

[Cite as *State v. Davis*, 2009-Ohio-4634.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)

PLAINTIFF-APPELLEE

VS.

EDWARD A. DAVIS

DEFENDANT-APPELLANT)

CASE NO. 08 MA 174

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio

Case No. 96 CR 580

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Edward A. Davis, Pro se
#A357-487
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430-0901

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: August 28, 2009

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WAITE, J.

{¶1} Appellant Edward A. Davis filed this pro se appeal challenging the decision to overrule a motion to vacate judgment in a felony criminal case. Appellant was convicted in a bench trial on April 28, 1998, of felonious assault, and the conviction included a firearm specification. He was sentenced to three years of actual incarceration on the firearm specification, and twelve to fifteen years imprisonment for felonious assault. The matter has been before us at least three times previously. He filed a direct appeal: the conviction and sentence were affirmed. *State v. Davis* (June 30, 1999), 7th Dist. No. 98 C.A. 97, appeal not allowed by 87 Ohio St.3d 1440, 719 N.E.2d 5. He filed two motions for postconviction relief, both of which were overruled. *State v. Davis*, 7th Dist. No. 01 CA 171, 2002-Ohio-2789; *State v. Davis*, 7th Dist. No. 04 MA 211, 2005-Ohio-2118, appeal not allowed by 106 Ohio St.3d 1534, 835 N.E.2d 383, 2005-Ohio-5146.

{¶2} In his current appeal, which can only be interpreted as a third postconviction relief motion, he raises issues which have already been raised and ruled upon in prior appeals. He argues that his conviction is void because a motion to suppress filed in the original criminal case was not ruled on in a timely manner. According to Appellant, this created a Sixth Amendment speedy trial violation, and he believes his conviction was void and should be vacated. Appellant raised speedy trial errors in his direct appeal and in his first petition for postconviction relief, and in both cases the conviction was upheld. The issue is now res judicata and cannot serve as a basis to overturn his conviction. He also argues that the trial court should not have overruled his motion to vacate prior to receiving a response from the state.

The trial court is not required to wait for a response from the state to overrule a faulty petition for postconviction relief, and this argument is unpersuasive. Furthermore, Appellant has not satisfied the requirements for filing a successive motion for postconviction relief, and therefore, the petition must be deemed as untimely. For these reasons, the judgment of the trial court is affirmed.

{¶13} As was established in his prior appeals, Appellant was imprisoned in 1972 for manslaughter, assault with a deadly weapon, and breaking and entering. He was paroled in November, 1993. In December of 1993, he shot his former girlfriend Lisa Jeffries twice with a shotgun; once in the chest and once in the abdomen. She was rushed to a local hospital, treated for the gunshot wounds and later released. Before he could be apprehended, he fled from the State of Ohio. An arrest warrant was issued for the felonious assault charge. A warrant was also issued for his parole violation.

{¶14} In June 1996, the Federal Bureau of Investigation arrested Appellant in Las Vegas, Nevada on the parole violation warrant, and he was transferred to Mahoning County. During the criminal proceedings, Appellant requested numerous continuances which delayed the trial. On October 2, 1996, he filed a motion to suppress evidence. On November 27, 1996, he filed a waiver of the right to speedy trial. The motion to suppress was overruled on April 23, 1998. Despite the waiver of speedy trial, he filed a motion to dismiss on speedy trial grounds on March 25, 1997.

{¶15} A speedy trial hearing was held in April 1998. On April 13, 1998, the trial court overruled the motion to dismiss. The matter was tried to the court. On

April 28, 1998, Davis was found guilty of felonious assault with a firearm specification. He was sentenced to three years of actual incarceration plus twelve to fifteen years of imprisonment.

{¶16} In Appellant's direct appeal to this Court, he raised one assignment of error, which alleged that the trial court should not have overruled his speedy trial motion to dismiss. We affirmed the conviction, and the Ohio Supreme Court declined to accept the case for review.

{¶17} In 2002 Appellant filed his first petition for postconviction relief, which was denied by the trial court. The basis of the petition was that his criminal case should have been dismissed on speedy trial grounds. We determined that the petition was untimely and that he did not satisfy the grounds for filing an untimely petition under R.C. 2953.23(A), and we affirmed the judgment of the trial court.

{¶18} In 2005 Appellant filed a second petition for postconviction relief. We concluded that Appellant, "raised the identical issues that this court has repeatedly addressed both on direct appeal and on postconviction. Since these issues are barred by res judicata and because Davis' petition for postconviction relief was untimely under R.C. 2953.23, the judgment of the trial court is affirmed." *Davis*, supra, 7th Dist. No. 04 MA 211, 2005-Ohio-2118, ¶15.

{¶19} Appellant is now presenting a similar issue through a postconviction motion to vacate. This type of motion is generally reviewed as if it were filed as a petition for postconviction relief. See, e.g., *State v. Wells*, 8th Dist. No. 90753, 2009-Ohio-223; *State v. Jones*, 10th Dist. No. 08AP-551, 2008-Ohio-6515. Appellant filed

his motion to vacate on June 4, 2008. The state did not reply. The trial court dismissed the motion on August 5, 2008. This appeal was filed on August 29, 2008.

Assignments of Error One and Two

{¶10} “TRIAL COURT WAS IN VIOLATION OF OHIO CONSTITUTION ART. I, §10 AND M.C. SUP.R. 6, HUNDRED TWENTY (120) DAYS TO RULE ON DEFENSE MOTIONS.”

{¶11} “TRIAL COURT ABUSED ITS DISCRETION BY SIMPLY OVERRULING APPELLANT’S MOTION TO VACATE, WHEN THAT MOTION WENT UNCHALLENGED BY THE PROSECUTOR FOR THE STATE, AND TRIAL COURT FAILED TO ADJUDICATE APPELLANT’S SUMMARY JUDGMENT MOTION FILED UNDER CIVIL RULE 56, CIVIL RULE 12(A)(2) AND MAHONING COUNTY COMMON PLEAS COURT LOCAL RULE 4(C)(2).”

{¶12} A petition for postconviction relief under R.C. 2953.21 is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. “It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record.” *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233. R.C. 2953.21 affords a prisoner postconviction relief, “only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph four of the syllabus. A postconviction

petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01 AP-1011, 2002-Ohio-3321, ¶32.

{¶13} Effective September 21, 1995, R.C. 2953.21 was amended to require that a postconviction relief petition under R.C. 2953.23(A) 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 or adjudication.” R.C. 2953.21(A)(2). The amendment further provided that, “[i]f no appeal is taken * * * 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).

{¶14} Pursuant to R.C. 2953.23(A), a court may not entertain an untimely second or successive petition unless the defendant initially demonstrates either (1) he is unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If Appellant were able to satisfy one of those two conditions, R.C. 2953.23(A) further requires him to demonstrate that, but for the constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶15} Appellant contends that he is not presenting a collateral attack on his conviction, but rather, is arguing that the conviction is void ab initio due to the failure of the trial court to timely rule on a motion, thus creating a speedy trial error. If we accept Appellant's characterization of his argument as correct, he is barred from

raising it because it is an issue that should have been raised during his direct appeal. The doctrine of res judicata bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal. *State v. Ishmail* (1981), 67 Ohio St.2d 16, 18, 423 N.E.2d 1068. Appellant relies on evidence that was of record during the first appeal, and therefore, he could have raised the instant error in his initial direct appeal. He is also ultimately arguing that the error in this case is a speedy trial error, an issue that was actually raised and failed in his direct appeal. As was pointed out in the original appeal, Appellant filed a valid waiver of his speedy trial rights and the trial court could rely on that waiver as it presided over the case. *Davis*, supra, 7th Dist. No. 98 C.A. 97, *3.

{¶16} Even if we could reach Appellant's issue, his appeal fails because his timeliness argument is based on a former Rule of Superintendence governing municipal courts, not the courts of common pleas. Appellant was prosecuted in the court of common pleas, not a municipal court. Former M.C.Sup.R. 6 directed a municipal court to rule on a motion within 120 days. There may be a corresponding rule relating to courts of common pleas, but Appellant does not cite such a rule. It ultimately does not matter whether there is a more applicable rule that could have been cited because it has been regularly held that the, "Rules of Superintendence are internal housekeeping rules and do not give any rights to individual defendants." *State v. Hurst* (Mar. 12, 1999), 4th Dist. No. 98CO08, *3, see also *State ex rel. Matasy v. Morley* (Dec. 26, 1985), 7th Dist. No. 85 C.A. 114.

{¶17} Regardless of Appellant's characterization of his motion to vacate, the trial court correctly treated it as a third petition for postconviction relief. Appellant is seeking relief from judgment, which only applies to civil cases. He is also relying on the Ohio Rules of Civil Procedure to establish his case. A petition for postconviction relief is a civil action that enables a criminal defendant to argue, "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". R.C. 2953.21(A)(1)(a).

{¶18} In *Davis*, supra, 7th Dist. No. 01CA17, we explained that pursuant to R.C. 2953.21(A)(2), Appellant's prior petition for postconviction relief was untimely as it was filed more than one hundred eighty days after the trial transcript was filed in the direct appeal. We further held that the trial court may not entertain an untimely petition unless the petitioner shows he was unavoidably prevented from discovering the facts upon which his petition is based or the United States Supreme Court has created a new, retroactive right. R.C. 2953.23(A)(1)(a) and (b). Even if the petitioner can show one of these two alternatives, the petitioner must still demonstrate by clear and convincing evidence that a reasonable trier of fact would not have convicted him but for constitutional error. R.C. 2953.23(A)(1)(2). In the instant appeal, it is clear that Appellant has no new facts to present, and the evidence he relies on, namely, court filings in his original criminal case, was available during the direct appeal. For this reason, the trial court was correct in dismissing Appellant's motion.

{¶19} Appellant's final argument is that the trial court should not have ruled on his motion until the state filed a response, or should have granted his motion since the state did not reply. Appellant's argument is not persuasive. It is true that R.C. 2953.21(D) directs the prosecuting attorney to file a response to a petition for postconviction relief within ten days. Nevertheless, "[i]t is well-settled that R.C. 2953.21(C) mandates the trial court to sua sponte analyze a petition for post-conviction relief regardless of whether the State responds to such petition." *State v. Houser*, 1st Dist. No. 21555, 2003-Ohio-6811, ¶6. If the petition for postconviction relief fails to allege facts which, if proved, would entitle the petitioner to relief, the trial court may so find and summarily dismiss the petition. *Perry*, supra, paragraph two of the syllabus.

{¶20} For the aforementioned reasons, Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.