

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 06AP-452
v.	:	(C.P.C. No. 85CR-177)
	:	
Hassen Habibi I'juju,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 7, 2006

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Hassen Habibi I'Juju, pro se.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Hassen Habibi I'Juju ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas in which the court denied his "Motion for Modification of Sentence." For the following reasons, we affirm that judgment.

{¶2} In 1985, appellant was convicted of aggravated murder and kidnapping, and was sentenced to 30-years to life for aggravated murder, ten to 25-years for kidnapping, and three years for a firearm specification, with all sentences to run

consecutive to each other. Appellant appealed, and this court affirmed his convictions in *State v. Ijuju* (Sept. 2, 1986), Franklin App. No. 85AP-803.

{¶3} On March 13, 2005, appellant filed a "Motion for Modification of Sentence." Therein, he alleged that *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, required modification of his sentences. On April 20, 2006, the trial court journalized a judgment entry denying appellant's motion, stating simply, "[t]his cause came to be heard on the Defendant's Motion to Modify his Sentence. The motion is denied."

{¶4} Appellant appeals the judgment of the trial court, and brings the following two assignments of error for our review:

[1.] TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S PETITION FOR MODIFICATION OF SENTENCE WITHOUT ABIDING BY THE OHIO SUPREME COURT RULING IN STATE V. FOSTER, SUPRA.

[2.] THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S PETITION FOR A MODIFICATION OF SENTENCE BY VIOLATING OHIO REVISED CODE 2953.21(C)(G).

{¶5} Because appellant's assignments of error are interrelated, we address them jointly. We do not, however, reach the merits of his assigned errors because we find the trial court lacked jurisdiction to consider appellant's motion.

{¶6} Preliminarily, we note that to the extent appellant's motion asked the trial court to reconsider the sentences it imposed upon appellant, the same is considered a nullity because a trial court lacks jurisdiction to reconsider its own valid final judgment. *State v. Wilson*, Franklin App. Nos. 05AP-939, 2006-Ohio-2750, at ¶9; *State v. Steele*, Franklin App. No. 05AP-92, 2005-Ohio-4786, at ¶11.

{¶7} In construing appellant's motion as a petition for post-conviction relief pursuant to R.C. 2953.21, we find the trial court lacked jurisdiction to consider it because it was untimely. The post-conviction relief process 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. "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 trial court record. *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. Post-conviction review is not a constitutional right, but rather is a narrow remedy which affords a petitioner no rights beyond those granted by statute. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281. A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, Franklin App. No. 01AP-1011, 2002-Ohio-3321, at ¶32; *Murphy*, supra.

{¶8} R.C. 2953.21(A)(2) provides the time limitation for filing a petition for post-conviction relief, stating the petition must 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." Here, appellant unquestionably did not file his petition within 180 days of the date his trial transcript was filed in the court of appeals: the trial transcript was filed on January 2, 1986, and his petition for post-conviction relief was filed on March 13, 2006 – approximately 20 years later.

{¶9} R.C. 2953.23(A) provides that a court may not entertain an untimely petition unless, as relevant here, the petitioner demonstrates both of the following: (1) that subsequent to the period prescribed in R.C. 2953.21(A)(2), the United States Supreme

Court recognized a new federal or state right that applies retroactively to persons in defendant's situation, and the petition asserts a claim based on that right; and (2) by clear and convincing evidence that, but for 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)(a) and (b). In an attempt to invoke the provisions of R.C. 2953.23(A)(1), appellant asserts that *Blakely* represents a new federal or state right that applies retroactively, and his sentence should be modified accordingly.

{¶10} The fundamental flaw in appellant's argument is that he was not sentenced under Senate Bill 2, which became effective on July 1, 1996, and applies only to the sentences of individuals who committed an offense on or after that date. See, e.g., *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶120. Here, appellant was sentenced for offenses committed a decade prior to the enactment of Senate Bill 2. Thus, the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, declared several portions of Senate Bill 2 unconstitutional, does not provide appellant with a basis for relief.

{¶11} Even if appellant had been sentenced under Senate Bill 2, *Blakely* does not recognize a new federal or state right that applies retroactively. *State v. Penn*, Franklin App. No. 06AP-269, 2006-Ohio-5204; *State v. Bivens*, Franklin App. No. 05AP-1270, 2006-Ohio-4340; *State v. Graham*, Franklin App. No. 05AP-588, 2006-Ohio-914; *State v. Myers*, Franklin App. No. 05AP-228, 2005-Ohio-5998; *State v. Cruse*, Franklin App. No. 05AP-125, 2005-Ohio-5095. Thus, appellant has failed to satisfy the requirement of R.C.

2953.23(A)(1)(a). We further note that appellant failed to satisfy the requirement of R.C. 2953.23(A)(1)(b), as his post-conviction petition addressed only sentencing issues and did not present any argument related to his guilt for the underlying charges. *State v. Penn*, supra; *State v. Barkley*, Summit App. No. 22351, 2005-Ohio-1268, at ¶11. As a result, the trial court was without jurisdiction to consider appellant's untimely petition for post-conviction relief.

{¶12} Based on the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.
