

[Cite as *State v. Dumas*, 2017-Ohio-731.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 MA 0101
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
NATHANIEL DUMAS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 11 CR 429
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Nathaniel Dumas, <i>Pro se</i> , #622-439 Ross Correctional Institution P.O. Box 7010 Chillicothe, Ohio 45601

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: February 24, 2017

{¶1} Appellant Nathaniel Dumas appeals the June 5, 2015 decision of the Mahoning County Court of Common Pleas to deny his delayed petition for postconviction relief. Appellant argues that videotaped witness statements provide evidence that multiple witnesses perjured themselves. Without the testimony of these witnesses, Appellant contends that there was insufficient evidence to support his felony murder, aggravated robbery, and accompanying firearm specification convictions. Additionally, Appellant argues that his trial counsel provided ineffective assistance of counsel. For the following reasons, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This postconviction petition stems from an incident that occurred on April 8, 2011. On that date, Appellant and his cousin, Warren Wright, recruited James Thomas to assist in their plan to rob the Galaxy Seafood store. Appellant and Wright paid Thomas \$20 to ring the doorbell buzzer at the Galaxy so that someone would let them inside.

{¶3} When they arrived at the Galaxy, Appellant dropped off Wright and Thomas a few blocks away before parking in the Galaxy parking lot. Wright and Thomas entered the store and began to execute the robbery. An off-duty police officer who had been hired by the Galaxy as a security guard intervened and attempted to stop the robbery. After the men refused to drop their guns, the security guard fired his weapon, shooting and killing Wright. Appellant fled the scene upon hearing the gunshot.

{¶14} Thomas, who was wearing a mask during the robbery, was in a group of people waiting to be interviewed by police before leaving the restaurant when another witness implicated him in the robbery. After initially denying involvement in the crime, Thomas eventually admitted that he and Appellant were involved in the robbery. Appellant was arrested and charged with felony murder, aggravated robbery, and a firearm specification.

{¶15} Pursuant to a Crim.R. 11 plea agreement, Thomas provided a videotaped statement implicating Appellant and testified at trial. An eyewitness who saw Appellant get into the car and drive away after the robbery also testified. The witness could not identify Appellant in a photo array but did testify as to the perpetrator's physical characteristics. Additionally, Wright's sister also testified at trial and stated that Appellant had admitted his role in the robbery to her. After a jury trial, Appellant was found guilty on all charges and was sentenced to a period of incarceration of fifteen years to life on the felony murder charge, ten years of incarceration on the aggravated robbery charge, and three years on the firearm specification. The trial court ordered all counts to run consecutively for an aggregate sentence of twenty-eight years to life.

{¶16} We affirmed Appellant's conviction and sentence in *State v. Dumas*, 7th Dist. No. 12 MA 31, 2015-Ohio-2683 ("*Dumas I*"). Shortly thereafter, we denied Appellant's motion to reopen his appeal in *State v. Dumas*, 7th Dist. No. 12 MA 0031, 2016-Ohio-4799 ("*Dumas II*"). Subsequently, Appellant filed a Writ of Mandamus against his trial counsel, appellate counsel, the prosecutor, and the trial court judge in

Dumas v. Carofolo, et al., 7th Dist. No. 15 MA 0065, 2016-Ohio-4820, (“*Dumas III*”) which was also denied.

{¶7} On May 22, 2015, Appellant filed a motion for leave to file a delayed petition for postconviction relief. On June 5, 2015, the trial court dismissed the petition as untimely. Appellant timely appeals from this judgment.

{¶8} It is noted that Appellant filed a “Rule 3 Complaint” in the U.S. District Court, Northern District of Ohio on August 8, 2014. In Appellant’s complaint he asserted the same claims he raises in his postconviction petition. On December 22, 2014, the Court dismissed the action and certified that an appeal from the decision could not be taken in good faith. On March 13, 2015, the docket sheet shows an appeal order from the Sixth Circuit was denied. The docket sheet further shows that a writ of mandamus was filed and denied. An appeal to the Sixth Circuit regarding the writ of mandamus was also denied. On September 27, 2016, the Court granted Appellant’s motion for return of the video evidence. The docket reflects that the video evidence was mailed to Appellant on October 3, 2016.

Postconviction Petition

{¶9} Pursuant to R.C. 2953.21(A)(1)(a), an individual who claims that his or her rights have been violated may petition the sentencing court and ask that court to grant the appropriate relief. The petition is a civil action that collaterally attacks a criminal judgment. *State v. Agee*, 7th Dist. No. 14 MA 0094, 2016-Ohio-7183, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994).

{¶10} In order to successfully assert a postconviction petition, “the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions.” Agee at ¶ 9, citing R.C. 2953.21(A)(1). The petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). Pursuant to R.C. 2953.21(C), the petitioner bears the burden of demonstrating “substantive grounds for relief” through the record or any supporting affidavits. However, as a postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, *res judicata* bars many claims. Agee at ¶ 10.

{¶11} 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. Croom*, 7th Dist. No. 13 MA 98, 2014-Ohio-5635, ¶ 7, citing *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981). However, where “an alleged constitutional error is supported by evidence that is de hors the record, *res judicata* will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal.” *State v. Green*, 7th Dist. No. 02 CA 35, 2003-Ohio-5142, ¶ 21, citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). To overcome the *res judicata* bar, the petitioner must demonstrate that the claim could not have been appealed based on the original trial record. Agee at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994).

Timeliness

{¶12} The state contends that the trial court properly dismissed Appellant's postconviction petition as untimely. R.C. 2953.21(A)(2) and R.C. 2953.23(A)(1) require a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. The state argues that failure to comply with these statutes is fatal to a petition unless the petitioner can show that he was unavoidably prevented from discovering facts necessary to his claim or that the U.S. Supreme Court has recognized a new retroactive right and no reasonable factfinder could find him guilty but for the alleged error. The state notes that Appellant has filed this petition almost two years after the one-year period expired and has failed to provide an explanation of his delay.

{¶13} In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition "shall be filed no later than three hundred sixty-five 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." Ohio law provides a two-part exception to this rule if the petitioner can demonstrate that he meets the criteria found in R.C. 2953.23(A)(1)(a)-(b). Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show that he:

was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, * * * 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.

Pursuant to R.C. 2953.23(A)(1)(b), the petitioner must show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.”

{¶14} This record reflects that Appellant filed the trial transcripts with this Court on June 14, 2012. Appellant filed his postconviction petition on May 22, 2015. Pursuant to R.C. 2953.21(A)(2), this petition is untimely unless Appellant can show that his case falls within the exception provided by R.C. 2953.23(A)(1)(a)-(b). Appellant does not contend that he is entitled to relief pursuant to a new retroactive right declared by the U.S. Supreme Court. Instead, he appears to argue that he was not provided with evidence related to his case in a timely manner.

{¶15} Appellant bases his arguments on videotaped witness statements, which have not been provided to this Court. Appellant attached several documents to his petition which purportedly support his arguments regarding the statements. However, Appellant failed to present any argument demonstrating that he was unavoidably prevented from discovering any of this “evidence.” To the contrary, the record clearly shows that the videotaped statements and supporting documents were provided to Appellant or his counsel in a timely manner. Accordingly, the trial court correctly determined that Appellant’s petition was untimely and was not excused pursuant to R.C. 2953.23(A)(1)(a)-(b).

ASSIGNMENT OF ERROR NO. 1

DETECTIVE DARYL MARTIN VIOLATED APPELLANT’S
FOURTEENTH AMENDMENT SUBSTANTIAL AND PROCEDURAL

DUE PROCESS AND EQUAL PROTECTION RIGHT WHEN HE COACHED, TUTORED, AND COERSED [SIC] THOMAS' STATEMENTS ON VIDEO DATED 4-14-11.

ASSIGNMENT OF ERROR NO. 2

THE STATE OF OHIO'S PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS AND EQUAL PROTECTION RIGHTS, AND SIXTH AMENDMENT TO A FAIR TRIAL WHEN THE STATE OF OHIO: 1). BREACHED ITS CONTRACT WITH THE STATE'S WITNESS; 2). WITHHELD IMPEACHMENT MATERIAL AND BRADY MATERIAL FROM APPELLANT; 3). KNOWINGLY COMMITTED PERJURY UNDER OATH; AND 4). KNOWINGLY AND DELIBERATELY SUBORNED PERJURY AND TAMPERED WITH A WITNESS.

ASSIGNMENT OF ERROR NO. 3

TRIAL COUNSEL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE: 1). ALLOWED APPELLANT TO GO TO TRIAL UNPREPARED; 2). HAD KNOWINGLY ALLOWED FOR THOMAS' AND THE STATE OF OHIO'S PERJURY TO STAND UNCORRECTED; AND 3). WITHHELD EXCULPATORY AND IMPEACHMENT VIDEO AND PHOTO ARRAY EVIDENCE FAVORABLE TO APPELLANT FROM THE TRIAL.

ASSIGNMENT OF ERROR NO. 4

THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A CONVICTION ON COUNT ONE, MURDER, COUNT TWO, AGGRAVATED ROBBERY, AND FIREARM SPECIFICATIONS RAN CONCURRENT; IN VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS RIGHT.

{¶16} As Appellant's postconviction petition was untimely filed, his assignments of error are moot.

Conclusion

{¶17} Appellant argues that videotaped statements and supporting documents support his claims of ineffective assistance of counsel, witness tampering, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violations, and insufficiency of the evidence. However, Appellant's petition was untimely filed and he has failed to demonstrate that his untimeliness is excused pursuant to R.C. 2953.23(A)(1)(a)-(b). Accordingly, Appellant's arguments are without merit and the trial court's denial of Appellant's petition is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.