

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-691
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-5537)
v.	:	No. 14AP-692
	:	(C.P.C. No. 09CR-5876)
Ivan J. Lacking,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 5, 2015

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

*Ivan J. Lacking*, pro se.

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APPEALS from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Ivan J. Lacking, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for postconviction relief. For the reasons that follow, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} On July 27, 2010, appellant pleaded guilty to a number of felonies in two separate cases. Specifically, in case No. 09CR-5537, appellant pleaded guilty to two counts of robbery, both being third-degree felonies, accompanied by a firearm specification. In case No. 09CR-5876, appellant pleaded guilty to one count of robbery, a felony of the third degree, accompanied by a firearm specification. On July 30, 2010, the trial court sentenced appellant to a prison term of three years for each of the robbery

convictions, to be served concurrently, and a prison term of three years for each of the firearm specifications, to be served consecutively, for a total prison term of 12 years.

{¶ 3} Appellant did not file a timely appeal from the judgment of conviction and sentence journalized on July 30, 2010. On December 3, 2012, appellant filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A). On January 17, 2013, this court denied appellant's motion for leave. *State v. Lacking*, 10th Dist. No. 12AP-1011 (Jan. 17, 2013) (memorandum decision).

{¶ 4} On November 27, 2013, pursuant to Crim.R. 32.1, appellant filed a motion to withdraw his guilty plea. The trial court construed appellant's motion as a petition for postconviction relief, and on March 5, 2014, the trial court issued a decision denying the petition.

{¶ 5} On September 4, 2014, appellant filed a motion for delayed appeal, pursuant to App.R. 5 (A), seeking leave to appeal the trial court's March 5, 2014 judgment entry. In a November 20, 2014 memorandum decision, this court ruled that the notice of appeal filed by appellant in connection with his motion for delayed appeal was, in fact, a timely filed notice of appeal from the March 5, 2014 judgment. Accordingly, we ruled that the motion for delayed appeal was moot. *State v. Lacking*, 10th Dist. No. 14AP-691 (Nov. 20, 2014) (memorandum decision). Our memorandum decision reads, in relevant part, as follows:

Because an action for post-conviction relief constitutes a civil proceeding, Civ.R. 58 is applicable to any judgment rendered with regard to a motion for post-conviction relief. *State ex rel. Ford v. McClelland*, 8th Dist. No. 100014, 2013-Ohio-4379, ¶ 4. Civ.R. 58(B) provides that, within three days of entering the judgment upon the journal, the clerk "shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete." Here, consistent with appellant's claim, the record reveals the trial court failed to place an entry on its appearance docket noting service of the judgment. The failure to comply with Civ.R. 58(B) tolls the time for filing the appeal. *See In re Anderson*, 92 Ohio St.3d 63, 71 (2001).

{¶ 6} Given our prior ruling, this case is before us pursuant to appellant's direct appeal from the trial court's March 5, 2014 judgment entry denying his motion for postconviction relief.

## II. ASSIGNMENTS OF ERROR

{¶ 7} Appellant assigns the following as error:

Assignment of Error No. 1: The defendant's plea is invalid when he was not informed that he would receive nine (9) years mandatory on his sentence.

Assignment of Error No. 2: Trial court provided ineffective assistance of counsel by coercing/threatening the defendant into a plea.

Assignment of Error No. 3: Trial counsel provided ineffective assistance by failing to inform the defendant that his sentence would contain a 9 year prison term.

Assignment of Error No. 4: The trial court by erred by coercing/threatening the defendant into accepting a plea.

## III. STANDARD OF REVIEW

{¶ 8} The appropriate standard for reviewing a trial court's decision to dismiss a petition for postconviction relief, without an evidentiary hearing, involves a mixed question of law and fact. *State v. Tucker*, 10 Dist. No. 12AP-158, 2012-Ohio-3477, ¶ 9. This court must apply a manifest weight standard in reviewing a trial court's findings on factual issues underlying the substantive grounds for relief, but we must review the trial court's legal conclusions de novo. *Id.*

## IV. LEGAL ANALYSIS

{¶ 9} Because we find that the trial court lacked jurisdiction to entertain appellant's petition for postconviction relief, we will consider appellant's assignments of error together.

{¶ 10} The postconviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). The right to seek postconviction relief is governed by R.C. 2953.21(A), which provides in relevant part:

(1)(a) Any person who has been convicted of a criminal offense \* \* \* 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.

\* \* \*

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall 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 or adjudication \* \* \*. *If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.*

(Emphasis added.)<sup>1</sup>

{¶ 11} Here, the trial court entered a judgment of conviction and sentence on July 30, 2010. Appellant did not file his petition for postconviction relief until November 13, 2013, more than three years after the expiration of the time for filing the appeal from that judgment. See Crim.R. 32(C) and App.R. 4(A). Thus, appellant did not timely file his petition for postconviction relief.

{¶ 12} A trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless a petitioner demonstrates that one of the exceptions in R.C. 2953.23(A) applies. *State v. Tanksley*, 10th Dist. No. 13AP-769, 2014-Ohio-1194, ¶ 6, citing *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8. See also *State v. Sparks*, 10th Dist. No. 12AP-1063, 2013-Ohio-3598, ¶ 10. Pursuant to R.C. 2953.23, a court of common pleas may entertain an untimely filed petition for postconviction relief only under the following circumstances:

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<sup>1</sup> Sub.H.B. No. 663, effective March 23, 2015, amended R.C. 2953.21 to extend to 365 days the time for filing a postconviction relief petition.

(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:

(1) Both of the following apply:

(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.

(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.<sup>2</sup>

{¶ 13} Appellant has made no effort to establish that any of the exceptions apply to his petition. As a result of appellant's failure to establish the existence of an exception to the limitations period set forth in R.C. 2953.21, the trial court did not have jurisdiction to entertain appellant's untimely petition. *Tanksley; Hollingsworth; Sparks*. Moreover, we note that appellant's allegations that the trial court violated Crim.R. 11 in accepting appellant's guilty plea could have been raised by appellant in a timely appeal from his conviction and sentence. As such, res judicata barred appellant from raising such claims either in a petition for postconviction relief or a postconviction motion to withdraw his guilty plea. *See State v. Hayden*, 10th Dist. No. 14AP-361, 2014-Ohio-5107, ¶ 8 (res judicata barred appellant from raising sentencing error in a petition for postconviction relief where appellant failed to raise the issue in his direct appeal); *State v. Lowe*, 10th

Dist. No. 14AP-481, 2015-Ohio-382, ¶ 11 (res judicata barred appellant from raising alleged violations of Crim.R. 11 in a postconviction motion to withdraw his guilty plea where such errors could have been raised in a direct appeal from his conviction and sentence).

{¶ 14} For the foregoing reasons, we hold that the trial court did not have jurisdiction to entertain appellant's petition for postconviction relief. Accordingly, appellant's assignments of error are overruled.

## **V. CONCLUSION**

{¶ 15} Having overruled each of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., and TYACK, J., concur.

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<sup>2</sup> The exception under R.C. 2953.23(A)(2), pertaining to DNA testing, is not relevant in this case.