

[Cite as *State v. West*, 2009-Ohio-7057.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 08CA0102
vs.	:	T.C. CASE NO. 93CR526
DARRICK J. WEST	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 30th day of December, 2009.

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GRADY, J.:

{¶ 1} Defendant, Darrick West, appeals from a judgment that denied his petition for post-conviction relief, without a hearing.

{¶ 2} Defendant was found guilty following a jury trial in 1994 of four counts of aggravated robbery and three counts of felonious assault, all with firearm specifications, and was

sentenced according to law. The victim of several of those offenses was Brenda Peyatt. We affirmed Defendant's convictions and sentences on direct appeal. *State v. West* (Oct. 18, 1996), Clark App. No. 94CA26.

{¶3} On March 17, 2004, Defendant filed a petition for post-conviction relief pursuant to R.C. 2953.21. As grounds for relief Defendant claims (1) that he was wrongfully convicted of the crimes involving Brenda Peyatt because another person, Winston Burton, Jr., had confessed to committing those crimes, (2) that he was denied his right to compulsory process to obtain the testimony of Winston Burton, Jr., (3) that the eyewitness identification testimony of Brenda Peyatt was unreliable and therefore inadmissible, and (4) ineffective assistance of trial counsel based upon counsel's failure to call Winston Burton, Jr. to testify. The trial court dismissed Defendant's petition without a hearing, on October 6, 2008, concluding that the petition was not timely filed and that the exceptions in R.C. 2953.23(A)(1)(a) that allow the trial court to consider the untimely petition do not apply in this case.

{¶4} Defendant timely appealed to this court from the trial court's decision dismissing his petition for post-conviction relief.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "IT IS ERROR FOR THE TRIAL COURT TO DENY A PETITION FOR POST-CONVICTION RELIEF AS UNTIMELY WHEN PETITION SETS FORTH OPERATIVE FACTS THAT THE PETITIONER WAS UNAVOIDABLY PREVENTED FROM PRESENTMENT OF EVIDENCE UPON WHICH HIS CLAIMS FOR RELIEF MUST RELY."

{¶ 6} When a direct appeal has been taken from a criminal conviction, a petition for post-conviction 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); *State v. Reese*, Montgomery App. No. 23410, 2009-Ohio-5874. Defendant timely filed a direct appeal from his conviction. The transcript of his trial proceedings was filed in the court of appeals on January 4, 1996. The petition for post-conviction relief Defendant filed on March 17, 2004, eight years later, was clearly untimely. *Id.*

{¶ 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 argues that he was wrongfully convicted of the crimes involving Brenda Peyatt because another person, Winston Burton, Jr., confessed to committing those crimes. Defendant argues that because he did not obtain Burton's affidavit until many years after his trial concluded, he was unavoidably prevented from discovering evidence upon which he must rely to present his claim for relief. The record shows otherwise.

{¶ 9} On May 24, 2001, Winston Burton, Jr., gave a statement to Defendant, wherein Burton confessed to committing the crimes involving Brenda Peyatt for which Defendant had been convicted.

On May 1, 2003, Burton gave Defendant another statement concerning the crimes against Peyatt. On October 8, 2008, Defendant obtained Burton's affidavit, wherein Burton confessed to committing the crimes against Peyatt.

{¶ 10} Although the record clearly shows that as early as May 24, 2001, Defendant knew of Burton's confession that he committed the crimes against Peyatt, there is no explanation by Defendant for the nearly three year intervening delay before Defendant presented this claim for post-conviction relief. A post-conviction petition must be filed within a reasonable time after learning of new facts. *State v. Bristow* (Dec. 22, 2000),

Richland App. No. 00-CA-17-2.

{¶ 11} More importantly, it is clear from the evidence presented at Defendant's trial that Burton's conduct in claiming responsibility for the crimes against Peyatt does not constitute a "new fact" that Defendant was unavoidably prevented from discovering. To the contrary, as part of his defense at trial, Defendant and three of his witnesses testified that Burton admitted that he had committed the crimes against Peyatt. Defendant was clearly not prevented from discovering the facts upon which he must now rely to present his claim for relief. Indeed, those facts were introduced in evidence at Defendant's trial. Reduction of Burton's confession to affidavit form is not a new evidentiary fact. Because Defendant's petition was not timely filed, and Defendant failed to demonstrate that the exceptions in R.C. 2953.23(A)(1)(a) that would allow consideration of his untimely petition apply in this case, the trial court lacked jurisdiction to entertain Defendant's petition, and properly dismissed it. *Reese; Harden*.

{¶ 12} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING A HEARING ON PETITION."

{¶ 14} Defendant argues that the trial court erred in not

granting him a hearing on his petition for post-conviction relief.

Our disposition of the first assignment of error renders this assignment of error moot. Accordingly, we need not decide it. App.R. 12(A)(1)(c).

{¶ 15} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 16} "ASIDE FROM THE NEW EVIDENCE THE PROCESS WAS TAINTED BY DEFECT IN THE INDICTMENT."

{¶ 17} Relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), Defendant argues that his indictment was defective because the aggravated robbery counts in violation of R.C. 2911.01(A)(1) fail to allege a mens rea element. This claim lacks merit. Aggravated robbery in violation of R.C. 2911.01(A)(1) is a strict liability offense that does not require proof of a culpable mental state, and therefore the holding in *Colon* is inapplicable to indictments charging an offense of aggravated robbery. *State v. Smith*, Montgomery App. No. 22334, 2008-Ohio-6330; *State v. Johnson*, Montgomery App. No. 22656, 2009-Ohio-1288; *State v. Humble*, Montgomery App. No. 22765, 2009-Ohio-2180; *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112.

{¶ 18} Defendant's third assignment of error is overruled.

{¶ 19} The judgment of the trial court is affirmed.

DONOVAN, P.J., And FAIN, J. concur.

Copies mailed to:

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Hon. Richard J. O'Neill