

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2005-07-199
	:	
- VS -	:	<u>OPINION</u>
	:	6/19/2006
	:	
MITCHELL SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR99-11-1403

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Mitchell Smith, #384-372, Warren Correctional Institution, 5787 State Route 63, P.O. Box 120, Lebanon, Ohio 45036, defendant-appellant, pro se

WALSH, J.

{¶1} Defendant-appellant, Mitchell Smith, appeals the trial court's denial of his motion to correct his sentence.

{¶2} In 1999, appellant pled guilty to two third-degree felony counts of sexual battery. On December 17, 1999, the trial court sentenced appellant to consecutive terms of 18 months on each count and ordered those sentences to be served consecutive to a 17-month sentence imposed in another case. No direct appeal was ever taken from appellant's

convictions and sentences.

{¶3} Five and one-half years later, appellant filed a "Motion to Correct a Void Sentence Order" in which he claimed he was entitled to a minimum prison term because his constitutional right to a trial by jury had been violated.

{¶4} The trial court construed appellant's motion as a petition for postconviction relief and dismissed it on grounds that it was untimely under R.C. 2951.21(A), and that appellant did not satisfy the requirements for an untimely petition under R.C. 2953.23.

{¶5} On appeal, appellant presents a single assignment of error which claims the trial court erred by dismissing appellant's motion and by not amending appellant's sentence to impose a minimum term. Appellant claims that because he has not previously served a prison term, his Sixth Amendment right to a jury trial was violated under the United States Supreme Court decision of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531.

{¶6} The Ohio Supreme Court has held that "[w]here a criminal defendant subsequent to his or her direct appeal files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, syllabus. Since appellant's motion sought to modify his sentence based upon an alleged violation of his constitutional rights, his motion can only be properly construed as a petition for postconviction relief. See *State v. Abbott*, Warren App. No. CA2005-07-086, 2006-Ohio-2398, ¶12.

{¶7} The decision to grant or deny a petition for postconviction relief is committed to the discretion of the trial court. *State v. Watson* (1998), 126 Ohio App.3d 316, 324. Accordingly, the trial court's decision regarding a petition for postconviction relief will not be disturbed absent an abuse of discretion. *State v. Kruse*, Warren App. No. CA2005-10-112 and 113, 2006-Ohio-2510, ¶5.

{¶8} "Except as otherwise provided in section 2953.23 * * *, a [postconviction relief] petition * * * 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 * * *, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal." R.C. 2953.21(A)(2).

{¶9} Appellant did not directly appeal his convictions. The time for filing a notice of appeal expired on January 16, 2000. See App.R. 4(A). Consequently, the 180-day time period for filing a postconviction relief petition ended on July 14, 2000. However, appellant did not file his petition until June 21, 2005, nearly five years later.

{¶10} Although appellant did not file his petition within the statutory time period, an exception for untimely filings is codified in R.C. 2953.23(A)(1) which provides as follows:

{¶11} "[A] court may not entertain a petition filed after the expiration of the period described in * * * [R.C. 2953.21](A) * * * unless * * * [b]oth 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 described in * * * [R.C.] 2953.21[(A)(2)] * * *, 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 that by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted* * * *." (Emphasis added.)

{¶14} Appellant did not meet the requirements of R.C. 2953.23(A)(1)(b). Appellant's arguments in his petition only addressed sentencing issues, and did not address any issue related to his guilt. As this court has stated: "[t]he plain language of R.C. 2953.23(A)(1)(b)

extends only to trial error and does not extend to sentencing errors, except those occurring within the capital punishment context." *State v. Schroyer*, Clermont App. No. CA2005-05-032, 2006-Ohio-1782, ¶23, quoting *State v. Barkley*, Summit App. No. 22351, 2005-Ohio-1268, ¶11. See, also, *Kruse*, 2006-Ohio-2510, ¶12; and *State v. Moore*, Clermont App. No. CA2005-07-071, 2006-Ohio-1897, ¶13.

{¶15} Since appellant's sole assignment of error relates to sentencing and not to guilt, we overrule his assignment of error. The common pleas court did not abuse its discretion in denying appellant's postconviction relief petition. Appellant neither filed his petition within the 180-day time period of R.C. 2953.21(A)(2), nor satisfied the exception of R.C. 2953.23(A)(1). Consequently, the court was without jurisdiction to consider appellant's petition. See *Kruse* at ¶13; *Schroyer* at ¶15.

{¶16} Judgment affirmed

POWELL, P.J., and YOUNG, J., concur.

[Cite as *State v. Smith*, 2006-Ohio-3088.]