

WELBAUM, J.

{¶ 1} Defendant-appellant, Michael Moore, appeals from a decision of the Clark County Court of Common Pleas denying his petition for post-conviction relief alleging ineffective assistance of trial counsel. For the reasons outlined below, the judgment of the trial court will be affirmed.

{¶ 2} On May 2, 2007, a jury found Moore guilty of one count of murder and one count of felony murder, both with firearm specifications, as well as one count of having a weapon while under disability. His conviction stemmed from the November 18, 2006 shooting death of Charles Humphrey outside the Game Day bar in Springfield, Ohio. At sentencing, the trial court merged the murder offenses and imposed a prison term of three years for the firearm specification to be served prior and consecutively to a prison term of 15 years to life for murder. Moore was also sentenced to a consecutive five-year prison term for having a weapon while under disability.

{¶ 3} On May 8, 2007, Moore appealed from his conviction on grounds that the guilty verdicts were against the manifest weight of the evidence. In *State v. Moore*, 2d Dist. Clark No. 2007 CA 40, 2008-Ohio-2577, we affirmed his conviction. Specifically, we concluded that the evidence did not weigh heavily against Moore's conviction despite there being some question as to the witnesses' motives and honesty, as we found the jury was in the best position to determine who was credible. *Id.* at ¶ 11. In so holding, we stated the following regarding the evidence presented at trial:

It was undisputed that Moore, Moore's girlfriend Tamika Owens, Humphrey, and several of their acquaintances, including Omari Kittrell and Anaje Muta Ali, had been inside the Game Day bar shortly before the

shooting. The men knew one another from time spent together in prison. Moore had been to several bars with Owens, Ali, and Kittrell before arriving at Game Day, and he was driving a silver Cadillac. A surveillance video from the Game Day bar showed Moore placing a gun in his waistband before he entered the bar, and several witnesses testified to seeing him with a gun at various points during the evening.

The witnesses' accounts of the events leading to the shooting were somewhat inconsistent. However, it is clear that Humphrey arrived at Game Day before Moore did. Moore, Owens, Kittrell, and Ali arrived at the bar as it was about to close, near 3:00 a.m. They entered the bar, and one or more verbal exchanges erupted among those present. According to some witnesses, Moore became upset because Humphrey touched Owens inappropriately. According to others, Humphrey made a comment related to Moore's sexual orientation, suggesting that he had engaged in homosexual activity while in prison. In any event, Moore was of the view that he had been "disrespected." He was also briefly separated from Owens in the crowd, which he did not like, and some witnesses testified that angry words were exchanged between Moore and Owens. According to Owens, Moore took her out the back door of the bar, pinned her against the building, and pressed a hard object against the side of her face, leaving a bruise. A Game Day employee testified that Moore had choked and threatened Owens with a gun outside the bar while talking about disrespect. Owens then started walking away from the bar without Moore and called a

relative to pick her up.

Humphrey left the bar around that same time as Moore because the bar was closing. Surveillance tapes from the bar and from a nearby Ohio Edison facility established that Humphrey was shot less than a minute after leaving the bar. Moore's friends, Kittrell and Ali, testified that they saw Moore shoot Humphrey once at close range, "face to face." Kittrell and Moore then fled in Moore's silver Cadillac. The first police officers who responded to the scene saw the silver Cadillac pulling away. Kittrell claimed that he did not want to flee with Moore, but that he did so out of fear because Moore still had the gun. He further testified that they had driven to northern Kentucky and that Moore had thrown the gun out of the car, perhaps over the Ohio River. Ali claimed that he had fled the scene by paying a stranger to take him to his truck in a different part of town. Although Moore attempted to pick up Owens moments after the shooting, she refused to go with him. According to Owens, Moore called her the following morning and asked her to tell the police that he had been with her the previous night.

Moore's version of events, as testified to at trial, was that Owens became enraged at him over his friendliness toward some of his female cousins at the Game Day bar. He claimed that she stormed off after a confrontation in the back room of the bar, and he attempted to follow her in his car to talk with her. As he was following her, Kittrell showed up and jumped in the car. Moore then left with Kittrell and drove to Cincinnati.

* * *

The evidence in this case does not weigh heavily against Moore's conviction. Although Moore's testimony casts suspicion on Kittrell and many of the witnesses (including Moore) have criminal pasts which might cause one to question their credibility, the majority of the evidence pointed toward Moore as Humphrey's shooter.

Moore, 2d Dist. Clark No. 2007 CA 40, 2008-Ohio-2577 at ¶ 6-11.

{¶ 4} Almost six years after we affirmed Moore's conviction, on March 25, 2014, Moore filed a petition for post-conviction relief alleging ineffective assistance of trial counsel. In the petition, Moore claimed that his counsel was aware that the police had allegedly threatened to send Tamika Owens to jail if she did not testify against him and that his counsel was ineffective in failing to investigate the matter. Moore also contended that his counsel was ineffective in failing to pursue information from Owens and a bar patron named Shane Ramey that he claims would have challenged the credibility of Omari Kittrell's trial testimony.

{¶ 5} The evidentiary documents submitted in support of Moore's petition included six sworn affidavits made by Moore; Moore's mother, Pamela Brown; Moore's step-father, Michael Brown; Moore's friend, Keenan Brown; Moore's girlfriend, Tamika Owens; and Shane Ramey. After reviewing Moore's petition and supporting affidavits, the trial court denied the petition on grounds that it did not satisfy the requirements for filing late petitions in R.C. 2953.23(A). The trial court did not hold an evidentiary hearing prior to making that decision.

{¶ 6} Moore now appeals from the trial court's decision denying his petition for

post-conviction relief, raising one assignment of error for review. His sole assignment of error is as follows:

THE TRIAL COURT ERRED IN FAILING TO ORDER A HEARING ON APPELLANT'S PETITION FOR POST[-]CONVICTION RELIEF.

{¶ 7} Under his single assignment of error, Moore contends that the trial court erred when it dismissed his petition for post-conviction relief without holding an evidentiary hearing. While stated differently in his brief, Moore essentially claims that an evidentiary hearing was necessary for the trial court to determine whether he met the requirements set forth in R.C. 2953.23(A), as he claims the court needed to determine when and how Moore discovered the facts upon which his ineffective assistance of counsel claim is based.

{¶ 8} An appellate court reviews a trial court's denial of a petition for post-conviction relief under an abuse-of-discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. " 'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable.' " (Citation omitted.) *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 9} " 'A post[-]conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.' " *Gondor* at ¶ 48, quoting *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). "For this reason, a defendant's petition for post-conviction relief is not a constitutional right; the only rights afforded to a defendant in post-conviction proceedings are those specifically granted by the legislature." *State v. Palmer*, 2d Dist. Montgomery No. 26279, 2014-Ohio-5266, ¶ 10,

citing *Steffen* at 410 and *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999).

{¶ 10} “Petitions for post-conviction relief are governed by R.C. 2953.21 through R.C. 2953.23. Under these statutes, any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to vacate or set aside the judgment and sentence.” *State v. Johnson*, 2d Dist. Montgomery No. 24775, 2012-Ohio-2542, ¶ 10, citing R.C. 2953.21(A).

{¶ 11} A petition for post-conviction relief must 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 does not have jurisdiction to entertain a late petition unless otherwise provided in R.C. 2953.23(A). That statute states, in pertinent part, that:

(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:

(1) Both of the following apply:

(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.

(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.

(Emphasis added.) R.C. 2953.23(A)(1)(a)-(b).

{¶ 12} “When a trial court lacks jurisdiction to consider an untimely petition, it is not necessary for the court to hold an evidentiary hearing on that petition.” *Johnson* at ¶ 18, citing *State v. Foster*, 10th Dist. Franklin No. 09AP-227, 2009-Ohio-5202, ¶ 8. Even when the court has jurisdiction, the post-conviction relief statutes do “not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required.” *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). Rather, in addressing a petition for post-conviction relief, a trial court plays a gatekeeping role as to whether a defendant will receive a hearing. *Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77 at ¶ 51. A trial court may dismiss a petition for post-conviction relief without a hearing “ ‘where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.’ ” *Id.* at ¶ 51, quoting *Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 at paragraph two of the

syllabus.

{¶ 13} “ [I]n a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness.’ ” *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983), quoting *Jackson* at syllabus. This is because a claim of ineffective assistance requires a defendant to demonstrate that counsel’s performance was deficient and fell below an objective standard of reasonable representation, and that the defendant was prejudiced by counsel’s performance; that is, there is a reasonable probability that but for counsel’s unprofessional errors, the result of the defendant’s trial or proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶ 14} “[A] trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact.” *Calhoun* at paragraph one of the syllabus. “The trial court may, under appropriate circumstances in post[-]conviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant.” *Id.* at 284.

{¶ 15} In the present case, the transcript of the trial proceedings was filed in Moore’s direct appeal on July 18, 2007. Moore filed his petition for post-conviction relief over six years later on March 25, 2014; accordingly, Moore’s petition was clearly untimely. As a result, Moore was required to satisfy the initial requirements set forth in R.C.

2953.23(A)(1)—that Moore had been unavoidably prevented from discovering the facts underlying his ineffective assistance claim, or that his claim was based upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court.

{¶ 16} After reviewing Moore’s petition and supporting affidavits, we find that he failed to demonstrate that he was unavoidably prevented from discovering the facts underlying his ineffective assistance of counsel claim. Moore states in his petition that he just recently learned that Omari Kittrell had admitted to testifying falsely at his trial; however, this information is not the basis of his ineffective assistance claim. Rather, Moore’s ineffective assistance claim is based on his counsel’s alleged failure to investigate police threats to Tamika Owens and the failure to pursue information from Owens and Shane Ramey that would have allegedly challenged Kittrell’s credibility at trial. Even if his counsel knew of the matters alleged in Moore’s petition, but did not pursue them, Moore knew at the time of trial that the information in question had not been elicited at trial; therefore, he was not unavoidably prevented from discovering counsel’s alleged failures.

{¶ 17} Moore’s petition and affidavits do not otherwise contain any credible evidence accounting for the six-year delay in filing his petition. In addition, Moore makes no claim that the Supreme Court has recognized a new right that applies to him. Thus, he has not met the first requirement in R.C. 2953.23(A)(1)(a). Moore also did not even attempt to demonstrate the second requirement in section (b), as he did not show by clear and convincing evidence that but for counsel’s alleged ineffective assistance, no reasonable fact finder would have found him guilty.

{¶ 18} We also note that Moore’s ineffective assistance claim is nothing more than an assault on his counsel’s defense strategy and we will not second-guess the trial strategy decisions of defense counsel. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 156, citing *State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998). Furthermore, the affidavits Moore filed in support of his claim fail to demonstrate that his counsel was deficient and also lack credibility given the affiants’ relationship to Moore and the inclusion of hearsay statements. See *Calhoun*, 86 Ohio St.3d at 285, 714 N.E.2d 905 (finding that the inclusion of hearsay statements and whether the affiants are relatives of the defendant or otherwise interested in the success of the defendant’s petition are some of the factors to be considered when evaluating the credibility of affidavits in post-conviction proceedings).

{¶ 19} Because Moore’s untimely petition does not meet the requirements in R.C. 2953.23(A)(1), the trial court did not have jurisdiction to entertain Moore’s petition and was not required to hold an evidentiary hearing. Moreover, even if the trial court had jurisdiction, an evidentiary hearing would not have been warranted because the affidavits submitted with Moore’s petition lack credibility and do not set forth sufficient operative facts establishing that his counsel provided representation that fell below an objective standard of reasonableness.

{¶ 20} For the foregoing reasons, Moore’s sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

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