

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-T-0027
OSBY CORTEZ SCOTT,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 02 CR 234.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Osby Cortez Scott, pro se, PID# A442-679, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Osby Cortez Scott, appeals the February 18, 2011 Judgment Entry of the Trumbull County Court of Common Pleas, denying his Application for Post-Conviction Relief, Motion for Inspection of Grand Jury Minutes, and Motion for an Evidentiary Hearing. Scott's petition for postconviction relief, filed over seven years after his conviction, was not timely pursuant to R.C. 2953.21(A)(2) and fails to demonstrate that he is otherwise entitled to substantive relief. Accordingly, we affirm the decision of the court below.

{¶2} On April 15, 2002, the Trumbull County Grand Jury indicted Scott on the following charges: Aggravated Burglary, a felony of the first degree in violation of R.C. 2911.11(A)(1) and (B); Robbery, a felony of the second degree in violation of R.C. 2911.02(A)(2) and (B); Kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(2) and (C); Grand Theft of a Motor Vehicle, a felony of the fourth degree in violation of R.C. 2913.02(A)(1) and (B)(1) and (5); Failure to Comply with Order or Signal of Police Officer, a felony of the third degree in violation of R.C. 2921.331(B) and (C)(1) and (5)(a)(ii); and Burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1) and (C).

{¶3} On February 10, 2003, Scott entered a plea of guilty to Aggravated Burglary, Failure to Comply, and Burglary. At the change of plea hearing, the State presented the following proffer as to what it would have proven at trial:

{¶4} [T]he State would have shown that as to [Aggravated Burglary] on April 9, 2002, *** this Defendant did by force, enter the home of one Pauline Dziama, age 82, located at 734 Willard Southeast, here in the City of Warren, Trumbull County, Ohio, with the purpose to commit a theft offense inside the structure, and that the Defendant did inflict physical harm on Mrs. Dziama, specifically abrasions to her wrist and forehead. Inside the house, the Defendant stole from Mrs. Dziama, among other things, some cash and her car keys.

{¶5} As to [Failure to Comply], the State would have shown that on April 9, 2002, immediately subsequent to the aggravated burglary at Mrs. Dziama's house, this Defendant committed the offense of failure to comply with the order or signal of a police officer, specifically this Defendant fled from Officer Hosokawa, and led Officer Hosokawa and other officers on a pursuit through the southeast side of Warren after receiving a visible and audible signal from Officer Hosokawa, specifically lights and siren, for this Defendant to bring his motor vehicle to a stop. The speed and reckless nature, with which this Defendant led that pursuit, caused a substantial risk of serious physical harm to persons or property, in fact this Defendant crashed the car he was driving into a garage on the southeast side of Warren causing extensive damage to that garage.

{¶6} As to [Burglary], the State would have shown that on April 9, 2002, this Defendant by force broke into a basement window of the Browning residence located at 964 Columbia Place here in the City of Warren, *** when the Browning[s] were present, with purpose to commit in the structure any criminal offense, and he broke into that [structure] to escape detection by the police.

{¶7} The State would have offered into evidence, photographs of Mrs. Dziama, photographs of the crime scene at 734 Willard, photographs of the damage to the garage located at 964 Columbia Place, and would have offered into evidence, the testimony of officers from Warren City Police Department ***, as well as the testimony of Mike Bakos, Pauline Dziama, Raymond Browning, others from the area of Columbia Place ***, as well as other detectives, from the Warren City Police Department. And that would comprise the facts as to the State's case.

{¶8} On February 12, 2003, the trial court issued its written Entry on Sentence, ordering Scott to serve a prison term of six years for Aggravated Burglary, two years for Failure to Comply, and four years for Burglary. The court ordered all sentences to be served consecutively, for an aggregate prison sentence of twelve years.

{¶9} On February 14, 2003, the trial court entered an order of nolle prosequi on the remaining counts of the Indictment.

{¶10} Scott appealed the trial court's acceptance of the guilty plea, arguing that the court failed to determine if he understood the effect of the plea.

{¶11} On February 18, 2005, this court affirmed the validity of Scott's plea. *State v. Scott*, 11th Dist. No. 2003-T-0172, 2005-Ohio-689.

{¶12} On December 31, 2009, Scott filed a Common Law Motion to Vacate or Set Aside Void Judgment, on that grounds that his indictment for Robbery failed to contain a mens rea element.

{¶13} On February 18, 2010, the trial court denied Scott's Common Law Motion to Vacate. This court affirmed that decision on appeal. *State v. Scott*, 11th Dist. No. 2009-T-0088, 2010-Ohio-4977.

{¶14} On January 4, 2011, Scott filed an Application for Post-Conviction Relief. In the Application, Scott asserts his actual innocence. As grounds for relief, Scott maintains that trial counsel was constitutionally ineffective for, inter alia, failing to conduct pretrial discovery, to challenge the defective Indictment, to retain an expert in eyewitness identification to discredit the State's witness (Mrs. Dziama), and to raise the argument that racial discrimination was a factor in his Indictment. As cause for the delay in filing the petition, Scott claimed he is "incarcerated at a private prison where access to legal material is limited," and was "unable to retain legal assistance because of poverty."

{¶15} Scott also filed a Motion for Inspection of Grand Jury Minutes, based on his belief that minorities were systematically excluded from the Grand Jury, and a Motion for an Evidentiary Hearing, on the grounds that his constitutional claims cannot be determined without recourse to matters outside of the record.

{¶16} On February 18, 2011, the trial court issued a Judgment Entry denying Scott's Motions. The court found that Scott's petition was untimely and that he failed to demonstrate substantive grounds for relief.

{¶17} On March 3, 2011, Scott filed his Notice of Appeal. On appeal, Scott raises the following assignments of error:

{¶18} "[1.] The trial court committed reversible error, by denying petitioner-appellant's petition for post-conviction relief without conducting an evidentiary hearing, as mandated by R.C. 2953.21, and in violation of the 6th, and 14th [Amendments to the] U.S. Constitution and Article 1, of the Ohio Constitution."

{¶19} "[2.] The trial court erred in denying appellant's claims of ineffective assistance of counsel. (Petitioner's first, second, third, and fourth claims for relief.) The

failure by counsel to obtain necessary experts and conduct pre-trial investigation violated appellant's rights as guaranteed by the 5th, 6th, and 14th amendment[s] to the United States Constitution and Article 1, Section[s] 1, 2, 9, 10, 16, and 20 of the Ohio Constitution."

{¶20} "[3.] Appellant was denied due process of law when the court did not grant [his] request for disclosure of grand jury transcript for appellant's claim of intentional racial discrimination in the composition of the grand jury."

{¶21} We will first consider the trial court's finding that Scott's petition was untimely. While Scott's assignments of error address the merits of his petition, the requirement that a petition for postconviction relief be timely filed has been considered a "jurisdictional" prerequisite to a consideration of the merits. *State v. Rice*, 11th Dist. No. 2010-A-0046, 2011-Ohio-3746, at ¶20 ("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, at ¶7, citing *State v. Beaver* (1998), 131 Ohio App.3d 458, 461 (holding that the trial court should have summarily dismissed the untimely petition without addressing the merits).

{¶22} A petition for postconviction relief "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." R.C. 2953.21(A)(2). "[A] court may not entertain a petition filed after the expiration of the period prescribed *** unless ***: (1) *** 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, *** the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation," or "(2) [t]he petitioner

was convicted of a felony, the petitioner is an offender for whom DNA testing was performed ***, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense ***.” R.C. 2953.23(A).

{¶23} In the present case, the trial transcript of Scott’s direct appeal was filed on March 22, 2004. Thus, Scott’s petition was due on September 18, 2004. Scott’s January 4, 2011 Application for Post-Conviction Relief is untimely by over six years.

{¶24} In the petition for postconviction relief, Scott asserted “that the claim of ineffective assistance of counsel was not discovered within 120 days [sic], and at the time of discovery, Petitioner is incarcerated at a private prison where access to legal material is limited, and individual training in the law to assist the Petitioner and others with legal trouble. Petitioner is unable to retain legal assistance because of poverty. Had these problems not emerged, Petitioner would have filed his petition in accordance with the requirement set forth in R.C. 2953.21.”

{¶25} Scott’s assertions fail to satisfy either of the conditions that would permit the trial court to consider his untimely petition. Scott does not specifically identify any “fact” that he was unavoidably prevented from discovering during the previous six years. Nor does Scott explain how limited access to legal material, individual training, and/or poverty has hindered him from filing the present petition. Particularly in light of Scott’s three prior appeals, in one of which he was represented by counsel, he has failed to justify the untimely filing of this petition. Accordingly, it was properly denied by the trial court.

{¶26} Scott’s assignments of error are without merit.

{¶27} Scott has filed a document captioned, “Judicial Notice,” in which he asks this court to permit him access to the transcript of his suppression hearing, which has

not yet been transcribed, and to file a supplemental brief. Scott has failed to demonstrate that he is entitled to the transcript of his suppression hearing. “[A] defendant who *** voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶78, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267. This waiver includes claims of ineffective assistance of counsel related to the conduct of a suppression hearing. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, at ¶104.

{¶28} In the present case, Scott entered a guilty plea to the charges and the validity of this plea has been affirmed on appeal. The request contained in Scott’s Judicial Notice is hereby denied.

{¶29} For the foregoing reasons, the February 18, 2011 Judgment Entry of the Trumbull County Court of Common Pleas, denying Scott’s Application for Post-Conviction Relief, Motion for Inspection of Grand Jury Minutes, and Motion for an Evidentiary Hearing, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.