

[Cite as *State v. Lowe*, 2011-Ohio-3996.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-584
 : (C.P.C. No. 07CR-06-4388)
 Louis N. Lowe, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 11, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for
appellee.

Louis N. Lowe, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Louis N. Lowe ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas denying his amended petition for postconviction relief on the grounds that the petition was not timely filed and lacked merit. Because we find his petition was untimely filed, we affirm.

{¶2} On June 21, 2007, appellant was indicted on one count of aggravated murder with a firearm specification and one count of having a weapon under disability. On May 15, 2009, appellant entered a plea of guilty to murder with a firearm specification. The weapon under disability offense was dismissed. The parties jointly recommended a

sentence of 15 years to life, consecutive to the three-year firearm specification. The trial court imposed the jointly recommended sentence. The judgment in this matter was journalized on that same date. Appellant did not file a direct appeal from that judgment.

{¶3} On November 30, 2009, appellant filed a motion for extension of time to file his petition for postconviction relief. Appellant asked the court to: consider his motion to be a timely placeholder petition; grant him an extension of time to amend his petition; and appoint counsel to assist him in filing his petition. The court of common pleas did not rule on appellant's motion. On January 14, 2010, appellant filed a second motion for extension of time to file a petition for postconviction relief. The trial court did not rule on the motion. On March 9, 2010, appellant filed an amended postconviction petition under R.C. 2953.21, setting forth ten grounds upon which appellant claimed he was entitled to relief. The state of Ohio filed a response, asking the court to dismiss the petition without a hearing. On May 24, 2010, the trial court dismissed the amended petition, finding it was untimely and without merit.

{¶4} Appellant filed a timely appeal and now raises three assignments of error for our review:

ASSIGNMENT OF ERROR NO. I:

The Trial Court Erred In Ruling That Appellant's [Amended] Post Conviction Relief Petition Was Untimely.

ASSIGNMENT OF ERROR NO. II:

The Trial Court Erred By Denying Appellant's Post Conviction Relief Petition Without Holding An Evidentiary Hearing Or Affording Some Other Opportunity To Further Develop Relevant Facts, Where Allegations In Petition Involved Matters Outside The Record Which, If Proved, Establish Substantive Grounds For Relief, And Where State's Summary

Judgment Motion Failed To Establish That Appellant Was Not Entitled To Relief.

ASSIGNMENT OF ERROR NO. III:

The Trial Court Erred By Failing To Issue Findings Of Fact And Conclusions Of Law Providing Bases For Decision To Deny Appellant's Post Conviction Relief Petition.

{¶5} The standard of review used by an appellate court in reviewing a trial court's decision to dismiss a postconviction petition for relief without an evidentiary hearing involves a mixed question of law and fact. *State v. Stewart*, 10th Dist. No. 09AP-817, 2009-Ohio-6423, ¶4. The trial court's decision on factual issues is reviewed under a manifest weight standard, while the trial court's decision on legal issues is reviewed de novo. *Id.*

{¶6} In his first assignment of error, appellant argues the trial court erred in finding his amended petition for postconviction relief was not timely filed. We disagree.

{¶7} The right to seek postconviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims 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 * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶8} Postconviction petitions must also be timely. Under R.C. 2953.21(A)(2), petitions 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[.]” Alternatively, “[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.”

{¶9} Because appellant did not file a direct appeal, his petition was due to be filed 210 days after the sentencing entry was journalized on May 15, 2009. Thus, appellant's petition was due on or before December 11, 2009. As a result, his March 9, 2010 petition is untimely. When a postconviction petition is untimely, the trial court lacks jurisdiction to consider it, unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). See *State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶8; *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶8; *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶5; and *State v. Soulivong*, 10th Dist. No. 11AP-12, 2011-Ohio-3601, ¶11.

{¶10} R.C. 2953.23(A) does provide exceptions to the timely filing requirement. “If a petition for post-conviction relief is untimely filed, a trial court has jurisdiction to entertain the petition only if the limited conditions of R.C. 2953.23(A) are satisfied.” *State v. Easley*, 10th Dist. No. 04AP-290, 2004-Ohio-7200, ¶10. A trial court may consider an untimely petition if the petitioner shows: (1) he was unavoidably prevented from discovering the facts upon which he relies to present the claim for relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner, and the petition asserts a claim based on that right. See R.C. 2953.23(A)(1)(a). In addition to demonstrating one of these two circumstances, the petitioner must also show, by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offense upon which he was convicted. See R.C. 2953.23(A)(1)(b). Alternatively, the trial court could

also consider an untimely petition if the petitioner presented DNA evidence establishing his actual innocence by clear and convincing evidence. See R.C. 2953.23(A)(2).

{¶11} Here, appellant has made no arguments nor presented any evidence to demonstrate that one of the exceptions found in R.C. 2953.23(A) applies to his case. Furthermore, nothing within R.C. 2953.23 permits an extension of time to file a petition for postconviction relief. Regardless, the trial court never granted appellant's request and in fact never ruled upon appellant's motions for extension of time. Where a trial court fails to explicitly rule on a motion, we presume that the trial court overruled the motion. *Burkart v. Burkart*, 191 Ohio App.3d 169, 2010-Ohio-5363, ¶30. More importantly, there is no authority on point to support appellant's proposal that his motion for an extension of time should be considered a valid "placeholder" for a timely petition.

{¶12} Because appellant's application was not timely filed, and because appellant has not met one of the exceptions which could overcome this jurisdictional bar, we find the trial court properly determined appellant's petition was untimely. Thus, we overrule appellant's first assignment of error.

{¶13} In his second assignment of error, appellant asserts the trial court erred in denying his petition for postconviction relief without affording him an evidentiary hearing or an opportunity to develop the relevant facts. We disagree.

{¶14} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 1999-Ohio-102. As discussed above, appellant's petition was untimely, which serves as a jurisdictional bar and prohibits the trial court from entertaining the petition. "Because the trial court lacked jurisdiction to consider the petition, it was not required to hold an evidentiary hearing."

State v. Foster, 10th Dist. No. 09AP-227, 2009-Ohio-5202, ¶8; see also *State v. Burke*, 10th Dist. No. 02AP-677, 2002-Ohio-6840, ¶19; *State v. Melhado*, 10th Dist. No. 05AP-272, 2006-Ohio-641, ¶24; and *State v. Russell*, 10th Dist. No. 05AP-391, 2006-Ohio-383, ¶10.

{¶15} Accordingly, we find the trial court did not err in denying appellant's petition without an evidentiary hearing. Thus, we overrule appellant's second assignment of error.

{¶16} In his third assignment of error, appellant argues the trial court erred in failing to issue findings of fact and conclusions of law in its decision denying appellant's petition for postconviction relief. Again, we disagree.

{¶17} Generally, R.C. 2953.21(C) requires a trial court to make findings of fact and conclusions of law if the court dismisses a petition for postconviction relief without holding a hearing. See *State v. Davis*, 10th Dist. No. 08AP-679, 2009-Ohio-1666, ¶8. Otherwise, the decision is not a final appealable order for our review. *Id.* However, a trial court is not required to make such findings of fact or conclusions of law when it dismisses a petition as untimely or successive. *Id.* at fn. 1, citing *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, ¶6. See also *State ex rel. Ashipa v. Kubicki*, 114 Ohio St.3d 459, 2007-Ohio-4563, ¶4; and *State ex rel. James v. Coyne*, 114 Ohio St.3d 45, 2007-Ohio-2716, ¶5. Even so, a trial court's decision dismissing a postconviction petition does not need to be designated "findings of fact and conclusions of law," so long as the decision is sufficient to advise the petitioner and the appellate court of the trial court's reasoning and permit meaningful appellate review. See generally, *State ex rel.*

Carrion v. Harris (1988), 40 Ohio St.3d 19; and *State ex rel. Knonoff v. Moon*, 79 Ohio St.3d 211, 1997-Ohio-398.

{¶18} Because the trial court was not required to issue findings of fact and conclusions of law under these circumstances, and because the decision was sufficient to apprise both appellant and this court of the trial court's rationale as well as permit meaningful review, we overrule appellant's third assignment of error.

{¶19} In conclusion, we overrule appellant's first, second, and third assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
