Colon II*.

{¶ 10} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 11} "FAILURE TO INFORM THE APPELLANT OF HIS RIGHT TO APPEAL OR TO PROCEED TIMELY ON THE ISSUE OF A DEFECTIVE INDICTMENT VIOLATES THE APPELLANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS."

{¶ 12} The trial court found that Defendant's ineffective assistance of counsel claim is barred by res judicata as grounds for post-conviction relief because it could have been raised in his direct appeal. *State v. Szefcyk* (1996), 77 Ohio St.3d 93; *State v. Perry* (1967), 10 Ohio St.2d 175. However, an exception exists with respect to a claim of ineffective assistance of counsel that was not raised and adjudicated in the direct appeal. *State*

v. Cooperrider (1983), 4 Ohio St.3d 226. Defendant's direct appeal raised no ineffective assistance claim.

{¶ 13} Nevertheless, Defendant's ineffective assistance of counsel claim must likewise be rejected as grounds for post-conviction relief, because the petition in which it was presented was untimely, R.C. 2953.21(A)(2), and no R.C. 2953.23(A)(1)(a) exception to the resulting jurisdictional bar is shown. More specifically, the fact that his counsel had failed in the respects Defendant points out was not a matter Defendant was unavoidably prevented from knowing either at trial or when his direct appeal was filed.

{¶ 14} The second assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

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