[Cite as *State v. McDougald*, 2009-Ohio-4417.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 09CA3278
v.	:	
	:	DECISION AND JUDGMENT ENTRY
Jerone McDougald,	:	
	:	**Released 8/17/09**
Defendant-Appellant.	:	

APPEARANCES:

Jerone McDougald, Orient, Ohio, Appellant, pro se.

Mark E. Kuhn, Scioto County Prosecutor, and Julie Cooke Hutchinson, Scioto County Assistant Prosecutor, Portsmouth, Ohio, for Appellee.

Harsha, J.

{¶1} Jerone McDougald appeals the Scioto County Common Pleas Court's judgment denying his petition for post-conviction relief. McDougald contends that the court erred in dismissing his petition because he suffered a violation of his Sixth Amendment right to confrontation when the trial court admitted a drug laboratory analysis report into evidence over his objection. He contends the report was "testimonial," so that under the Confrontation Clause he had a right to cross-examine the laboratory analyst who prepared it. In support of his untimely petition, McDougald argued that the United States Supreme Court had created a "newly Constitutional issue" that applied retroactively to him. However, the case upon which he relied for this proposition had not been decided by the Court – it was still pending when he filed his petition. Because McDougald's post-conviction petition was untimely, and because he

failed to demonstrate that his petition fell within an exception in R.C. 2953.23(A) governing late petitions, the trial court lacked jurisdiction to entertain it. Accordingly, we reject McDougald's appeal.

I.

{¶2} Following a jury trial in 2007, McDougald was convicted of possession of drugs, trafficking in drugs, possession of criminal tools, and having a weapon while under disability. The trial court ordered McDougald to serve a total of twenty years in prison. In May 2007, McDougald filed a direct appeal. The trial transcript was filed in this Court on July 3, 2007. We later affirmed his convictions. See *State v. McDougald*, Scioto App. No. 07CA3157, 2008-Ohio-1398.

{¶3} In December 2008, he filed a pro se petition for post-conviction relief under R.C. 2953.23 seeking to vacate his convictions and sentence. He argued that he was entitled to post-conviction relief because the trial court violated his Sixth Amendment right to confront witnesses against him, i.e., the B.C.I. lab tech.[1] In February 2009, the trial court denied McDougald's petition for post-conviction relief without conducting a hearing. In a pro se appeal of the denial of his petition, McDougald presents the following assignment of error:

> FIRST ASSIGNMENT OF ERROR:
>
> Defendant-Appellant Jerone McDougald [sic] Sixth Amendment right to confrontation was violated when the court admitted into evidence the drug laboratory analysis report from the Ohio Bureau of Criminal Investigation (B.C.I.), over objection without permitting him an opportunity to cross-examine "the chemist or technician who prepared it."

II.

[1] He also argued that he was entitled to re-sentencing, citing *State v. Cabrales*, 114 Ohio St.3d 1410, 2007-Ohio-2632, 867 N.E.2d 844. However, because McDougald does not raise this issue on appeal, we need not address it further.

{¶4} In his sole assignment of error, McDougald contends that he is entitled to post-conviction relief because the trial court violated his Sixth Amendment right to confrontation when it admitted a drug laboratory analysis report over his objection. He claims the report was "testimonial," thereby triggering his right under the Confrontation Clause to confront the laboratory analyst who prepared it.

{¶5} Appellate courts use a de novo standard of review when reviewing a trial court's dismissal or denial of a petition for post-conviction relief without a hearing.[2] *State v. Collins*, Athens App. No. 06CA40, 2007-Ohio-3558, at ¶7. Thus, we will independently review the record, without deference to the trial court's decision.

{¶6} R.C. 2953.21, et seq., govern petitions for post-conviction relief. Under R.C. 2953.21, relief from a judgment or sentence is available for a person convicted of a criminal offense who shows that "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States[.]" See, also, *State v. Grover* (1995), 71 Ohio St.3d 577, 645 N.E.2d 1246; *State v. Powell* (1993), 90 Ohio App.3d 260, 629 N.E.2d 13. Generally if a defendant files a direct appeal, he must file a petition for post-conviction relief no later than 180 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal. See R.C. 2953.21(A)(2).

{¶7} R.C. 2953.23(A)(1) provides that a court may not entertain a delayed petition for post-conviction relief unless (1) the petitioner shows that he was unavoidably prevented from discovering the facts upon which his claim for relief is based, or (2) after the 180-day time period expired, the United States Supreme Court recognized a new

[2] But see, *In re B.C.S.,* Washington App. No. 07CA60, 2008-Ohio-5771, at ¶9, which adopted a "mixed" standard of review. Here, the trial court made no factual findings, so we apply a de novo review.

federal or state right that applies retroactively to the petitioner and is the basis of his claim for relief. The petitioner must then show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found [him] guilty of the offense of which [he] was convicted[.]" R.C. 2953.23(A)(1)(b). Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider an untimely petition for post-conviction relief. *Collins*, supra, at ¶11, citing *State v. Gibson,* Washington App. No. 05CA20, 2005-Ohio-5353, appeal not allowed, 108 Ohio St.3d 1439, 2006-Ohio-421, at ¶10.

{¶8} McDougald's post-conviction petition was clearly untimely, having been filed over seventeen months after the date on which the trial transcript was filed in his direct appeal in this Court. Because the petition was untimely, McDougald had to satisfy the criteria set forth in R.C. 2953.23(A) before the trial court could consider the merits of the petition.

{¶9} In support of his untimely petition, McDougald cited a case that was pending before the United States Supreme Court and argued that the case created a "newly Constitutional issue" that applied retroactively to him. Specifically, he relied on *Melendez-Diaz v. Massachusetts* (2008), 552 U.S. ___, 128 S.Ct. 1647, 170 L.Ed.2d 352. (See entry of March 17, 2008 granting writ of certiorari as case No. 07-0591). This case presented the question of "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)." Id. However, while the Supreme Court has since issued a decision in this case, see *Melendez-Diaz v. Massachusetts,* 557

U.S. ___ (2009), the case was only pending at the time McDougald filed his post-conviction petition with the trial court.

{¶10} Clearly McDougald's post-conviction petition was premised on a case that the Supreme Court of the United States had yet to decide. Thus, McDougald failed to demonstrate to the trial court that the United States Supreme Court had in fact recognized a new federal or state right that applied retroactively to him or that it did so after the 180-day time period expired. See R.C. 2953.23(A). Because his petition was untimely and because he failed to satisfy the criteria set forth in R.C. 2953.23(A), the trial court lacked jurisdiction to consider the merits of the petition. *Gibson* at ¶10. Accordingly, the trial court did not err in rejecting the petition.

{¶11} Moreover, once we have determined that a petition is untimely, no further inquiry into the merits of the case is necessary. *State v. Taylor*, Highland App. No. 06CA20, 2007-Ohio-1185, at ¶10.

{¶12} Therefore, we overrule McDougald's assignment of error.[3]

JUDGMENT AFFIRMED.

[3] Generally, when a trial court denies a motion for post-conviction relief without conducting an evidentiary hearing, it must file findings of fact and conclusions of law. Failure to do so results in the lack of a final appealable order. Here, the court's judgment does not satisfy that requirement. However, findings of fact and conclusions of law are unnecessary when dismissing untimely or successive petitions. *State ex rel. Bunting v. Haas,* 102 Ohio St.3d 161, 2004-Ohio-2055, at ¶11. We are unable to decipher the grounds on which the trial court based its "overruling" of the petition. But, because we conclude the petition was not timely, there was no need for findings of fact and conclusions of law in this instance.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.