

[Cite as *State v. Roberson*, 2010-Ohio-3702.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Respondent-Appellee

-vs-

ANTHONY E. ROBERSON

Petitioner-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 2009CA00316

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 1999-CR-1508

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 9, 2010

APPEARANCES:

For Respondent-Appellee

For Petitioner-Appellant

JOHN D. FERRERO
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

JEFFRY M. BRANDT
Robinson & Brandt, P.S.C.
629 Main Street, Suite B
Covington, KY 41011

BY: RONALD MARK CALDWELL
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South – Suite 510
Canton, Ohio 44702-1413

Hoffman, J.

{¶1} Petitioner-appellant Anthony E. Roberson appeals the December 2, 2009 Judgment Entry entered by the Stark County Court of Common Pleas, which granted the motion to dismiss his petition for postconviction relief filed by respondent-appellee State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On December 10, 1999, the Stark County Grand Jury indicted Appellant on one count of possession of cocaine, in violation of R.C. 2925.11(A), a felony of the first degree. Appellant appeared before the trial court for arraignment on December 17, 1999, and entered a plea of not guilty to the charge. On March 3, 2000, Appellant filed a Motion to Suppress, arguing he was searched without a search warrant and without sufficient probable cause, and the parole officer participating in the search acted outside his capacity as a parole officer. After conducting a hearing, the trial court overruled the motion via Judgment Entry Nunc Pro Tunc filed March 31, 2000. The matter proceeded to jury trial and concluded with the jury finding Appellant guilty as charged. Attorney Steve LoDico represented Appellant. Appellant appealed his conviction and sentence. This Court affirmed. *State v. Roberson* (April 9, 2001), Stark App. No. 2000-CA-00178, unreported. The Ohio Supreme Court denied further review of the matter. *State v. Roberson* (2001), 93-Ohio St.3d 1474.

{¶3} On January 25, 2002, Appellant filed a Motion to Vacate or Set Aside Entry Appointing Counsel. Therein, Appellant asked the trial court for an order vacating

¹ A Statement of the Facts underlying Appellant's convictions is not necessary for our resolution of this appeal.

its June 2, 2000 Judgment, which appointed Attorney Steve LoDico as appellate counsel. The trial court denied the motion, finding the issue to be moot. On May 29, 2001, Appellant filed an Application for Reopening Appeal pursuant to App.R. 26(B). Therein, Appellant asserted he was denied the effective assistance of appellate counsel as a result of counsel's failure to assign as error the trial court's finding parole officer Beebe did not act outside his capacity as well as counsel's failure to assign as error the trial court's overruling his motion to suppress. Via Judgment Entry filed July 24, 2001, this Court denied Appellant's application for reopening.

{14} Appellant filed an Application for Reconsideration pursuant to App.R. 26(A) on August 6, 2001. This Court overruled the motion via Judgment Entry filed August 13, 2001. Appellant later filed a Motion for Reinstatement of Appeal and Appointment of Counsel on February 19, 2002. Therein, Appellant argued because trial counsel also acted as appellate counsel, he was deprived his right to raise ineffective assistance of counsel in his original appeal to this Court. Via Judgment Entry filed March 26, 2002, we denied Appellant's motion for reinstatement of appeal, finding Appellant had failed to set forth factual or legal allegations establishing counsel was ineffective at trial. Appellant subsequently filed an Application for Reconsideration pursuant to App.R. 26(A) on April 5, 2002. This Court overruled Appellant's application via Judgment Entry filed April 18, 2002.

{15} On November 3, 2009, Appellant filed a Petition to Vacate or Set Aside Judgment under R.C. 2953.23. Appellant asserted he was denied his constitutional right to raise a claim of ineffective assistance of trial counsel as trial counsel also had acted as appellate counsel. The State filed a response to Appellant's petition and a

motion for summary judgment. Via Judgment Entry filed December 2, 2009, the trial court granted the State's motion and dismissed Appellant's petition.

{¶16} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶17} "I. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO DISMISS, AS MR. ROBERSON WAS UNAVOIDABLY PREVENTED FROM RAISING HIS INEFFECTIVE ASSISTANCE CLAIM WITHIN THE 180-DAY PERIOD OF R.C. 2953.21(A).

{¶18} "II. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO DISMISS, AS THE PETITION'S CLAIM WAS NOT RES JUDICATA.

{¶19} "III. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO DISMISS, AS THE PETITION'S CLAIM WAS SUPPORTED BY THE RECORD."

I

{¶10} In his first assignment of error, Appellant maintains the trial court erred in dismissing his petition for post conviction relief as he was unavoidably prevented from raising a claim of ineffective assistance of counsel within the 180 day period prescribed in R.C. 2953.21(A).

{¶11} Pursuant to R.C. 2953.21(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 of the judgment of conviction." Without question, the petition filed by Appellant in November, 2009 is untimely. In order for a court to recognize an untimely post-conviction petition pursuant to R.C. 2953.23(A)(1), both of the following requirements must be established:

{¶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 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.

{¶13} “(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.”

{¶14} We find Appellant has failed to establish he was unavoidably prevented from discovery of the facts upon which he relies. In fact, Appellant made the same argument to this Court in 2001, and 2002, thus belying his contention he was unavoidably prevented from raising this issue until now. Assuming, *arugendo*, we accept Appellant's suggestion he was unavoidably prevented from being able to raise this claim within the 180 day time limit while his direct appeal was still pending, his direct appeal was denied on April 9, 2001. Therefore, even had we found the 180 day time limit was tolled during the pendency of the direct appeal, Appellant's attempt to raise the issue in 2009, is still far beyond 180 day time limit restarting April 9, 2001. We find the trial court correctly ruled Appellant's petition was untimely.

{¶15} Appellant's first assignment of error is overruled.

II, III

{¶16} In light of our disposition of Appellant's first assignment of error, we find Appellant's remaining assignments of error to be moot.

{¶17} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ W. Scott Gwin
HON. W. SCOTT GWIN

