

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 22
v.	:	T.C. NO. 2003 CR0840
JACQUELINE T. TONN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 5<sup>th</sup> day of February, 2010.

ELIZABETH A. ELLIS, Atty. Reg. No. 0074332, Assistant Prosecutor, 61 Greene Street, Xenia, Ohio 45385  
Attorney for Plaintiff-Appellee

JAY A. ADAMS, Atty. Reg. No. 0072135, 424 Patterson Road, Dayton, Ohio 45419  
Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} Jacqueline T. Tonn appeals from a judgment of the Greene County Court of Common Pleas denying her petition for post-conviction relief without a hearing. For the following reasons, the trial court’s judgment will be affirmed.

I.

{¶ 2} In 2004, Tonn was convicted of aggravated robbery with a firearm specification in connection with the robbery of a First American Cash Advance store in Fairborn, Ohio, on October 21, 2003. The trial court sentenced her to seven years for the aggravated robbery to be served consecutively to a mandatory three-year term of actual incarceration for the firearm specification. We affirmed Tonn’s conviction on April 29, 2005. *State v. Tonn*, Greene App. Nos. 2004-CA-36 & 2004-CA-37, 2005-Ohio-2021.

{¶ 3} On June 26, 2007, Tonn, with new trial counsel, moved for leave to file an untimely motion for a new trial. Tonn supported her motion with an unsigned letter, purportedly written by Henry Brown, with whom Tonn had lived at the time of the robbery. This letter stated that the robbery report was a “smoke screen” to hide the theft of money by Bobbi Verneman, the employee working at the store on October 21, 2003, who shared the money with Tonn and Brown. Brown stated that “[t]here was never a gun involved in this case at all.” (At Tonn’s trial, Dawn Drake, another employee of the store and Brown’s then-girlfriend, had testified for the State that she had participated in a staged robbery of the store with Brown on October 22, 2003, the day following Tonn’s alleged robbery; Drake testified that she gave \$1,500 to Brown to pay a drug debt and then called the police and falsely reported a robbery.) The trial court overruled Tonn’s motion for leave to file motion for a new trial, stating that it could not determine the merit of the unsigned letter and that the court had not been provided with any acceptable evidence on which it could determine whether Tonn was unavoidably delayed in discovering the evidence.

{¶ 4} In September 2007, Tonn filed a second motion for leave to file a motion for a new trial. Tonn supported this motion with an affidavit from Brown, in which he stated, in part:

{¶ 5} “3) There was a girl who worked at the Cash Advance store named Bobbi who I convinced to set up an inside job where money would be given to a person who came into [sic] fake a robbery.

{¶ 6} “4) Bobbi ultimately said that Jacqueline Tonn had robbed her. However, I know this was not true because I am the one who set the whole theft up.

{¶ 7} “5) There was no robbery of the Cash Advance and Jacqueline Tonn did not have a gun on this date. I am aware of these facts because I set up the theft and was with her before she entered the Cash Advance.

{¶ 8} “6) Jacqueline was to enter the Cash Advance and receive \$200.00 from Bobbi which was in fact what happened.

{¶ 9} “\*\*\*

{¶ 10} “9) I was not available to tell this story at a prior date because I was represented by an attorney and was advised not to participate because I would get into more trouble.

{¶ 11} “\*\*\*

{¶ 12} “11) I have been unwilling up until this point to provide this information for fear that I would get into more trouble. Thereby, preventing Jacqueline Tonn from obtaining this information and delaying her in attempting to prove her innocence on the charge of robbery with a gun.”

{¶ 13} The trial court granted the motion for leave and scheduled a hearing on the motion for a new trial for December 19, 2007. According to the record, the State requested a continuance of the hearing. However, the record does not reflect if that request was granted and when or if the hearing was ultimately held. The trial court has not ruled on the motion for a new

trial.

{¶ 14} On December 16, 2008, Tonn filed a petition for post-conviction relief, asserting that her trial counsel had rendered ineffective assistance by failing to call Brown as a witness at her trial. Tonn stated in her petition: “According to Brown’s testimony at Petitioner’s Hearing for a New Trial, (heard previously before this Court) he made Ms. Tonn’s trial counsel aware of these facts [the theft scheme] and indicated he would testify to said facts in court at her trial. Brown testified that he made Ms. Tonn’s attorney aware of the nature of the alleged robbery and described how it had been staged.” Tonn argued that the failure to call Brown as a witness was not reasonable trial strategy and that her petition was not barred by res judicata because this issue could not have been raised on direct appeal. Tonn attached to her petition an affidavit from Brown, which indicated that he had told Tonn’s trial attorney about the sham robbery and had not been called to testify at trial. The State responded that Tonn’s petition was untimely and that she did not address the statutory requirements for an untimely petition.

{¶ 15} On March 10, 2009, the trial court denied Tonn’s petition for post-conviction relief as untimely. The court reasoned:

{¶ 16} “Tonn’s petition does not explain how it is timely. It speaks to the merits of the ineffective assistance of counsel claim and cites cases. It also argues against her claim being denied on grounds of res judicata and cites additional cases on that issue. She does not address how she could qualify for an exception to the 180-day filing requirement. She does not state how she was prevented from discovering the evidence she now seeks to introduce. (In fact, the witness that she claims should have been called was living with her at the time of the robbery she was convicted of and was not someone unknown to her.) Nor does she allege any new right

promulgated by the United States Supreme Court.” (Footnote omitted.)

{¶ 17} Tonn appeals from the denial of her petition for post-conviction relief, raising two assignments of error.

## II.

{¶ 18} Tonn’s first assignment of error states:

{¶ 19} “THE TRIAL COURT ERRED IN DENYING APPELLANT’S PETITION FOR POST CONVICTION RELIEF AS UNTIMELY.”

{¶ 20} If a defendant has filed a direct appeal of his or her conviction, a petition for post-conviction relief must be filed no later than 180 days after the trial transcript is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Tonn filed a direct appeal of her conviction in April 2004, and the transcript of proceedings was filed in this Court in May 2004. Tonn’s petition for post-conviction relief, filed in December 2008, clearly was not filed within the 180-day time limitation set forth in R.C. 2953.21(A)(2).

{¶ 21} The trial court lacks jurisdiction to consider an untimely petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, ¶7. Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if she was unavoidably prevented from discovering the facts upon which she relies to present her claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to her situation. *Id.* If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which she suffered, no reasonable factfinder would have found her guilty. R.C. 2953.23(A)(1)(b).

{¶ 22} Tonn asserts that she was unavoidably prevented from discovering her counsel's ineffectiveness. She states:

{¶ 23} “\*\*\* Ms. Tonn would have the Court note that the evidence in question is not the availability of Mr. Brown and his role in the endeavor. The evidence in question is the testimony he was prepared to give at Ms. Tonn's initial trial. Ms. Tonn submits that the trial court was incorrect in their [sic] assertion that Ms. Tonn, through her living arrangements with Mr. Brown, was aware of the testimony he was prepared to offer. Instead, Ms. Tonn would submit that she was completely unaware and was unavoidably prevented from knowing what Mr. Brown, if called to the stand, would testify to prior to the Hearing for the Motion for New Trial. In fact, it was not until the oral hearing for that Motion that Mr. Brown's testimony was first introduced into any court record.

{¶ 24} “\*\*\* Ms. Tonn further submits that she was unavoidably prevented from discovering this evidence first because she did not know of its existence and secondly, because it was being offered against the Fifth Amendment interest of another person. As such, it was testimony that could not be compelled should Mr. Brown have been called to the stand in an adversarial role. In fact, it is that variety of evidence that would have to be voluntarily offered against Mr. Brown's own penal interest. As such, Ms. Tonn submits that she was unavoidably prevented not only from its discovery but also its production.”

{¶ 25} We find no fault with the trial court's conclusion that Tonn's petition for post-conviction relief was untimely. Brown states in his affidavits that Tonn's alleged robbery of the Cash Advance store on October 21, 2003, was, in fact, a theft committed jointly by Verneman, Tonn, and Brown, and without a gun. Assuming these statements to be true, at the time of her

trial, Tonn was aware of Brown's involvement in the alleged robbery of the Cash Advance store and of the favorable testimony that he could have provided on her behalf for the charge of aggravated robbery with a firearm specification. Tonn was also aware that her trial counsel did not call Brown as a witness. Thus, to the extent that Tonn asserts that her trial counsel should have called Brown as a witness and was ineffective in failing to do so, Tonn should have been aware of this ineffectiveness at the time of her trial, and we see no reason why Tonn was unavoidably prevented from raising this claim of ineffective assistance of counsel in a timely manner.

{¶ 26} Tonn appears to argue that, until the hearing on her motion for a new trial, she did not know that Brown would have testified favorably for her, in light of the fact that such testimony by Brown would have been against his penal interest. Nevertheless, considering that Brown wrote a letter and signed an affidavit in 2007 supporting her motion for a new trial, Tonn has not explained why she unavoidably prevented from discovering, more than a year prior to December 2008, that he was willing to testify favorably and that her counsel was aware of this fact. In addition, Tonn's living arrangement with Brown supports the trial court's conclusion that, regardless of her actual knowledge, Tonn was not unavoidably prevented from determining in a timely manner whether Brown would have been willing to testify on her behalf and, thus, whether her counsel should have called him as a witness at trial.

{¶ 27} We note that Brown's affidavits are contradictory as to whether he would have been helpful to Tonn's defense at trial. In his affidavit in support of her petition for post-conviction relief, Brown states: "I gave this information to [Tonn's] attorney before her trial and he never called me to court, nor did he bring up the fact that this had occurred." However,

Brown's prior affidavit in support of Tonn's motion for a new trial stated that he was "unwilling up until this point to provide this information," thus "delaying [Tonn] in her attempt to prove her innocence." However, as Tonn has not demonstrated that she was unavoidably prevented from discovering facts to support her claim of ineffective assistance of counsel (i.e., her counsel's failure to call Brown as a witness), the trial court appropriately did not consider the merits of her claim of ineffective assistance of counsel.

{¶ 28} The first assignment of error is overruled.

## II.

{¶ 29} Tonn's second assignment of error states:

{¶ 30} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING."

{¶ 31} Tonn claims that the trial court erred in denying her petition without an evidentiary hearing. However, the untimeliness of Tonn's petition deprived the trial court of jurisdiction to consider the merits of her petition for post-conviction relief. Accordingly, Tonn's second assignment of error is overruled as moot.

## III.

{¶ 32} The judgment of the trial court will be affirmed.

.....

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Elizabeth A. Ellis  
Jay A. Adams  
Hon. Stephen A. Wolaver

