

[Cite as *State v. Brooks*, 2015-Ohio-836.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

PLAINTIFF-APPELLEE,

V.

MARCUS BROOKS,

DEFENDANT-APPELLANT.

CASE NO. 14 JE 3

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common
Pleas of Jefferson County, Ohio
Case No. 04CR11

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellee

Jane Hanlin
Prosecutor
P.O. Box 1506
100 North Fourth St., 10th Floor
Steubenville, Ohio 43952
No brief filed.

For Defendant-Appellant

Marcus L. Brooks, Pro-se
#04775-087
201 FCI Lane
P.O. Box 6000
Glenville, WV 26351

JUDGES:

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

Dated: March 2, 2015

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DONOFRIO, J.

{¶1} Defendant-appellant, Marcus Brooks, appeals from a Jefferson County Common Pleas Court judgment denying his postconviction petition to vacate or set aside judgment.

{¶2} On February 4, 2004, a Jefferson County Grand Jury indicted appellant on one count of trafficking in drugs, a third-degree felony in violation of R.C. 2925.03(A)(1); one count of trafficking in counterfeit drugs, a fourth-degree felony in violation of R.C. 2925.37(B); and one count of possession of counterfeit drugs, a first-degree misdemeanor in violation of R.C. 2925.37(A). The first two counts also carried specifications of committing the offenses within 1,000 feet of a juvenile and within the vicinity of a school.

{¶3} Appellant initially pleaded not guilty, but later entered a guilty plea to the indictment. The trial court accepted appellant's guilty plea and proceeded to sentencing. The court stated that appellant and plaintiff-appellee, the State of Ohio, had entered into an agreed sentence, which the court imposed. The court sentenced appellant to 18 months in prison for trafficking in drugs, 12 months for trafficking in counterfeit drugs, and three months for possession of counterfeit drugs, all to be served concurrently. The court also imposed a two-year driver's license suspension and fined appellant \$500. Appellant did not file an appeal from this April 1, 2004, judgment.

{¶4} On December 9, 2013, appellant, acting pro se, filed a postconviction petition titled "BROOKS SUBMITS THIS MEMORANDUM OF LAW IN SUPPORT OF NUNC PRO TUNC ORDER VACATING CONVICTION." The petition suggested that his counsel was ineffective for failing to advise him of the collateral consequences of his plea. Numerous pages of appellant's petition are then missing. Appellant did make some mention of his offenses being allied offenses of similar import and that he was unaware that two of the charges were felonies.

{¶5} The trial court overruled appellant's motion, finding that appellant was fully advised of his sentence and that appellant did not appeal from the sentence or his guilty plea.

{¶16} Next, appellant filed a motion for reconsideration. In this motion, appellant seemed to suggest that his counsel failed to advise him that his drug convictions could be used to enhance any penalty he might receive in the future upon facing new drug charges. Apparently he was facing drug charges in federal court. The trial court overruled this motion for reconsideration.

{¶17} Appellant filed a timely notice of appeal on February 12, 2014.

{¶18} The State has failed to file a brief in this matter. Therefore, we may consider appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain that action. App.R. 18(C).

{¶19} Appellant, still acting pro se, now raises "proposition one," which appears to be his sole assignment of error. It states:

THE UNITED STATES SUPREME COURT RECENTLY FOUND
AN ATTORNEY WHO FAILS TO WARN AN IMMIGRANT OF THE
POSSIBILITY OF DEPORTATION IS INEFFECTIVE. DO THESE
PRINCIPLES APPLY WHERE A DEFENSE ATTORNEY OMITTS FROM
HIS ADVICE THE COLLATERAL CONSEQUENCES OF A
CONVICTION[?]

{¶10} Appellant claims that the trial court dismissed his petition for lack of jurisdiction. He goes on to argue that the trial court should have reviewed the transcripts from his change of plea hearing, which he claims would have demonstrated that the court never inquired whether appellant's counsel informed him of the collateral consequences of his plea. Appellant asserts his trial counsel was ineffective for failing to inform him of these consequences including the fact that his conviction could enhance his penalty on federal drug charges that he could face sometime in the future. He asserts his counsel led him to believe "he would shed the consequences [of his crimes] at the termination of the case providing an unimpaired future." Appellant states he relied on this advice of counsel and, therefore, chose not to file a direct appeal. Appellant asks that we reverse the trial court's judgment,

appoint him counsel, and remand the matter for an evidentiary hearing on his motion.

{¶11} A postconviction petition must be timely filed. This requirement is jurisdictional. R.C. 2953.23(A) (“a court may not entertain a petition filed after the expiration of the period prescribed [in R.C. 2953.21]”). Unless the petition is filed timely, the court is not permitted to consider the substantive merits of the petition. *State v. Beaver*, 131 Ohio App.3d 458, 461, 722 N.E.2d 1046 (11th Dist.1998) (the trial court should have summarily dismissed appellant's untimely petition without addressing the merits).

{¶12} If a postconviction relief petition is filed beyond the 180-day time limitation or the petition is a second or successive petition for postconviction relief, R.C. 2953.23(A) precludes the court from entertaining 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).

{¶13} Unless the defendant makes the showing required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for post-conviction relief. *State v. Carter*, 2d Dist. No. 03-CA-11, 2003-Ohio-4838, citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998).

{¶14} In this case, appellant's petition was unquestionably filed beyond the 180-day time limit set forth in R.C. 2953.21. The trial court entered the judgment entry of sentence in April 2004. Appellant did not file his petition until December 2013. Thus, unless appellant made one of the necessary showings, the trial court was without jurisdiction to rule on the petition.

{¶15} Appellant contends his petition was based on “an intervening change in Supreme Court precedent,” namely the United States Supreme Court’s judgment in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), and

therefore he is entitled to relief beyond the 180-day time limit.

{¶16} In *Padilla*, the Supreme Court found trial counsel was deficient in failing to inform the defendant that his guilty plea made him subject to automatic deportation. Appellant asserts that his counsel was likewise ineffective because counsel failed to inform him of the collateral consequence stemming from his guilty plea of enhanced penalties he might face in future charges. Appellant seems to claim this “new right” applies retroactively to him.

{¶17} *Padilla*, however, does not apply retroactively. *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 1107, 185 L.E.2d 149 (2012). As the First District Court of Appeals explained,

the Supreme Court, applying the principles set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), held that *Padilla* could not be applied retroactively to convictions that had become final before March 31, 2010, when the case was decided, because the case announced a “new rule” when it answered an open question concerning the reach of the Sixth Amendment in a way that altered the law of most jurisdictions. *Chaidez* at 1107-1113.

State v. Bishop, 1st Dist. No. C-130074, 2014-Ohio-173, ¶9. A conviction is final when all appellate remedies have been exhausted. *Id.* at ¶10, citing *Teague*, at 295.

{¶18} Under these rules, appellant’s conviction became final in 2004, when the time for him to file a direct appeal from his conviction expired. See *Chaidez*, at ¶10. Because appellant’s conviction was final before the Supreme Court decided *Padilla*, *Padilla* does not apply retroactively to appellant’s case. See *Id.*; See also, *State v. Spivakov*, 10th Dist. Nos. 13AP-32, 13AP-33, 2013-Ohio-3343, ¶15.

{¶19} Because *Padilla* does not apply retroactively to appellant’s case, appellant has not met the exception to the timeliness requirement for postconviction petitions. Appellant’s postconviction petition was untimely.

{¶20} Since *Padilla* does not apply retroactively, we need not address

whether it might be applicable to a case involving collateral consequences of a guilty plea other than deportation.

{¶21} Accordingly, appellant's sole assignment of error is without merit.

{¶22} For the reasons stated above, the trial court's judgment is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.