

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-01-011
 :
 - vs - : OPINION
 : 11/23/2009
 :
 D'ANTHONY CHATTAMS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2004-12-2242

Robin N. Piper, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

D'Anthony Chattams, #A525-417, Lebanon Correctional Institution, P.O. Box 56, 3791 State Route 63, Lebanon, Ohio 45036, defendant-appellant, pro se

RINGLAND, J.

{¶1} Defendant-appellant, D'Anthony Chattams, pro se, appeals a decision of the Butler County Court of Common Pleas denying a motion for postconviction relief.

{¶2} Appellant was indicted on one count of aggravated robbery with a gun specification in violation of R.C. 2911.01(A)(1). Following a jury trial, appellant was found guilty as charged and sentenced to a total of ten years in prison. Appellant appealed his conviction to this court.

{¶3} While his direct appeal was pending in this court, appellant filed a petition

to vacate or set aside his conviction with the trial court, arguing that his trial counsel was ineffective. The trial court denied appellant's petition. Thereafter, this court affirmed appellant's conviction on direct appeal. See *State v. Chattams* (June 19, 2007), Butler App. No. CA2006-06-146, accelerated calendar judgment entry.

{¶14} On December 16, 2008, appellant filed a petition labeled "Motion to Vacate Void Judgment," claiming that the indictment was defective for failing to include the mens rea and, as a result, the trial court was without jurisdiction to convict him for aggravated robbery. The trial court denied the motion. Appellant timely appeals, raising four assignments of error.

{¶15} Assignment of Error No. 1:

{¶16} "TRIAL COURT ERRED WHEN IT BASED ITS DECISION ON APPELLANT'S MOTION TO VACATE VOID JUDGMENT USING FAULTY AND UNTRUE INFORMATION."

{¶17} Assignment of Error No. 2:

{¶18} "TRIAL COURT ERRED BY CONSTRUING MOTION TO VACATE VOID JUDGMENT (USING TRIAL COURT'S INHERENT POWER) TO SET ASIDE A VOID JUDGMENT DUE TO LACK OF JURISDICTION OF TRIAL AS A MOTION FOR POSTCONVICTION RELIEF UNDER R.C. 2953.21."

{¶19} Assignment of Error No. 3:

{¶110} "TRIAL COURT FAILED TO RECOGNIZE THAT CRIMINAL LAW JURISDICTION WAS LACKING UNDER R.C. 2901.11."

{¶111} Assignment of Error No. 4:

{¶112} "AGGRAVATED ROBBERY R.C. 2911.01(A)(1) LACKS THE REQUIRED MENS REA ELEMENT NOR IS IT A STRICT-LIABILITY."

{¶113} Appellant argues in his first assignment of error that the trial court's

decision was based on erroneous findings not supported by the record. Appellant's remaining assignments urge that the trial court erred when it denied his motion to vacate his conviction for lack of jurisdiction. Appellant claims that the indictment was defective for omitting the mens rea element and the trial court was without jurisdiction to convict him.

{¶14} "Although appellant did not specify the procedural basis for his motion to vacate, an argument based upon a claimed lack of subject-matter jurisdiction as the result of a defective indictment should be advanced pursuant to a petition for postconviction relief under R.C. 2953.21." *State v. Reynolds*, Franklin App. No. 08AP-1052, 2009-Ohio-2147, ¶7, citing *State v. Wooden*, Franklin App. No. 02AP-473, 2002-Ohio-7363, ¶9; and *State v. Malone* (Jan. 30, 1997), Cuyahoga App. No. 71094, 1997 WL 35554, *1. Appellant's motion to vacate in this case meets the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1) because it was: (1) filed subsequent to the defendant's direct appeal; (2) claimed a denial of constitutional rights; (3) sought to render the judgment void; and (4) asked for vacation of the judgment and sentence. *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304.

{¶15} After review of the record, any discussion of appellant's assignments of error or the trial court's decision in this case would be futile because appellant's petition was filed out-of-time.

{¶16} A petition for postconviction relief must be filed no later than 180 days after the date on which the trial transcript is filed with the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Appellant's direct appeal was filed on June 21, 2006. The trial transcripts were filed on August 30, 2006 and his conviction was affirmed by this court on June 19, 2007. Appellant filed his motion to vacate judgment for lack of jurisdiction in the instant matter on December 16, 2008, clearly outside the applicable period.

{¶17} Pursuant to R.C. 2953.23(A)(1), a court may entertain an untimely petition if the petitioner demonstrates either: (1) he was unavoidably prevented from discovering facts necessary for the claim for relief; or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If the petitioner is able to satisfy one of these two conditions, he must then demonstrate that, but for the constitutional error at trial, no reasonable fact-finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶18} Here, appellant has not advanced, nor could he demonstrate, either of the prerequisites for entertaining an untimely petition for postconviction relief. Appellant has not claimed that he was unavoidably prevented from discovering facts necessary for his claim for relief. *State v. Gadson*, Franklin App. No. 09AP-268, 2009-Ohio-5715, ¶7. Rather, appellant's claim in his motion was based upon new case law that had developed since his sentencing; specifically, the First District Court of Appeal's decision in *State v. Lester*, Hamilton App. No. C-070383, 2008-Ohio-3570, and the Seventh District Court of Appeals decision in *State v. Jones*, Mahoning App. No. 07-MA-200, 2008-Ohio-6971.¹ *Gadson* at ¶7. Furthermore, appellant does not claim any new right recognized by the United State Supreme Court that applies retroactively to persons in appellant's situation. *Id.* Instead, the law relied upon by appellant were Ohio decisions. *Id.* Therefore, appellant has not met the requirements necessary to entertain an untimely petition for postconviction relief. Accordingly, appellant's petition was untimely.

{¶19} Appellant's assignments of error are overruled.

{¶20} Judgment affirmed.

1. Even if appellant had met the procedural requirements of R.C. 2953.21, both cases he relies upon have been overruled by the recent Ohio Supreme Court decision in *State v. Lester*, Slip Opinion No. 2009-Ohio-

BRESSLER, P.J., and YOUNG, J., concur.

4225. In *Lester*, the court concluded that aggravated robbery under R.C. 2911.01(A)(1) is a strict liability offense, not subject to a mens rea of "recklessness" that must be included in the indictment. *Id.* at ¶1.