

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 09 MA 116
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
CRAIG OWENS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CR427.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 12, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant Craig Owens appeals the decision of the Mahoning County Common Pleas Court which found that his petition for post-conviction relief was filed untimely. The sole issue on appeal is whether an appellate court's grant of permission to file a delayed appeal pursuant to App.R. 5(A) extends the time for filing a timely petition for post-conviction relief so that the petitioner has one hundred eighty days from the filing of the trial transcripts in the delayed appeal. For the following reasons, we conclude that the time for filing a timely post-conviction petition expired one-hundred eighty days after the time for filing a timely appeal expired and that the allowance of a delayed appeal does not circumvent this limitations provision. Thus, appellant's petition was untimely filed, and the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} It was alleged that on April 16, 2004, appellant participated in tying up and robbing Efrin Brown. It was also alleged that appellant thereafter killed Mr. Brown by shooting him in the head. Appellant was indicted on two counts of aggravated murder and one count of aggravated robbery, all with firearm specifications.

¶{3} On January 5, 2007, appellant pled guilty to involuntary manslaughter, aggravated robbery, and two firearm specifications. At the plea hearing, the state noted that its case had weakened a bit after some witnesses were indicted for unrelated offenses. On March 9, 2007, the court followed the state's recommendation and sentenced appellant to ten years for involuntary manslaughter, five years for aggravated robbery, and three years on the merged firearm specifications for a total of eighteen years in prison.

¶{4} On August 30, 2007, appellant filed an untimely notice of appeal and a motion for leave to file a delayed appeal. On September 24, 2007, this court granted appellant leave to file a delayed appeal and appointed counsel. The plea and sentencing transcripts were filed with this court on October 30, 2007 and November 1, 2007. This court issued a decision in the delayed appeal affirming appellant's conviction on June 28, 2008. *State v. Owens*, 7th Dist. No. 07MA153, 2008-Ohio-3246.

¶{5} In the meantime, on April 29, 2008, which was exactly one hundred eighty days after the November 1, 2007 filing of the last transcript in the appeal, appellant filed a petition for post-conviction relief in the trial court. He urged that the petition was timely because he filed his petition within one hundred eighty days from the filing of the transcripts in the appellate court in the “direct appeal” and urged that a delayed appeal is considered to be the “direct appeal.” The state disagreed and responded that the trial court should apply the post-conviction provision which states that where no appeal is filed, the petition must be filed within one hundred eighty days after the time for filing the direct appeal expired.

¶{6} On March 19, 2009, the trial court denied appellant’s petition for post-conviction relief by stating that appellant “is ineligible as to time served and as to original date of filing.” (Emphasis original). The court then stated that all other issues alleged in the petition were or should have been addressed in his appeal.

¶{7} Appellant asked for findings of fact and conclusions of law, which the trial court issued on June 3, 2009. The trial court clarified its decision holding that no direct appeal had been taken and that a delayed appeal does not extend the time for filing a post-conviction petition. The court concluded that the time for filing a timely petition expired on October 10, 2007, one hundred eighty days after the time expired for timely appealing the March 9, 2007 judgment of sentence. The within appeal followed.

ASSIGNMENT OF ERROR

¶{8} Appellant’s assignment of error provides:

¶{9} “THE LOWER COURT ERRED WHEN IT DENIED MR. OWENS’ PETITION FOR POST-CONVICTION RELIEF AS UNTIMELY FILED PER R.C. 2953.21(A)(2), EVEN THOUGH MR. OWENS’ WAS GRANTED A DELAYED APPEAL PER APP.R. 5.”

¶{10} Notably, appellant’s sole argument is that his petition was timely filed under R.C. 2953.21(A)(2) due to our acceptance of a delayed appeal. He did not and does not alternatively argue that he met the test for an untimely filing under R.C. 2953.23(A). Thus, the only question on appeal is whether a delayed appeal can extend the time limitations provided in the post-conviction relief statute.

¶{11} Pursuant to R.C. 2953.21(A)(2), a timely post-conviction petition:

¶{12} “shall 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 * * *. If 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.”

¶{13} This court has specifically held that our grant of a delayed appeal does not extend the time for filing for postconviction relief and that regardless of the grant of a delayed appeal, a timely appeal must be filed no later than one-hundred eighty days after the time expired for filing a timely direct appeal. *State v. Johnson* (2001), 144 Ohio App.3d 222, 225-266. See, also, *State v. Haschenburger*, 7th Dist. No. 08MA223, 2009-Ohio-6527, ¶17; *State v. Tribble*, 7th Dist. No. 08MA145, 2009-Ohio-2651, ¶19-20. The Fifth, Sixth, Eighth, and Tenth Districts have held likewise. *State v. Macias*, 6th Dist. No. L-01-1391, 2003-Ohio-684, ¶8; *State v. Bird* (2000), 138 Ohio App.3d 400, 403-404 (10th Dist.); *State v. Fields* (1999), 136 Ohio App.3d 393, 396-397 (8th Dist.); *State v. Johnson* (Apr. 21, 1999), 5th Dist. No. CT-98-29; *State v. Price* (Sept. 29, 1998), 10th Dist. No. 98AP-80.

¶{14} Part of the rationale expressed by some of these courts is that a delayed appeal is not a “direct appeal” under the first part of R.C. 2953.21(A)(2) quoted above. At the time of our *Johnson* decision, it was unresolved by the Supreme Court whether a delayed appeal was part of the direct appeal. Although appellant does not provide this citation, we recognize that the Supreme Court recently held that an allowed delayed appeal is the same as a timely direct appeal and that there is no discernible difference between them besides timeliness. *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, ¶1, 8, 14, 17.¹ Specifically, the Court held: “A delayed appeal granted pursuant to App.R. 5(A) is treated the same as a direct appeal under App.R. 4(A), and the case proceeds as if it had been timely filed.” *Id.* at ¶17.

¶{15} One could argue that the phrase “delayed appeal” can now be substituted for “direct appeal” in the first part of R.C. 2953.21(A)(2) so it essentially reads that a timely petition “shall be filed no later than one hundred eighty days after

¹It was also unresolved whether a motion to reopen was part of the direct appeal. The Supreme Court then held that an App.R. 26(B) motion to reopen a direct appeal based upon ineffective assistance of appellate counsel is not part of the direct appeal but is considered a collateral proceeding. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶26. See, also, *State v. Fuller*, 121 Ohio St.3d 137, 2009-Ohio-722, ¶2 (applying *Morgan* to summarily reverse a First District case, which had ruled that a reopened appeal extends the time for filing a timely post-conviction petition).

the date on which the trial transcript is filed in the court of appeals in the [delayed appeal] of the judgment of conviction * * *.” However, the purpose of the holding in *Silsby* was to determine the scope of the Court’s prior statement in *Foster* that cases “pending on direct review must be remanded for new sentencing hearings.” *Id.* at ¶4, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶104. The *Silsby* Court was not concerned with the post-conviction relief statute.

¶{16} Accordingly, we do not construe the aforementioned language in *Silsby* as being indicative of an intent to override the holdings of multiple appellate districts. Moreover, that conclusion is reinforced by the language of the statute itself. R.C. 2953.21(A)(2) states 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.” This provision specifically refers to the expiration of time for filing a timely appeal.

¶{17} Thus, where no timely appeal is filed and where two hundred ten days have passed from the filing of the final judgment, the statutory limitations period for filing a timely post-conviction petition will have expired. This is a statutory end point for filing a timely petition. The expiration date cannot be erased by the allowance of a delayed appeal. Otherwise, the intent of the legislature to place definite time limits on these petitions would be nullified. See *Johnson*, 144 Ohio App.3d at 225, citing *Price*, 10th Dist. No. 98AP-80.

¶{18} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.