

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- VS -	:	<b>CASE NO. 2009-T-0003</b>
CHARLES W. THEISLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 04 CR 150.

Judgment: Affirmed.

*Dennis Watkins*, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

*Robert Troll Lynch*, 26300 Seville Drive, Suite 104, Beachwood, OH 44122 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Charles W. Theisler, appeals from the judgment entered by the Trumbull County Court of Common Pleas. The trial court denied Theisler’s petition for postconviction relief.

{¶2} Theisler was indicted for 118 counts related to his activity at Pain Management Associates from 2001 to 2004. Theisler had a medical degree but did not have a license to practice medicine or the authority to dispense prescription drugs in Ohio. The indictment alleged, among other matters, that Theisler was practicing

medicine and prescribing controlled substances to patients of Pain Management Associates.

{¶3} Theisler pled not guilty to the charges, and a jury trial was held. Prior to trial, 12 counts of the indictment were dismissed at the request of the state. The jury found Theisler guilty of 86 counts, including one count of engaging in a pattern of corrupt activity and multiple counts of illegal processing of drug documents, aggravated trafficking in drugs, and practicing medicine or surgery without a certificate. On September 6, 2005, the trial court sentenced Theisler to an aggregate prison term of three years.

{¶4} Theisler filed a timely direct appeal of the trial court's judgment entry of sentence to this court. On appeal, this court affirmed the judgment of the trial court. *State v. Theisler*, 11th Dist. No. 2005-T-0106, 2007-Ohio-213.

{¶5} On October 28, 2008, Theisler filed a petition for postconviction relief. Theisler attached an affidavit from Daniel Goodrich to his petition. Therein, Goodrich states he is a licensed physician assistant and would have testified as an expert witness regarding the duties of physician assistants. In addition, Theisler filed a "memorandum in support of waiver of time deadline pursuant to postconviction relief." Theisler attached his own affidavit to this memorandum, wherein he states his prior counsel did not inform him of Ohio's postconviction relief procedure, including the time deadline. In response to Theisler's motions, the state filed a motion to dismiss Theisler's petition for postconviction relief. Theisler filed a reply to the state's motion to dismiss. Theisler attached an affidavit from Deborah Nash to his reply. In her affidavit, Nash states that she was employed as the office administrator at Pain Management Associates when Theisler worked there. In addition, she states that Theisler performed the work of a

physician assistant under the supervision of licensed doctors, including filling out prescriptions upon their direction. The trial court denied Theisler's petition for postconviction relief.

{¶6} Theisler raises seven assignments of error. We will address his assigned errors out of numerical order. Theisler's first and sixth assignments of error are:

{¶7} “[1.] The trial court erred in failing to grant waiver of time deadline for Post-Conviction Relief.

{¶8} “[6.] The trial court erred by failing to recognize that the facts of this case do not bar petition for Post-Conviction Relief, and such trial court should have waived the filing deadline due to ineffective assistance of counsel.”

{¶9} Theisler argues the trial court should have considered his untimely petition for postconviction relief.

{¶10} This court has held that, “[p]ursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed within 180 days of the date the trial transcript is filed with the court of appeals in the direct appeal. \*\*\* However, an exception to the 180-day rule is set forth in R.C. 2953.23[.]” *State v. Scuba*, 11th Dist. No. 2006-G-2713, 2006-Ohio-6203, at ¶12. (Internal citation omitted.) R.C. 2953.23 provides, in part:

{¶11} “(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶12} “(1) Both of the following apply:

{¶13} “(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.

{¶14} “(b) The petitioner shows 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 or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶15} “(2) [This subsection is not applicable. It pertains to an inmate’s actual innocence as demonstrated by the results of DNA testing.]”

{¶16} The transcripts were filed with this court in Theisler’s direct appeal in December 2005. He did not file his petition for postconviction relief until October 2008. Thus, since his petition was filed more than 180 days after the trial transcript was filed, it is untimely. R.C. 2953.21(A)(2).

{¶17} Theisler does not contend that the United States Supreme Court has recently recognized a new constitutional right that applies to his case. Thus, he must demonstrate that he was “unavoidably prevented” from discovering the facts necessary to submit his petition for postconviction relief. R.C. 2953.23(A)(1)(a). The crux of Theisler’s arguments to the trial court was that he was denied the effective assistance of counsel due to trial counsel’s failure to call expert witnesses. Theisler submitted the affidavits of Daniel Goodrich (attached to his petition for postconviction relief); himself

(attached to his memorandum in favor of waiver of time deadline); and Deborah Nash (attached to his reply to the state's motion to dismiss his petition for postconviction relief). None of these affidavits state that Theisler was unavoidably prevented from discovering the proffered evidence contained in Nash's and Goodrich's affidavits. Theisler has not shown that this evidence was unavailable at an earlier date. Thus, he has not demonstrated the existence of qualifying facts that he was "unavoidably prevented" from discovering. Accordingly, he has failed to meet the initial prong of R.C. 2953.23(A). See, e.g., *State v. Brooks*, 9th Dist. No. 03CA008292, 2004-Ohio-194, at ¶12.

{¶18} In addition, Theisler submitted his own affidavit, which was attached to his memorandum in support of waiving the time deadline of R.C. 2953.21(A)(2). Therein, Theisler states that he was unaware of the time deadline in the postconviction relief statute. He states he received ineffective assistance of counsel, since his original counsel did not inform him about the postconviction relief statutes. This court recently addressed a similar argument, in *State v. Amato*:

{¶19} "[Appellant] argues he was precluded from discovering the fact that he could file a petition for postconviction relief because none of his attorneys informed him of this right or of the time restrictions. However, we note the statute requires [appellant] to show that he was unable to discover the 'facts upon which the petitioner must rely to present the claim.' R.C. 2953.23(A)(1)(a). (Emphasis added.) [Appellant's] assertion that he was not informed of the procedural mechanism of postconviction relief does not satisfy this requirement." *State v. Amato*, 11th Dist. No. 2008-L-022, 2009-Ohio-2950, ¶19.

{¶20} Essentially, Theisler is asking this court to recognize an additional exception to the timeliness requirement of R.C. 2953.21 – that a criminal defendant was unaware of Ohio’s postconviction relief process due to the failure of his attorneys to notify him of such. However, we note this court has held that the exceptions to the timeliness requirement of R.C. 2953.21 are those contained in R.C. 2953.23 and “[n]o other excuses will be accepted.” *State v. Beaver* (1998), 131 Ohio App.3d 458, 462.

{¶21} Theisler has not met his burden of demonstrating that one of the factors of R.C. 2953.23(A)(1)(a) applies.

{¶22} Moreover, under R.C. 2953.23(A)(1)(b), Theisler needed to show, by clear and convincing evidence, that the jury would not have found him guilty of the offenses. Theisler submitted evidence of certain expert testimony he argues should have been used at his trial to rebut the state’s evidence. However, this evidence was not, per se, exculpatory. The jury would still have had to weigh that evidence against the significant evidence presented by the state.

{¶23} Accordingly, the trial court did not have jurisdiction to hear Theisler’s untimely petition for postconviction relief.

{¶24} Theisler’s first and sixth assignments of error are without merit.

{¶25} Theisler’s remaining assignments of error are:

{¶26} “[2.] The trial court erred in failing to grant the Post Conviction Relief Petition due to ineffective assistance of trial counsel.

{¶27} “[3.] The trial court erred in failing to recognize the ‘operative facts’ of the petition are sufficient to indicate ineffective assistance of trial counsel.

{¶28} “[4.] The lower court erred in failing to recognize the ‘totality of the evidence’ indicates ineffective assistance of trial counsel.

{¶29} “[5.] The lower court erred in failing to recognize that exculpatory facts were available through defense experts, which trial counsel failed to call due to the ineffectiveness of trial counsel, and which ineffectiveness was not asserted on appeal.

{¶30} “[7.] The trial court erred in failing to recognize that this matter required a formal hearing on the Post-Conviction Relief Petition.”

{¶31} Having found Theisler’s petition for postconviction relief was untimely and none of the exceptions of R.C. 2953.23 applied to extend the filing deadline, the trial court was without jurisdiction to consider Theisler’s petition. The trial court correctly found it was without jurisdiction to consider Theisler’s petition; thus, it did not set the matter for a hearing nor consider the merits of the petition. We note we are to use an abuse of discretion standard of review when reviewing a trial court’s determination on a petition for postconviction relief. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, at ¶45. In this matter, since the trial court did not address the merits of Theisler’s petition, there is nothing for us to review under the abuse of discretion standard.

{¶32} Accordingly, Theisler’s remaining assignments of error are moot. App.R. 12(A)(1)(c).

{¶33} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.