

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-A-0046
BRANDON J. RICE,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2007 CR 392.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Joseph R. Klammer, The Klammer Law Office, LTD., Lindsay II Professional Center, 6990 Lindsay Drive, Suite 7, Mentor, OH 44060 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Brandon Rice appeals from a judgment of the Ashtabula Court of Common Pleas dismissing his petition for postconviction relief as untimely. Mr. Rice's petition was filed almost a year after the trial transcript was filed with this court in his direct appeal, long past the 180-day time limit prescribed in R.C. 2953.21(A)(2). He did not allege that one of the two exceptions set forth in R.C. 2953.23(A) applies to excuse his delay. Therefore, we affirm the trial court's judgment.

{¶2} Substantive Facts and Procedural History

{¶3} Mr. Rice was indicted on two counts of murder, in violation of R.C. 2903.02(A) and R.C. 2903.02(B), respectively, for causing the death of his infant son. After a jury trial, he was found not guilty on the former but guilty of the latter count. The trial court sentenced him to an indefinite term of imprisonment of 15 years to life for his conviction. He filed a direct appeal, contending (1) the trial court committed prejudicial error in admitting the taped interviews containing the detectives' statements regarding what medical personnel had relayed to them as to his son's cause of death; (2) his trial counsel was ineffective for failing to file a motion in limine to exclude the statements of medical personnel as relayed by the police to him during an interview, and for failing to remove a juror for cause; and (3) the weight of the evidence does not support the jury's verdict. On April 9, 2010, this court affirmed his conviction, in *State v. Rice*, 11th Dist. No. 2009-A-0034, 2010-Ohio-1638. He subsequently filed a motion with the Supreme Court of Ohio for leave to file a delayed appeal, which was denied by the court, in *State v. Rice*, 126 Ohio St.3d 1580, 2010-Ohio-4542.

{¶4} In his petition for postconviction relief, Mr. Rice claimed his trial counsel had provided ineffective assistance, in that his trial counsel conducted an initial interview with a potential medical expert, Dr. Janice Ophoven, whose initial review raised some "serious concerns with the state's evidence," yet counsel failed to move the trial court for an order permitting the expert's retention at the state's expense.

{¶5} The trial court dismissed his petition as untimely. On appeal, he raises the following two errors for our review:

{¶6} "[1.] The trial court erred in dismissing the Petition for Postconviction relief as having been untimely.

{¶7} [“2.] The trial court erred in failing to find that defense counsel was ineffective.”

{¶8} Standard of Review

{¶9} We review a trial court’s decision on a petition for postconviction relief for abuse of discretion. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679; *State v. Hendrex*, 11th Dist. No. 2010-T-0103, 2011-Ohio-1588, ¶28. In *Gondor*, the Supreme Court of Ohio stressed that in postconviction cases, a trial court acts as a gatekeeper and reiterated its prior holding that “the trial court’s gatekeeping function in the postconviction process is entitled to deference.” *Id.* at ¶51 - 52.

{¶10} Time Limitation for Postconviction Relief

{¶11} R.C. 2953.21(A)(2) governs the time period for filing a postconviction petition:

{¶12} “(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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. 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.)

{¶13} R.C. 2953.23 provides:

{¶14} “(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:

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

{¶16} “(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.

{¶17} “(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.”

{¶18} “(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.”

{¶19} Prior to the amendments enacted by the legislature in 1995, R.C. 2953.21 provided no time limitation within which a motion for postconviction relief needed to be filed. Since the amendment, a trial court's discretion in granting postconviction relief has been limited by R.C. 2953.21. *In re Snyder*, 4th Dist. No. 01CA11, 2002-Ohio-6137, ¶15.

{¶20} Furthermore, the requirement that a petition for postconviction relief be filed timely is jurisdictional; unless the petition is filed timely, the court is not permitted to consider the substantive merits of the petition. *State v. Goist*, 11th Dist. No. 2002-T-0136, 2003-Ohio-3549, ¶7, citing *State v. Beaver* (1998), 131 Ohio App.3d 458, 461 (holding the trial court should have summarily dismissed appellant's untimely petition without addressing the merits).

{¶21} Tolling of the 180-day Time Limit

{¶22} In this case, the trial transcript was filed with this court on August 10, 2009. Mr. Rice's petition for postconviction relief was filed on July 20, 2010, almost a year after the trial transcript was filed, long past the 180-day statutory time limit. Mr. Rice attempted to circumvent the time bar by arguing that the 180-day clock did not begin to run until March 12, 2010, the date this court sua sponte supplemented the record with two CDs. These CDs, the state's exhibits C and E, which were played for the jury during his trial, are electronic copies of recorded interviews of Mr. Rice conducted by the detectives regarding the death of his son.¹

¹These CDs were not initially included as part of the record filed with this court, because, as the court reporter noted in the trial transcript, "[d]ue to the nature and extent of the State of Ohio's Exhibit[s] [C and E], [they] are being held in the possession of the Court Reporter, or appropriate law enforcement agency, until further order of the Court."

{¶23} Mr. Rice cites App.R. 9(A)² for his contention that a supplementation of the record tolls a defendant's time to file a postconviction relief petition. He cites no precedent for this proposition; instead, he attaches to his petition eight common pleas court judgment entries from various jurisdictions, in which the trial court granted a request for an extension of the 180-day deadline based on a supplementation of the appellate record.

{¶24} The trial court in Mr. Rice's case found these cases distinguishable, and we agree. Each of the judgment entries involved a capital case, and the courts considering the request for an extension of the 180-day time period invariably stressed the importance of a capital defendant's entitlement to a complete, unabridged transcript and record on appeal. More importantly, in each of the judgment entries cited, the capital defendant requested an extension of the 180-day deadline *prior* to its expiration, and, in six of the eight cases the parties stipulated to the extension of the deadline.

{¶25} Mr. Rice is not a capital defendant. More importantly, he never requested an extension of the 180-day deadline, either prior to or after its expiration; neither was an extension stipulated to by the parties. Thus, the judgment entries cited by Mr. Rice are not directly pertinent to the instant case.

² App.R. 9(A) provides, in part:

"The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs."

{¶26} Instead, the case law is well-established that the supplementation of the record is irrelevant for the purposes of the 180-day time limit for a postconviction relief petition.

{¶27} In *State v. Johnson*, 11th Dist. No. 99-T-0143, 2001 Ohio App. LEXIS 494, after the trial transcript was filed with this court in appellant's direct appeal, appellant supplemented the record with a hearing transcript. We determined that the supplementation of the record was irrelevant for the purposes of the 180-day time limitation, citing the plain language of R.C. 2953.21(A)(2). *Id.* at *5.

{¶28} Other appellate districts have reached the same conclusion regarding the date the time for a postconviction relief begins to run when the record is supplemented. In *State v. Dotson*, 2d Dist. No. 06-CA-45, 2007-Ohio-4078, appellant argued that because the appellate record was supplemented with a transcript of the grand jury testimony of one witness, the time to file his petition was extended. The Second District rejected this argument, holding appellant's failure to file within time specified in R.C. 2953.21 defeats the jurisdiction of the trial court to consider the petition, unless the untimeliness is excused under R.C. 2953.23.

{¶29} In *State v. Chavis-Tucker*, 10th Dist. No. 05AP-974, 2006-Ohio-3105, appellant claimed the 180-day time period to file his petition for postconviction relief began from the filing of two supplemental transcripts of pretrial hearings, and therefore his petition was timely. The Tenth District rejected this argument, holding the controlling date is the date the trial transcript was filed, and therefore appellant's petition was untimely. *Id.* ¶7-9.

{¶30} In *State v. Carter*, 7th Dist. Nos. 07-JE-32 and 07-JE-33, 2008-Ohio-6594, appellants supplemented the record with a transcript of an audiotape that was played

for the jury and admitted as an exhibit. They argued the trial transcript was not completely filed until a transcript of this audiotape exhibit was filed, and the delay extended the time for filing their postconviction petition. The majority of the panel rejected this claim.

{¶31} In a recent decision, *State v. Everett*, Slip Opinion No. 2011-Ohio-2856, the Supreme Court of Ohio likewise strictly interpreted R.C. 2953.21(A)(2). The issue in that case was what constituted a “trial transcript” for purposes of the time limitation for filing a petition for postconviction relief pursuant to R.C. 2935.21(A)(2) -- whether it was the videotapes of the trial and the suppression hearing, or the written transcripts of these proceedings. The court held that “in cases in which a videotape recording of the proceedings and a written form of the trial court proceedings is certified by a reporter, only the certified, written transcript of the trial court proceedings constitutes a ‘transcript’ under App.R. 9 for purposes of calculating the 180-day period in which an appellant may timely file a petition for postconviction relief in accordance with R.C. 2953.21.” *Id.* at ¶9.

{¶32} Mr. Rice cites *Snyder*, *supra*, to support his claim. In *Snyder*, because of the failure of the recording device and the resulting lack of a transcript, an App. R. 9(C) statement was filed in lieu of a transcript. The Fourth District concluded the date it granted appellant’s motion to supplement the record with the App.R. 9(C) statement was the triggering date. The instant case does not involve an App.R. 9(C) statement in lieu of a transcript, and therefore, *Snyder* is inapplicable.

{¶33} Exceptions Under R.C. 2953.23(A)

{¶34} As the trial court found, Mr. Rice did not allege, let alone establish, either of the exceptions under R.C. 2953.23 which would rescue his untimely petition. He did

not allege he was unavoidably prevented from discovering the facts upon which he relies in his petition, or that his claim was based on a new federal or state right recognized by the United States Supreme Court that could be retroactively applied to his case. There is also no allegation a DNA test establishes his innocence. Mr. Rice did not offer any reason for the delay in filing his petition for postconviction relief, and the record does not reflect any circumstances which prevented him from bringing his claims within the 180 eighty day time limitation in R.C. 2953.21(A)(2).

{¶35} Mr. Rice had to file his postconviction petition no later than 180 days after August 10, 2009, the date the trial transcript was filed in his direct appeal to this court. He did not file his petition until July 20, 2011, almost a year after the filing of the trial transcript. He failed to establish the applicability of one of the two exceptions under R.C. 2953.23, which would allow the trial court to consider his untimely petition. Therefore, the trial court lacked jurisdiction to entertain his untimely petition, and thus properly dismissed the petition. The first assignment of error is without merit and the second assignment of error is therefore rendered moot.

{¶36} Judgment of the Ashtabula County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.