

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-025

Appellee

Trial Court No. 2005CR0012

v.

Jeffrey Thomas

DECISION AND JUDGMENT

Appellant

Decided: February 5, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant
Prosecuting Attorneys, for appellee.

Jeffrey Thomas, pro se.

* * * * *

HANDWORK, P.J.

{¶ 1} Jeffrey Thomas, pro se appellant, appeals the judgment of the Wood County Court of Common Pleas, which denied his motion for postconviction relief. He has also filed a separate motion, asking us to find his sentence void for want of being

sentenced to a definite term of postrelease control. On appeal, Thomas asserts the following assignment of errors for review:

{¶ 2} "Assignment of Error Number One: The trial judge abused his discretion by denying appellant's petition after seeing evidence of witness perjury.

{¶ 3} "Assignment of Error Number Two: The trial judge abused his discretion by denying appellant's petition after seeing evidence proving the prosecution suppressed favorable evidence to the defense.

{¶ 4} "Assignment of Error Number Three: The trial judge abused his discretion by denying appellant's petition in violation of R.C. 2953.21(E)."

{¶ 5} In an amendment to his appellate brief, appellant asserts a fourth assignment of error:

{¶ 6} "Fourth Assignment of Error: The trial court erred by failing to make findings of facts and conclusions of law when denying appellant's petition for post-conviction relief containing new medical evidence."

{¶ 7} Appellant was found guilty by a jury of one count of rape and one count of gross sexual imposition. He was sentenced to a total term of nine years incarceration, ordered to pay a fine of \$10,000, and was classified as a sexually oriented offender. This court affirmed his convictions on direct appeal. *State v. Thomas*, 6th Dist. No. WD-06-014, 2007-Ohio-3466, discretionary appeal denied by 116 Ohio St.3d 1440, 2007-Ohio-6518.

{¶ 8} Thomas filed a motion for a new trial and a motion for postconviction relief. The trial court denied both. The merits of both motions were not appealed to this court.

{¶ 9} The circumstances underlying Thomas' convictions were detailed in his direct appeal:

{¶ 10} "The victim in this case was appellant's step-daughter, who was less than 13 years of age at the time the offenses were committed. * * *

{¶ 11} "[The victim] testified that approximately one month prior to her mother marrying appellant, which occurred in June 2002, appellant began touching the victim's vagina underneath her clothing. The victim testified that on numerous occasions from that time until October 2004, when the victim finally disclosed appellant's conduct to her mother, appellant would put his mouth on her vagina, make her put her mouth on his penis, make her stroke his penis with her hand, put his fingers inside of her, and touch her chest under her shirt. Although the victim would have been nine-years-old at the time of the wedding, she also testified that she was eight-years-old when the abuse began, and stated that the abuse occurred for a period of three years.

{¶ 12} "The victim testified that appellant hurt her when he stuck his fingers in her. She testified that appellant never put anything else inside her vagina and that appellant told her that she was too small for him to put his penis inside of her. She also testified that, on one occasion, white stuff came out of appellant's penis onto her stomach. The victim stated that appellant had a large mole under his penis, which was verified by

the victim's mother. The victim disclosed to authorities that abuse had occurred when her mother was gone to play softball.

{¶ 13} "On cross-examination, the victim testified that she could not recall precise dates, but knew that appellant digitally penetrated her five to ten times and engaged in oral contact with her five to ten times. She testified that the abuse took place in her room. However, when questioned further by appellant, the victim also testified that two incidents occurred in appellant's room. When questioned by appellant why, prior to trial, she had disclosed fewer incidents to her father, the police, the prosecutor, and two social workers, the victim replied that she was eventually able to remember all the incidents by '[b]eing able to talk about it more.'

{¶ 14} "The victim testified that she did not disclose the abuse until after her mom told appellant during a fight, on October 8, 2004, to move out and that the marriage was over. According to the victim, during the abuse, appellant had told her not to tell her mother about his conduct. Additionally, the victim testified that she did not disclose the conduct earlier because she did not want to upset her mother, who seemed happy with appellant; she was embarrassed; and she was afraid that her biological father would be mad at her.

{¶ 15} "* * * Mark Baumgardner, a Perrysburg police officer, testified that he interviewed the victim on October 12, and October 15, 2004. Baumgardner testified that, during the initial interview, the victim described incidents where appellant had touched her on her private parts, above and beneath her clothing, touched her chest, and asked her

to touch his penis. During the October 15, 2004 interview, Jamie Colatruglio, investigator of child abuse and neglect for the Wood County Department of Job and Family Services, was also present. Baumgardner testified that, during the second interview, the victim described two incidents where appellant put his penis into her mouth, placed his mouth on her vagina, and touched her on her private parts. On cross-examination, Baumgardner disagreed with appellant that the victim's statements were inconsistent; rather, Baumgardner testified that he felt, at different times, more information came out.

{¶ 16} " * * * Concerning other potentially inconsistent statements by the victim, on December 13, 2004, the Children's Mercy Hospital report indicated that the victim denied ever seeing anything on appellant's 'private parts.' However, during a later interview with a prosecutor, when asked to draw appellant's penis, the victim drew in 'the mole' located beneath his penis." *State v. Thomas*, 2007-Ohio-3466, ¶ 2-24.

{¶ 17} The drawing the victim made of appellant's penis and the location of his mole forms the subject of appellant's instant petition for postconviction relief. In this petition, appellant raises his own medical records showing that he had a mole removed from a different location in his genital region, arguing that these medical records constitute new evidence available to impeach the victim.

{¶ 18} A petition for postconviction relief must be filed within 180 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. R.C. 2953.21(A)(2). If a petition is filed after the 180 day

period, the petition must either demonstrate the petitioner's actual innocence, R.C. 2953.23(A)(2), or the petition must demonstrate the existence of two conditions pursuant to R.C. 2953.23(A)(1). That section requires a petitioner to show that both of the following conditions apply:

{¶ 19} "(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.

{¶ 20} "(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 * * *."

{¶ 21} Appellant represented himself at his jury trial, and was thus well aware that the victim testified to the existence and location of a mole in his own genital area. He was not "unavoidably prevented" from access to information which might have contradicted that testimony. Thus, he cannot meet the first condition necessary for an untimely petition.

{¶ 22} Additionally, the petition was barred pursuant to the doctrine of res judicata. "Since a postconviction proceeding is a collateral civil attack on a judgment, the trial court has the same discretion to deny relief as in any other civil postjudgment

motion. See *State v. Steffen* (1994), 70 Ohio St.3d 399, 410." *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 87. As this issue could have been raised in appellant's first postconviction petition, res judicata bars appellant from raising this issue.

{¶ 23} As the petition was properly dismissed, the trial court was not obligated to hold a hearing pursuant to R.C. 2953.21(E), and the trial court was not obligated to set forth findings of fact and conclusions of law. Each of the four assignments of error is not well-taken.

{¶ 24} Also, within the instant appeal, appellant has filed a motion with this court requesting "deletion of all appeals from public record, reimbursement of funds paid as expenses on appeals following void sentence, and order for resentencing pursuant to Crim.R. 32 all resulting from void sentence." Appellant points to his original judgment entry of conviction and sentence and alleges that the trial court failed to properly impose postrelease control, citing, inter alia, *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577 and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197.

{¶ 25} Upon consideration, we find that appellant cannot raise this issue for the first time in this court as a motion. Neither his petition for postconviction relief nor his appellate brief appealing the dismissal of his petition raises this issue. Appellate courts have jurisdiction over final, appealable orders, and on appeal, the appellate courts must review and affirm, modify, or reverse the judgment or final order appealed, App.R. 12(A)(1)(a), and determine the merits of the appeal based on the assignments of error and the record. App.R. 12(A)(1)(b). Here, appellant has appealed a judgment dismissing his

petition for postconviction relief – his original judgment of conviction and sentence is not before us. Appellant did not raise this issue in his petition for postconviction relief, and so the issue is not part of the judgment challenged on appeal. He has not appealed a denial of a motion filed in the trial court which raised this issue. Also, appellant has not raised the issue via an assignment of error which we must address on the merits or through an application to reopen his appeal. This, we are without jurisdiction to consider the issue. The motion is not well-taken.

{¶ 26} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
