[Cite as *State v. Miller,* 2012-Ohio-4895.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-T-0007**
- vs -	:	
WILLIAM R. MILLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CR 148.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

William R. Miller, pro se, PID: A580970, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, William R. Miller, appeals from the judgment of the Trumbull County Court of Common Pleas denying his motion for postconviction relief. Based on the following, we affirm.

{¶2} On November 24, 2010, in *State v Miller*, 11th Dist. No. 2010-T-0018, 2010-Ohio-5795, this court affirmed the jury's guilty verdict of rape and kidnapping,

each carrying a repeat violent offender specification. Appellant was sentenced to a 30-year term of imprisonment.

{¶3} On September 8, 2011, appellant, acting pro se, filed a "motion to set aside or vacate judgment of conviction or sentence pursuant to R.C. 2953.21 based upon ineffective assistance of trial counsel." Appellant then filed a September 23, 2011 "supplemental brief for motion for post conviction relief." In his supplemental brief, appellant stated that his petition was not time-barred because, under R.C. 2953.23(A)(1)(a), he "did not know of his attorney's involvement" with the Mahoning County Bar Association and the Ohio Supreme Court Disciplinary Counsel.

{¶4} In an October 21, 2011 judgment entry, the trial court found that it was without jurisdiction to entertain appellant's petition. The trial court found the petition was "well outside of the limitation period" of R.C. 2953.21(A)(2), and appellant failed to establish the requirements of R.C. 2953.23(A)(1)(a) and (b) to allow an appeal outside of the 180-day limitation.

{¶5} Appellant now appeals this judgment and asserts the following assignments of error:

> **{¶6}** [1.] Defendant-Appellant William R. Miller's right to effective assistance of counsel guaranteed under Article I, Sections 10 and 16 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to make the adversarial process work during pretrial and trial stages of his case.

{¶7} [2.] The trial court abused its discretion when it dismissed Miller's motion to set aside or vacate judgment of conviction [of] sentence without conducting an evidentiary hearing.

{¶8} For ease of discussion, we first address appellant's second assigned error.

{¶9} Initially, we note that a postconviction proceeding is a collateral civil attack on a criminal judgment. *State v. Dudley*, 2d Dist. No. 23613, 2010-Ohio-4152, ¶30, citing *State v. Steffen*, 70 Ohio St.3d 399, 410. It is not, therefore, an appeal of a criminal conviction. *Id*. Consequently, postconviction relief is not a constitutional right, but instead is afforded to a convicted defendant as a statutory remedy. *Id*., citing *State v. Moore*, 99 Ohio App.3d 748, 751 (1st Dist.1994).

{¶10} 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, ¶12.

{¶11} R.C. 2953.23 provides, in part:

{¶12} (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:

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

{¶14} (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.

{¶15} (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.

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

{¶17} The transcripts were filed with this court in appellant's direct appeal in March 2010. The appeal was dismissed for failure to prosecute. The record was then re-filed with this court in April 2010, and the appeal was reinstated. Appellant, however, did not file his petition for postconviction relief until September 2011. 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).

{¶18} Appellant does not contend that the United States Supreme Court has recently recognized a new constitutional right that applies to his case. Thus, appellant must initially demonstrate that he was "unavoidably prevented" from discovering the facts necessary to timely submit his petition for postconviction relief. R.C. 2953.23(A)(1)(a).

{¶19} The crux of appellant's argument to the trial court was that he was denied the effective assistance of counsel due to trial counsel's failure to properly investigate his case. Appellant argued, inter alia, that his defense counsel failed to investigate the "alleged crime scene"; failed to speak to any witnesses at the bar; and failed to challenge the credibility and veracity of the prosecution's key witnesses. Further, in his supplemental motion, appellant noted his trial counsel failed to advise him that he was being "investigated by the Ohio Supreme Court's Disciplinary Counsel and the Mahoning County Bar Association." Appellant attached correspondence from the Mahoning County Bar Association to his motion which stated that his trial counsel was indefinitely suspended from the practice of law in February 2010.

{¶20} Appellant, however, has not demonstrated the existence of qualifying facts that he was "unavoidably prevented" from discovering. Accordingly, he has failed to meet the initial prong of R.C. 2953.23(A). *See*, *e.g.*, *State v. Brooks*, 9th Dist. No. 03CA008292, 2004-Ohio-194, ¶12.

{¶21} Additionally, under R.C. 2953.23(A)(1)(b), appellant was required to demonstrate by clear and convincing evidence that the jury would not have found him guilty of the offenses. Appellant did not provide any evidence to meet this burden.

{¶22} Accordingly, the trial court did not have jurisdiction to hear appellant's untimely petition for postconviction relief. Appellant's second assignment of error is without merit.

{¶23} In his first assignment of error, appellant maintains he was denied effective assistance of trial counsel. As previously recognized, appellant filed a direct appeal from the jury verdict. As appellant could have raised an ineffective assistance of counsel claim on direct appeal, this argument is barred by res judicata. *See State v. Pound*, 2d Dist. Nos. 24789 & 24980, 2012-Ohio-3392, ¶8 (Cannon, J., sitting by assignment) (recognizing that res judicata applies in petitions for postconviction relief). Appellant's first assignment of error is without merit.

{¶24} Based on the opinion of this court, the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.