

[Cite as *State v. Tribble*, 2009-Ohio-2651.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 MA 145
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JAMES TRIBBLE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 06 CR 1078.
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JUDGMENT:	Affirmed.
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APPEARANCES:
For Plaintiff-Appellee:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: June 3, 2009

[Cite as *State v. Tribble*, 2009-Ohio-2651.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, and the parties' briefs. Appellant, James Tribble, appeals the decision of the Mahoning County Court of Common Pleas that granted appellee State of Ohio's motion for summary judgment in an action for post-conviction relief. On appeal, Tribble argues that the trial court erred by allowing the State to file a response to the petition beyond the 10-day time-limit prescribed by R.C. 2953.21(D), and that the trial court erred by granting summary judgment without affording Tribble an opportunity to respond.

{¶2} Upon review, Tribble's arguments are meritless. The time-limits contained in R.C. 2953.21(D) are directory, not mandatory, and in this case the trial court did not abuse its discretion by accepting a response from the State beyond the 10-day deadline. Further, the trial court properly dismissed Tribble's petition on summary judgment without waiting for a response, because Tribble's petition was baseless on its face for three reasons: (1) it did not present any evidence of sufficient operative facts to demonstrate a cognizable claim of constitutional error; (2) the claims within it were barred by res judicata; and, (3) it was untimely. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶3} On October 26, 2006, Tribble was indicted by the Mahoning County Grand Jury on two counts: having weapons while under disability pursuant to R.C. 2929.13(A)(3)(B), a third-degree felony; and improperly handling a firearm in a motor vehicle, pursuant to R.C. 2923.16(B)(1)(2), a fourth-degree felony. On February 28, 2007, Tribble entered into a Crim.R. 11 plea agreement where he agreed to plead guilty to both counts contained in the indictment. In exchange, the State agreed to recommend the in-house drug treatment program at the Community Corrections Association. After a hearing, the trial court accepted Tribble's guilty plea.

{¶4} A sentencing hearing was held on April 20, 2007 and the trial court sentenced Tribble to five years on the R.C. 2929.13(A)(3)(B) charge, and eighteen months on the R.C. 2923.16(B) charge, with the two sentences to run concurrently. In its April 24, 2007 judgment entry of sentencing, the trial court stated that the sentence would be "held in abeyance" and that Tribble would be placed in-house at the Community

Corrections Association's drug treatment program, as recommended by the State.

{¶5} On July 13, 2007, a probation violation was filed, alleging that Tribble had tested positive for alcohol. A hearing was held on September 7, 2007. The trial court then entered two judgment entries on September 13, 2007. One stated that the parties entered into an agreed judgment that Tribble would be placed on two years of community control to be supervised by the Adult Parole Authority, under the condition that Tribble successfully complete an in-house treatment program at Glenbeigh Hospital. The second entry repeated that Tribble had been sentenced to five years in prison, that the sentence would be held in abeyance, and he would be serving two years of community control.

{¶6} On October 19, 2007, another probation violation was filed, alleging that Tribble had been arrested for possession of drugs and drug paraphernalia, along with other violations. Tribble stipulated to probable cause, and following a hearing on October 29, 2007, the trial court found Tribble had committed a probation violation. Further, the court noted that Tribble had been sentenced to five years in prison originally, which had been held in abeyance. In a judgment entry dated October 31, 2007, the trial court ordered Tribble to serve five years in prison on Count One, and 18 months on Count Two, to be served concurrently. The court also ordered Tribble to serve three years of post-release control.

{¶7} On November 8, 2007, Tribble filed an appeal, 07MA205, from the October 31, 2007 judgment entry. In that appeal, he alleged he was not placed on community control at his original sentencing hearing on April 20, 2007, and that therefore the trial court lacked jurisdiction to impose the first probation violation and subsequently the second probation violation. Ultimately, in an opinion dated March 19, 2009, this court found Tribble's arguments meritless, and affirmed the judgment of the trial court. *State v. Tribble*, 7th Dist. No. 07MA205, 2009-Ohio-1311.

{¶8} On April 2, 2008, Tribble filed a pro-se post-conviction petition with the trial court, which is the subject of the present appeal. In the post-conviction petition, Tribble alleged two grounds for relief: first, that his due process rights were violated when the trial court allegedly conducted the September 7, 2007 probation violation hearing in his

absence, and second, that the trial court erred by imposing probation in the April 24, 2007 sentencing entry because Tribble did not agree to probation in his plea agreement. Notably, Tribble failed to present any affidavits or other evidence de hors the record to support his claims. The State filed a motion for summary judgment, which the trial court granted.

{¶9} In addition, we note that on September 22, 2008, while both his appeal from the October 31, 2007 judgment entry, 07MA205, and the instant appeal, 08MA145, were pending before this court, Tribble filed a motion for delayed appeal, 08MA190, wherein he sought leave to appeal the April 20, 2007 and September 13, 2007 judgment entries. We denied Tribble's motion for delayed appeal and dismissed 08MA190 on November, 7, 2008 (Vukovich, P.J., dissenting).

Summary Judgment

{¶10} In his sole assignment of error, Tribble argues:

{¶11} "The trial court erred when it granted summary judgment in favor of the State of Ohio without providing appellant James Tribble an opportunity to respond to the motion."

{¶12} As an initial matter, Tribble argues that the trial court erred by allowing the State to file a response to his petition beyond the 10-day time-limit prescribed by R.C. 2953.21(D). Tribble filed his petition on April 2, 2008, and the State filed a motion for summary judgment on May 14, 2008. It is true that R.C. 2953.21(D) provides that "[w]ithin ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion." R.C. 2953.21(D). However, that provision is directory, not mandatory. *State v. Bryant*, 7th Dist. No. 04MA109, 2005-Ohio-5054, at ¶19. The trial court in this case did not abuse its discretion by accepting a response beyond the ten-day time-limit. Further, Tribble did not explain how his substantial rights were affected by the trial court's acceptance of the late response, thus, any error would be harmless. *Bryant* at ¶20.

{¶13} In addition, Tribble's argument that he was denied due process because the trial court granted summary judgment against him without affording him adequate time to

respond, is meritless. While it is true that the trial court ruled on the State's motion after only eight days, the timing of the trial court's decision did not prejudicially affect Tribble's due process rights.

{¶14} An appellate court applies a de novo standard of review when reviewing a trial court's decision to deny a petition for post-conviction relief without a hearing. *State v. Herring*, 7th Dist. No. 06JE8, 2007-Ohio-3174, at ¶14. Post-conviction review is not a constitutional right. *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741, 891 N.E.2d 1191, at ¶26. A post-conviction petition is a special civil action governed exclusively by statute, thus "a petitioner receives no more rights than those granted by the statute." *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905.

{¶15} Tribble argues at length in his brief that Civ.R. 56 should govern the summary judgment proceedings with regard to his post-conviction petition. The Ohio Rules of Civil Procedure do apply in post-conviction proceedings, but only to the extent that they are not inconsistent with R.C. 2953.21. *State v. Peterson*, 7th Dist. No. 08MA102, 2009-Ohio-1504, at ¶15. And in the context of a post-conviction petition pursuant to R.C. 2953.21, "[a] trial court has the discretion to dismiss a petition for post-conviction relief *without any response from the State or the Petitioner* if 'the petition fails to set forth any substantive ground upon which relief can be granted.'" *Peterson* at ¶10, quoting *In re J.B.*, 12th Dist. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, at ¶48. (emphasis added.) In other words, if the petition is baseless on its face, the trial court may dismiss it without reviewing the record, and without waiting for a response from either the petitioner or the state. See, e.g., *State v. McNeill* (2000), 137 Ohio App.3d 34, 40, 738 N.E.2d 23. Tribble's petition was baseless on its face for three reasons, and thus the timing of the trial court's decision was proper.

{¶16} First, Tribble's petition failed to set forth facts that could support a constitutional claim. A petitioner for post-conviction relief must provide evidence of sufficient operative facts to demonstrate a cognizable claim of a constitutional error. *State v. Kapper* (1983), 5 Ohio St.3d 36, 37-38, 5 OBR 94, 448 N.E.2d 823. "A civil post-conviction proceeding is a vehicle for raising issues outside of (or de hors) the record in

the criminal case below, not those that exist within that record." *State v. Jones*, 7th Dist. No. 07MA81, 2008-Ohio-1536, at ¶28, citing, *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 2 OBR 661, 443 N.E.2d 169. Tribble's first claim for relief, that his due process rights were violated when the trial court allegedly conducted the first probation violation hearing in his absence, was unsupported by any affidavits or evidence outside the record. Moreover, "[t]he remedy of postconviction relief is not available to contest probation revocation proceedings." *State v. Armstrong* (1988), 56 Ohio App.3d 105, 564 N.E.2d 1070, at paragraph one of the syllabus, appeal dismissed (1989), 47 Ohio St.3d 705, 547 N.E.2d 986. Tribble's second claim for relief, that the imposition of probation in his original sentencing entry was error because he did not agree to probation in his plea agreement, is a claim that could *only* be supported by the record, and is therefore suited for a direct appeal, not a post-conviction petition. Based on this, Tribble failed to provide evidence of sufficient operative facts to demonstrate a cognizable claim of a constitutional error.

{¶17} Second, Tribble's claims were barred by the doctrine of res judicata. Res judicata bars the petitioner from raising any claim that could have been raised on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraphs eight and nine of the syllabus. In his petition, Tribble alleged that (1) his due process rights were violated when the trial court allegedly conducted the first probation violation hearing in his absence, and (2) that imposition of probation in his original sentencing entry was error, because he did not agree to probation in his plea agreement. Tribble could have raised those claims by way of direct appeals from the pertinent judgments, however he failed to do so. Tribble's later attempt to file a delayed appeal therefrom was denied by this court.

{¶18} Third, Tribble's post-conviction petition was untimely, which the State raises for the first time on appeal. However, this is an issue of subject matter jurisdiction which may be "raised sua sponte by a court at any stage in the proceedings and may be raised for the first time on appeal." *State v. Davis*, 7th Dist. No. 08MA16, 2008-Ohio-6211, at ¶10.

{¶19} Pursuant to R.C. 2953.21(A)(2), a defendant who appeals his conviction must file his post-conviction petition within one hundred eighty days from the date on which the trial transcript is filed in the court of appeals on the direct appeal. R.C. 2953.21(A)(2). If no direct appeal is filed, then 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). Further, this court has held that when a petitioner files a delayed appeal, he is required to file his petition for post-conviction relief within one hundred eighty days from when the time for filing his direct appeal expired. *State v. Johnson*, 144 Ohio App.3d 222, 225-226, 2001-Ohio-3301, 759 N.E.2d 889. In other words, filing a delayed appeal does not extend the deadline for filing a post-conviction petition.

{¶20} Tribble's post-conviction petition was untimely. Tribble did not file a timely direct appeal from his conviction in this case. His motion to file a delayed appeal was denied by this court. Thus, in order for the post-conviction petition to be timely, Tribble should have filed within one hundred eighty days from the time that the filing of a direct appeal from his conviction expired. The judgment entry of sentencing in this case was filed on April 24, 2007. The time to file a direct appeal expired on May 24, 2007. App.R. 4(A). Therefore, Tribble had until November 20, 2007 to file his post-conviction petition. Tribble did not file his petition with the trial court until April 2, 2008.

{¶21} In cases where the petition was filed in an untimely manner, the trial court will not consider the petition unless (1) the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based; or (2) after the 180-day time period expired, the United States Supreme Court recognized a new federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. R.C. 2953.23(A)(1)(a). The petitioner then must also show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b). Unless the appellant satisfies the requirements of R.C. 2953.23(A), the trial court lacks jurisdiction to consider the untimely petition for post-conviction relief. *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155;

State v. Johnson, 144 Ohio App.3d 222, 226, 2001-Ohio-3301, 759 N.E.2d 889.

{¶22} Tribble's petition makes no allegation that he was unavoidably prevented from discovering the facts upon which his petition is based, nor does he argue that the Supreme Court recognized some new right applicable here. Because Tribble failed to meet either of the alternate threshold requirements, the trial court lacked jurisdiction to consider the merits of his petition. For this reason, Tribble's petition was also baseless on its face. Therefore, the trial court properly dismissed the petition, although it should have been dismissed for lack of jurisdiction rather than through summary judgment. *State v. Hatfield*, 10th Dist. No. 07AP-784, 2008-Ohio-1377, at ¶8.

{¶23} Given the foregoing, the trial court properly dismissed Tribble's petition via summary judgment without affording Tribble an opportunity to respond. Tribble's petition was baseless on its face because (1) he failed to provide evidence of sufficient operative facts to demonstrate a cognizable claim of a constitutional error; (2) his claims were barred by res judicata; and, (3) his petition was untimely. Further, the court properly allowed the State to file an answer to his petition outside of the time limit prescribed by R.C. 2953.21(D). Tribble's sole assignment of error is meritless. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.