

[Cite as *State v. Foster*, 2009-Ohio-5202.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 09AP-227
	:	(C.P.C. No. 06CR09-6880)
v.	:	
	:	
William A. Foster,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2009

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

William A. Foster, pro se.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, William A. Foster ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his petition for post-conviction relief. For the following reasons, we affirm.

{¶2} In April 2007, the trial court sentenced appellant for his conviction of aggravated murder and having a weapon while under disability. Appellant appealed,

and this court amended appellant's aggravated murder conviction to murder in *State v. Foster*, 10th Dist. No. 07AP-419, 2007-Ohio-6279. The trial court resentenced appellant on January 25, 2008, and issued a sentencing judgment entry on January 29, 2008. Appellant filed no appeal, but, on January 8, 2009, he filed a petition for post-conviction relief. Appellant contended that the prosecution withheld exculpatory evidence and knowingly suborned perjury. The trial court denied the petition as untimely.

{¶3} Appellant appeals, raising the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

The trial court erred in not granting relief to the appellant on his claim of newly discovered evidence of prosecutorial misconduct thus violating his [F]ourteenth [A]mendment right to due process of law.

SECOND ASSIGNMENT OF ERROR:

The trial court erred in not granting appellant relief on his claim of ineffective assistance of counsel, thus violating his rights under the Sixth and Fourteenth Amendments.

{¶4} We address appellant's assignments of error together. Appellant argues that the trial court erred by denying his post-conviction relief petition without an evidentiary hearing. We disagree.

{¶5} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. Post-conviction relief is a narrow remedy that affords appellant no rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281,

1999-Ohio-102. We need not disturb a trial court's decision to deny a post-conviction petition absent an abuse of discretion. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, ¶45. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} R.C. 2953.21(A)(2) sets a deadline for a post-conviction petition. Pursuant to *State v. Laws*, 10th Dist. No. 04AP-283, 2004-Ohio-6446, ¶6-7, we calculate appellant's post-conviction petition deadline from the time of his initial appeal of his conviction, and not from the resentencing, because the petition concerned proceedings related to his conviction. That deadline is "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." R.C. 2953.21(A)(2). Thus, appellant needed to file the post-conviction petition no later than 180 days after the June 28, 2007 date that the trial transcript was filed in the court of appeals. Appellant's January 8, 2009 petition is well beyond that deadline. Appellant's post-conviction petition is untimely, even calculating the deadline from his resentencing. Appellant filed no appeal of the resentencing. R.C. 2953.21(A)(2) states that, if no direct appeal is taken, a defendant must file a post-conviction petition no later than 180 days after the expiration of the time for filing a direct appeal. Appellant's January 8, 2009 petition is well beyond that deadline, given that the trial court issued the resentencing entry on January 29, 2008.

{¶7} A trial court lacks jurisdiction to consider an untimely post-conviction petition unless an exception applies pursuant to R.C. 2953.23(A). *State v. Hatfield*, 10th Dist. No. 07AP-784, 2008-Ohio-1377, ¶7. Appellant's petition did not involve a new federal or state right that applies retroactively. See R.C. 2953.23(A)(1). Nor did appellant present DNA evidence of his innocence. See R.C. 2953.23(A)(2). Appellant cannot justify the untimely petition on grounds that he was "unavoidably prevented from discovery" of evidence to support the claims in his petition. See R.C. 2953.23(A)(1)(a). Instead, to support his post-conviction petition, appellant relied on (1) information he was aware of at the time of trial, and (2) information he has not shown that he was unavoidably prevented from discovering by the deadline for the post-conviction petition. Accordingly, appellant's case does not fit within the R.C. 2953.23(A) exceptions.

{¶8} Because appellant failed to establish an exception that would allow the trial court to consider his untimely post-conviction petition, we conclude that the court lacked jurisdiction to consider the petition. Because the trial court lacked jurisdiction to consider the petition, it was not required to hold an evidentiary hearing. See *State v. Burke*, 10th Dist. No. 02AP-677, 2002-Ohio-6840, ¶19. Therefore, the court did not abuse its discretion when it denied appellant's post-conviction petition without an evidentiary hearing, and we overrule appellant's two assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
