[Cite as *State v. Lichtenwalter*, 2010-Ohio-4838.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10-CA-11
DEREK LICHTENWALTER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas Case No. 2008-CR-04-00116
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 24, 2010

APPEARANCES:

For Plaintiff-Appellee:

MICHAEL J. ERNEST
Assistant Tuscarawas County
Prosecutor
125 E. High Ave.
New Philadelphia, Ohio 44663

For Defendant-Appellant:

DEREK LICHTENWALTER, pro se
Inmate No. 564-988
2000 South Avon Beldon Rd.
Grafton, Ohio 44044

Delaney, J.

{¶1} Defendant-Appellant, Derek Lichtenwalter, appeals from the judgment of the Tuscarawas County Court of Common Pleas, denying his petition for post-conviction relief. The State of Ohio is Plaintiff-Appellee.

{¶2} On April 28, 2008, Appellant was charged under a Bill of Information with two counts of receiving stolen property for having two license plates that did not belong to him, pursuant to R.C. 2913.51(A). Because the property received was property listed under R.C. 2913.71, the offenses were enhanced to felonies of the fifth degree.

{¶3} Appellant pled guilty to the Bill of Information on both charges of receiving stolen property. His guilty plea was accepted on May 20, 2008, wherein he was sentenced, based on a stipulation by the prosecutor and defense, to serve twelve months in prison with no opposition to his release after he served 90 days of said sentence. A judgment entry journalizing Appellant's sentence was filed by the Tuscarawas Court of Common Peas on July 10, 2008.

{¶4} Appellant did not file a direct appeal to this court subsequent to his plea.

{¶5} Appellant filed a motion for judicial release on August 25, 2008. On November 12, 2008, the trial court granted the motion and released Appellant from prison, placing him on three years of community control sanctions, with the following terms and conditions:

{¶6} "1. That the Defendant follow all rules of community control as previously established by this Court;

{¶7} "2. That the Defendant pay all Court costs assessed in this matter;

{¶8} "3. That the Defendant not consume alcohol or drugs, or enter into establishments whose primary source of business is the sale of alcoholic beverages and that the Defendant submit to random screening;

{¶9} "4. That the Defendant successfully complete the S.R.C.C.C. Program and any recommended substance abuse treatment or counseling, as well as any and all aftercare with the S.R.C.C.C. Program;

{¶10} "5. That the Defendant serve local incarceration pending placement into the S.R.C.C.C. program;

{¶11} "6. That the Defendant obtain/maintain employment; and

{¶12} "7. That the Defendant complete 80 hours of community service."

{¶13} Appellant agreed in open court to the conditions of his community control sanctions and was advised of the consequences of failing to comply with said conditions.

{¶14} On February 26, 2009, Appellant successfully completed the residential program at S.R.C.C.C. and was released and ordered to report to the Adult Parole Authority.

{¶15} Appellant violated his community control, and on April 8, 2009, the trial court ordered Appellant to be held at the Tuscarawas County Sheriff's Office pending hearing.

{¶16} On June 29, 2009, Appellant waived a probable cause hearing on his community control violations and admitted to allegation number two in the motion, which stated that on April 4, 2009, Appellant was arrested and charged with Failure to Comply with the Order of a Police Officer, a felony of the third degree, four counts of Receiving

Stolen Property, felonies of the fifth degree, Falsification, a misdemeanor of the first degree, Obstructing Official Business, a misdemeanor of the second degree, Driving Under FRA suspension, a misdemeanor of the first degree, and Willful/Wanton Operation and Displaying Expired Plates, both minor misdemeanors.

{¶17} Through a judgment entry on June 30, 2009, the trial court revoked Appellant's community control and imposed the twelve month consecutive terms of imprisonment for the two counts of receiving stolen property that Appellant was previously charged with. The Court ordered that sentence to be served concurrently with Appellant's current term of incarceration from the original offense. Appellant was granted nine months of jail time credit for the completion of his initial sentence.

{¶18} Subsequent to this sentence, Appellant began filing numerous motions in both the trial court and this Court, including a Motion to Suspend Court Costs, which was denied; a Motion for Jail Credit, which was denied; a Request for Delayed Appeal, which was denied; an Addendum to Motion for Delayed Appeal, Motion for Appointment of Counsel, Affidavit of Indigency, all of which were denied; a Motion for Reconsideration of Jail Time Credit, which was denied; Motion to Merge Multiple Convictions and Motion to Correct Void Sentence, which was denied; Motion to Reinstate Judicial Release, which was denied; Motion to Dismiss Bill of Information, which was denied; motion for Withdrawal of Guilty Plea, which was denied; Motion for Reconsideration of the Merger of Allied Offenses and Jail Time Credit and Court Costs, which is currently pending; and a Writ of Habeas Corpus in the Ninth District Court of Appeals.

{¶19} Appellant raises eleven Assignments of Error:

{¶20} "I. THE COURT FAILED TO CONSIDER THE DEFENDANTS [SIC] TIMELY FILED PETITION FOR POST CONVICTION RELIEF. 2953.21, [SIC]

{¶21} "II. ALSO DEFENDANT MET THE CRITERIA FOR 2953.23 AS THE CASE CONCERNS A FORMER DEFENSE COUNSEL PATRICK WILLIAMS TYPING AND FILING THE REVOCATION OF MY COMMUNITY CONTROL, AND CLEAR VIOLATIONS OF DOUBLE JEOPARDY SINCE THE DECISION IN THE STATE OF OHIO V. UNDERWOOD, ___ N.E.2D___, 2010 WL 45973 (OHIO), 2010-OHIO-1, DECIDED JANUARY 5TH 2010. AS THIS COURT THE FIFTH DISTRICT COURT OF APPEALS HAS DENIED MY APPEAL (APPEAL # 2009 AP 12 0064, AND AS THIS IS ONE OF THE SEVERAL RELEVANT CONSTITUTIONAL ISSUES, AS THE DECISION IN THE UNDERWOOD CASE IS A MANDATE THAT A JOINTLY RECOMMENDED SENTENCE IS SUBJECT TO REVIEW IF IT IS FOR MULTIPLE COUNTS AND THOSE COUNTS WAS NOT CONSIDERED UNDER THE ALLIED OFFENSE STATUE [SIC] 2941.25(A) OR (B). THIS IS PLAIN ERROR SEE STATE V UNDERWOOD. [SIC]

{¶22} "III. THE TRIAL COURT FAILED TO REVIEW THE RECORD OR THE POST CONVICTION PETITION AS IS REQUIRED BY THE LAW THE COURT ONLY CONSIDERED THE UNTIMELY FILED RESPONSE BY THE PROSECUTOR. [SIC]

{¶23} "IV. THE TRIAL COURT SHOULD HAVE DISMISSED THE RESPONSE BY THE PROSECUTOR AS IT IS FILED OUTSIDE THE TEN DAY LIMIT ALLOWED, AND WITHOUT A FINDING OR SHOWING OF GOOD CAUSE BEING CONSIDERED, AND WITHOUT A REQUEST FROM THE PROSECUTOR FOR AN EXTENSION OF THE TIME LIMIT. (POST CONVICTION PETITION WAS FILED ON 1-28-2010, STATE RESPONSE IS SHOWN AS BEING FILED ON 2-12-2010). [SIC]

{¶24} "V. THE TRIAL COURT HAS PREVENTED ABILITY TO APPEAL APPROPRIATELY AS THE DEFENDANT HAD PUT FORTH SUFFICIENT OPERATIVE FACTS AND THE COURT FAILED TO CONSIDER THE RECORD OR EVEN TO ORDER THE RECORD OR EVEN TO CONSIDER THE DEFENDANTS PETITION THE COURT CLEARLY STATES THAT "UPON REVIEW OF THE MOTIONS AND MEMORANDUM IN RESPONSE THE COURT FINDS THE MOTIONS ARE NOT WELL TAKEN." [SIC]

{¶25} "VI. ACCORDING TO 2953.21 OF THE OHIO REVISED CODE THE TRIAL COURT MUST MAKE FINDINGS THAT ARE CONSISTENT WITHIN THE LAWS AND RULES OF THE STATE OF OHIO AND THE SUPREME COURT OF OHIO. THIS DECISION IS WITHOUT FACTS AND FINDINGS IN LAW. [SIC]

{¶26} "VII. THE TRAIL [SIC] COURT ERRED BY NOT RECORDING THE PROCEEDINGS OF THE 6-29-09 SENTENCING HEARING.

{¶27} "VIII. THE TRAIL [SIC] COURT FAILED TO GRANT THE APPROPRIATE AMOUNT OF JAIL TIME CREDIT AS I WAS HELD ON THE OFFENSES IN THE STARK COUNTY JAIL AND THE DAYS ARE NOT IN QUESTION ONLY THE APPLICATION OF THE LAW I AM DUE AN ADDITIONAL 83 DAYS. [SIC].

{¶28} "IX. THE TRAIL [SIC] COURT SENTENCED ME TO A FELONY WHEN THE BILL OF INFORMATION IS ONLY FOR A MISDEMEANOR.

{¶29} "X. THE TRAIL [SIC] COURT ACTED ON MOTIONS AND DOCUMENTS THAT EITHER ERE [SIC] NOT SERVED AND THAT DO NOT COMPLY WITH THE RULES OF COURTS SET DOWN BY THE SUPREME COURT.

{¶30} "XI. THE TRIAL COURT ISSUED A JUDGMENT ENTRY SIGNED BY A JUDGE HAT [SIC] IS NOT THE JUDGE IT PURPORTS TO BE, WITHOUT ANY CITING AS TO HOW THE JUDGE GAINS THE AUTHORITY TO ACT ON THE BEHALF OF ELIZABETH LEHIGH THOMAKOS. (SEE THE SIGNATURE ON THE 6-29-09 JOURNAL ENTRY FILED 6-30-09)."

I.

{¶31} In Appellant's first through eleventh assignments of error, Appellant argues that the trial court erred in failing to grant Appellant an evidentiary hearing on his post-conviction petition and that the trial court committed various errors in not addressing his claims in his petition concerning sentencing and consideration of previous motions that Appellant filed. We disagree.

{¶32} Ohio Revised Code 2953.21 governs the filing of post-conviction petitions as follows:

{¶33} "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims 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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or,

if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶34} "(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

{¶35} "(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of

the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

{¶36} * * *

{¶37} "(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived."

{¶38} Having had several prior opportunities to litigate all of the claims that Appellant sets forth in his latest motion, either via a timely direct appeal, or through the various motions that Appellant previously filed in the trial court, Appellant's most recent round of arguments are barred under the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The *Perry* court explained the doctrine as follows:

{¶39} "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment."

{¶40} As such, Appellant's only remaining avenue for airing his arguments falls under R.C. 2953.23. We would first note that the filing of Appellant's post-conviction petition was untimely. He filed his petition for post-conviction relief on January 28, 2010. The judgment entry convicting Appellant was filed on May 20, 2008 and the entry journalizing his sentence was filed on July 10, 2008. Had he filed a direct appeal, he would have had to file his notice of appeal within thirty days of the judgment entry of

conviction. Given that Appellant did not file his post-conviction petition until January 28, 2010, well over 180 days had passed. When dealing with an untimely post-conviction petition, R.C. 2953.23 allows the filing of such a petition in the following limited circumstances:

{¶41} "(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:

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

{¶43} "(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.

{¶44} "(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.

{¶45} "(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised

Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death."

{¶46} Appellant has not argued, nor would it be appropriate to do so, that the results of DNA testing establish by clear and convincing evidence, his actual innocence under R.C. 2953.23(A)(2).

{¶47} Moreover, he has failed to establish, under R.C. 2953.23(A)(1) that he was either (a) unavoidably prevented from the discovery of facts upon which he relies to present his claim for relief or that the U.S. Supreme Court has recognized a new federal or state right that applies retroactively to a person in his situation, and that (b) by clear and convincing evidence, but for the constitutional error at trial, no reasonable factfinder would have found him guilty.

{¶48} Appellant has not asserted, nor would it be a valid argument, that the U.S. Supreme Court has recognized a new federal or state right that applies retroactively to a person in Appellant's situation. Thus, he must establish, by clear and convincing evidence that but for a constitutional error committed at trial, no reasonable factfinder would have found him guilty of the offenses he was convicted of and that he was

unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

{¶49} Appellant failed to meet his initial burden of attaching to his petition evidence demonstrating a cognizable claim of constitutional error. Thus, Appellant has failed to satisfy the condition in R.C. 2953.23(A)(1)(b) that he would not have been convicted but for constitutional error at trial.

{¶50} Based on the foregoing, we find that Appellant has failed to set forth any claims that are not barred by res judicata or that would justify an oral or evidentiary hearing. Appellant has failed to meet his burden and therefore, we do not find that the trial court erred in denying Appellant a hearing. The trial court properly denied Appellant's motion, as it was either barred by res judicata or did not meet the requirements of R.C. 2953.23.

{¶51} Appellant's assignments of error are overruled and the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. Lichtenwalter*, 2010-Ohio-4838.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DEREK LICHTENWALTER	:	
	:	
Defendant-Appellant	:	Case No. 10-CA-11
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE