

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-001
ANTON D. HAMILTON, JR.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 99 CR 000231.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Anton D. Hamilton, Jr., pro se, PID: 379-712, Southern Ohio Correctional Institution, P.O. Box 45699, Lucasville, OH 45699 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Anton D. Hamilton, Jr., appeals the judgment entered by the Lake County Court of Common Pleas. The trial court denied Hamilton’s petition for postconviction relief.

{¶2} On May 11, 1999, Hamilton’s grandfather, Melvin Hamilton, was found dead in his house. Melvin Hamilton died of gunshot wounds to his head.

{¶3} Hamilton was charged with one count of murder, in violation of R.C. 2903.02, for the shooting death of his grandfather. This count also contained a firearm specification. Hamilton pled not guilty to the charge, and a jury trial was held. The jury found Hamilton guilty of murder, and the trial court sentenced him to a prison term of 15 years to life, with an additional three-year term for the firearm specification. Hamilton appealed his conviction to this court, and this court reversed his conviction due to evidentiary errors. *State v. Hamilton*, 2000-L-003, 2002-Ohio-1681, at *39.

{¶4} Following the remand from this court, Hamilton was retried on the murder charge. In this second trial, Hamilton was also found guilty of murder, and the trial court again sentenced him to a prison term of 15 years to life, with an additional three-year term for the firearm specification. Thereafter, Hamilton appealed his conviction to this court. On appeal, this court affirmed his murder conviction. *State v. Hamilton*, 11th Dist. No. 2004-L-042, 2005-Ohio-4907, at ¶126. Hamilton appealed this court's decision to the Supreme Court of Ohio, but that court declined jurisdiction to hear the appeal. *State v. Hamilton*, 108 Ohio St.3d 1417, 2006-Ohio-179.

{¶5} On November 27, 2009, Hamilton filed a petition for postconviction relief with the trial court. The state filed a brief in response to Hamilton's petition. The trial court denied Hamilton's petition for postconviction relief without a hearing. The trial court found Hamilton's petition untimely. In addition, the trial court noted that the arguments raised in Hamilton's petition for postconviction relief were barred by the doctrine of res judicata.

{¶6} This matter is now before us on Hamilton’s appeal from the trial court’s judgment entry denying his petition for postconviction relief. Hamilton raises two assignments of error. His first assignment of error is:

{¶7} “The trial court erred to the prejudice of appellant when it denied appellant’s postconviction petition in violation of state and federal law.”

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

{¶9} 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:

{¶10} “(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:

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

{¶12} “(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.

{¶13} “(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.

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

{¶15} The transcripts were filed with this court in Hamilton's direct appeal from his second trial on August 11, 2004. He did not file his petition for postconviction relief until November 2009. 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).

{¶16} Hamilton 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).

{¶17} Hamilton argues he received ineffective assistance of trial counsel due to his assertions that counsel failed to adequately investigate certain matters.

{¶18} Jonathon King testified at Hamilton's second trial that he encountered Hamilton near Melvin Hamilton's residence on the night of the murder. King testified that he was walking toward the Brentwood apartment complex to visit Antonio Rimmer. Hamilton argues that Rimmer was actually living in the Argonne Arms apartment

complex during that time and that he was in the Lake County Jail on May 10, 1999. He argues his defense counsel should have called the postmaster to verify Rimmer's address and the Lake County Sheriff to testify that Rimmer was in custody that day. Regarding Rimmer's address during that time period, Rimmer testified at Hamilton's second trial that while his mother lived in the Brentwood complex, he was staying with his girlfriend in the Argonne Arms complex. In addition, he testified that he had no knowledge of whether King encountered Hamilton on that night. Since Rimmer testified on behalf of Hamilton at his second trial regarding his living arrangements and his criminal record, Hamilton has not demonstrated that he was unavoidably prevented from discovering the facts in question.

{¶19} Hamilton asserts that he was unable to discover facts regarding Darlene Vonhoff. Vonhoff gave a statement to the police shortly after the murder. Vonhoff stated she saw a person with "olive color skin" driving Melvin Hamilton's vehicle on May 11, 1999. Vonhoff was subpoenaed for the first trial, but she did not testify. Vonhoff was on the state's and Hamilton's witness lists for the second trial, but she did not testify. Apparently, this witness was unable to be located and/or refused to testify in both trials. In his petition for postconviction relief, Hamilton asserts that he was never able to get an affidavit from Vonhoff for over ten years since she gave her police statement. Thus, it appears Vonhoff continues to be unavailable for purposes of providing additional information in this matter. Since nothing has changed regarding Vonhoff's status, Hamilton has not demonstrated that there are new facts he was unavoidably prevented from discovering.

{¶20} Hamilton next asserts that he was unable to obtain fingerprint analysis. Hamilton attached a letter from an assistant attorney general in the Ohio Attorney General's Office to his petition for postconviction relief. This letter states that the Bureau of Criminal Investigation ("B.C.I.") only conducts fingerprint analysis for law enforcement personnel. Hamilton claims this letter is proof that he is "unavoidably prevented" from conducting a fingerprint analysis comparing the fingerprint on the murder weapon to the "50 million prints" on file in the national database. First, this letter merely states that the B.C.I., a state agency, would not conduct an independent analysis on behalf of Hamilton. Second, Hamilton needs to identify specific facts that he was unavoidably prevented from discovering during the initial time frame for filing a petition for postconviction relief. His current hypothetical assertion that fingerprint analysis consisting of comparison of the fingerprint found on the murder weapon with millions of individuals on file is too abstract to satisfy the newly-discovered facts prong of R.C. 2953.23(A)(1)(a).

{¶21} Hamilton has not demonstrated that he was unavoidably prevented from discovering the facts in question to present his petition for postconviction relief at an earlier time.

{¶22} In addition, Hamilton would have to show that, in the absence of the purported constitutional errors, no reasonable jury would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶23} The state presented the testimony of Jonathon King to establish that Hamilton was in the vicinity of Melvin Hamilton's residence on the night in question. We note that Jameson Jeffries also testified at Hamilton's second trial. He testified that he

picked up Hamilton in his car and drove around the block. This occurred in the vicinity of Melvin Hamilton's residence. Jeffries testified that he dropped off Hamilton on Jackson Street, and, at that point, Hamilton exited his vehicle and walked towards Jonathon King. Thus, even if Hamilton's attorney had rebutted King's testimony through the presentation of other witnesses, Jeffries' testimony still placed both Hamilton and King in the vicinity of the crime scene on the night in question. Accordingly, Hamilton cannot demonstrate that a jury would not have found him guilty of murder had the purported evidence been introduced to discredit King's testimony.

{¶24} In regard to the fingerprint evidence, Mitchell Wisniewski of the Lake County Crime Lab testified at Hamilton's second trial that the latent print on the murder weapon matched the right index finger of Hamilton. Moreover, Hamilton testified at his second trial that it was possible that his fingerprint was on the murder weapon because he had touched the gun on a prior occasion. He testified that Melvin Hamilton had several firearms and that he had handled them, both with and without Melvin's permission, during the time he lived at Melvin's residence. Accordingly, through his own testimony, Hamilton offered an alternative explanation for his fingerprint being on the murder weapon. In light of this evidence, we cannot say a jury would not have found Hamilton guilty if he was permitted to compare the latent print on the murder weapon to other, random individuals.

{¶25} As it pertains to Vonhoff's police statement, Hamilton has not shown that a jury would not have found him guilty if there was additional information presented from this potential witness. At most, Vonhoff would testify that someone with "olive colored skin" was driving Melvin Hamilton's vehicle on the day after the murder. If the jury

concluded that the driver was not Hamilton, who is African-American, it would not preclude the jury from finding Hamilton guilty of murder. The jury could conclude that Hamilton killed Melvin Hamilton, but gave or sold the vehicle to another person after the crime. Thus, another individual could have been driving the car when Vonhoff witnessed it.

{¶26} Finally, as this court stated in its analysis of Hamilton's assigned error regarding the sufficiency of the evidence on his appeal from the second trial:

{¶27} "The state presented sufficient evidence showing Hamilton had a motive for killing Melvin, that Hamilton's fingerprint was on the murder weapon, that he was in the area on the night of the crime, and that he made several statements suggesting he was involved in the murder." *State v. Hamilton*, 2005-Ohio-4907, at ¶95.

{¶28} Accordingly, Hamilton has not demonstrated that without the purported constitutional errors, no reasonable jury would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶29} Since Hamilton's petition for postconviction relief was filed beyond the statutory deadline and he has not demonstrated that any of the exceptions contained in R.C. 2953.23 apply, the trial court did not have jurisdiction to consider the merits of his petition. See *State v. Theisler*, 11th Dist. No. 2009-T-0003, 2009-Ohio-6862, at ¶21-23.

{¶30} Alternatively, as the trial court found, even if Hamilton's petition was timely, his claims would be barred by the doctrine of *res judicata*.

{¶31} "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of

due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

{¶32} In a petition for postconviction relief, “[t]o overcome the *res judicata* bar, evidence offered *dehors* the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record.” *State v. Lawson* (1995), 103 Ohio App.3d 307, 315. (Citation omitted.)

{¶33} Hamilton’s arguments are solely based on information in the original record, including the transcripts. As such, he could have raised these claims in his direct appeal. In fact, Hamilton raised the issues of fingerprint identification and Jonathon King’s testimony in his appeal from his conviction after the second trial. See *State v. Hamilton*, 2005-Ohio-4907, at ¶88, 91, 104, & 105. While he did not specifically raise the issue of Vonhoff’s identification of the driver, Vonhoff was subpoenaed for the first trial, her name appeared on the witness lists for the second trial, and Sergeant David Lutha testified regarding her identification at Hamilton’s first trial. Thus, this was an issue that Hamilton *could have* raised on direct appeal. As such, Hamilton’s claims are barred by the doctrine of *res judicata*.

{¶34} Hamilton’s first assignment of error is without merit.

{¶35} Hamilton’s second assignment of error is:

{¶36} “The trial court erred to the prejudice of appellant when it failed to order appellant’s immediate release from state custody under a ‘void’ judgment, that is in violation of state and federal law.”

{¶37} Hamilton claims the state presented fraudulent evidence to the grand jury and, as a result, his conviction should be vacated.

{¶38} “Pursuant to App.R. 9, the appellant has a duty to file a transcript of all portions of proceedings necessary for the court to consider the appeal. When an appellant fails to provide a complete transcript, or those portions that support the claimed error, the reviewing court has no choice but to presume the regularity of the proceedings and affirm the judgment of the trial court.” *State v. Stislow*, 11th Dist. No. 2005-L-207, 2006-Ohio-4168, at ¶24. (Citations omitted.)

{¶39} Hamilton has not provided a transcript of the grand jury proceedings to this court. Therefore, we cannot determine exactly what evidence was presented by the state at that proceeding. Accordingly, Hamilton cannot demonstrate this claimed error.

{¶40} In addition, Hamilton’s claims are rebutted by other portions of the record. Hamilton claims the latent fingerprint on the murder weapon did not match his fingerprint. However, Mitchell Wisniewski of the Lake County Crime Lab testified at Hamilton’s second trial that the latent print on the murder weapon matched the right index finger of Hamilton. Hamilton claims Vonhoff’s description of the driver of Melvin Hamilton’s vehicle does not match his characteristics. As previously noted, the driver of the vehicle was not necessarily the same individual who committed the murder.

{¶41} Finally, Hamilton claims the police destroyed Sandra Lawrence’s original police statement and “forged” a second statement. We note that part of the reason of this court’s reversal of Hamilton’s first conviction was the trial court’s erroneous decision to exclude Lawrence’s police statement, which was offered by the defense. *State v. Hamilton*, 2002-Ohio-1681, at *23-28. Since Lawrence’s police statement was a central

issue in Hamilton's *first* appeal, the fact that he failed to raise any purported irregularities in relation to her police statement in his *second* trial precludes his current argument under the doctrine of res judicata.

{¶42} Hamilton's second assignment of error is without merit.

{¶43} The judgment of the trial court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

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