

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**STATE OF OHIO**

**CASE NO. 1-01-04**

**PLAINTIFF-APPELLEE**

**v.**

**KIRK ALAN KOENIG**

**OPINION**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas  
Court.**

**JUDGMENT: Judgment Affirmed.**

**DATE OF JUDGMENT ENTRY: May 2, 2001**

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**ATTORNEYS:**

**KIRK ALAN KOENIG  
Inpropria Persona  
Inmate Number A-317-731  
Allen Correctional Institute  
P. O. Box 4501  
Lima, Ohio 45802-4501  
For Appellant**

**JANA E. GUTMAN  
Assistant Prosecuting Attorney  
Reg. #0059550  
204 North Main Street, Suite 302  
Lima, Ohio 45801  
For Appellee**

**Bryant, J.** This appeal is taken by Defendant-Appellant, Kirk Koenig from the judgment of the Court of Common Pleas of Allen County denying his petition for post-conviction relief without a hearing.

On July 13, 1995, Koenig was indicted on one count of attempted murder and one count of felonious assault. Both counts of the indictment contained firearm specifications. On August 28, 1995 a jury trial commenced and Koenig was found guilty of all charges contained in the indictment. Koenig was sentenced to an indefinite term of ten (10) to twenty-five (25) years in prison plus an additional consecutive three-year term for the firearm specification.

Koenig immediately filed a direct appeal and on June 20, 1996, this court affirmed Koenig's conviction and sentence. On November 20, 2000, Koenig filed a petition for post-conviction relief. On November 28, 2000, the state filed its answer and motion to dismiss. In its judgment entry dated December 14, 2000, the trial court granted the state's motion to dismiss.

On appeal from that judgment entry Koenig presents the following four assignments of error:

- 1. The trial judge abused his judicial discretion and erred as a matter of law when not applying Ohio Rev. Code §2953.23(A)(1)(a)& (2) to the delayed petition for post-conviction relief because Appellant met the criteria and the trial judges failure to apply the law violated Appellant's right of Due Process and Equal Protection of Law contrary to the U.S. Constitution Amendments 5 and 14.**

- 2. The trial judge abused judicial discretion and erred as a matter of law when not conducting an evidentiary hearing pursuant to Ohio Rev. Code §2953.22, and not allowing expert medical testimony as it pertained to a later found exculpatory medical report dehors the record, resulting in Appellant's prejudice to further establish he was denied the effective assistance of counsel at trial and that the prosecution engaged in misconduct, which, would further establish Appellant was denied his right to the lesser charge of aggravated assault at trial in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution.**
- 3. The trial judge abused judicial discretion and erred as a matter of law when not conducting an evidentiary hearing pursuant to Ohio Rev. Code § 2953.22, and by not compelling an exculpatory ballistic report, including, the ballistic experts into court to testify at such a hearing pursuant to *State v. Wiles* (1998), 126 Ohio App. 3d 71, to establish that the firearm in subject did not fire correctly and was exculpatory as to Appellant's intent, and would have further assisted in Appellant's claims of ineffective assistance of trial counsel resulting in prejudice to Appellant's defense of the lesser charge of aggravated assault in violation of Amendments 5, 6, and 14 of the United States Constitution.**
- 4. The trial judge abused judicial discretion and erred as a matter of law when not ordering an evidentiary hearing pursuant to Ohio Rev. Code §2953.22 notwithstanding the earlier arguments of not compelling medical experts into court to testify as to the proper interpretation of an exculpatory medical report dehors the record, which would have further established Appellant's claims of prosecutorial misconduct, by suborning perjury and making false statements during closing arguments which, prejudiced the Appellant's overall defense of the lesser charge of aggravated assault in violation of Amendments 5 and 14 of the United States Constitution.**

For purposes of convenience and clarity, all of Koenig's assignments of errors will be addressed together. In each assignment of error Koenig claims that

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the trial court abused its discretion by failing to grant an evidentiary hearing and further, by failing to grant post-conviction relief. Koenig presents several arguments in support of this claim. Each of Koenig's arguments is wholly without merit and for the reason that follow we affirm the decision of the Court of Common Pleas of Allen County.

When filing a petition for post-conviction relief R.C. 2953.21 requires:

**(A)(2) A petition [for post conviction 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.**

The transcript herein was filed in the court of appeals in December 1995 after several extensions had been granted. Thus, Koenig's petition for post-conviction relief was required to be filed by the end of June 1996 at the latest. However, Koenig's petition was filed nearly four years later on November 20, 2000. Therefore the Court of Common Pleas correctly dismissed the petition as untimely.

For the reasons stated it is the order of this Court that the judgment of the Court of Common Pleas of Allen County be, and hereby is, affirmed.

***Judgment Affirmed.***

**WALTERS, P.J. and HADLEY, J., concur.**

**/jlr**