[Cite as *State v. Rodriguez*, 2011-Ohio-6812.]

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

State of Ohio — Court of Appeals No. WD-11-011

Appellee — Trial Court No. 2007CR0212

v.

Jose Rodriguez — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen-Howe Gebers, Chief Assistant Prosecuting Attorney, for appellee.

Jose Rodriguez, pro se.

* * * * *

SINGER, J.

{¶1} Appellant, Jose Rodriguez, appeals the judgment of the Wood County Court of Common Pleas which dismissed his petition for postconviction relief. For the reasons that follow, we affirm the trial court's judgment.

{¶2} This matter originates from appellant's January 29, 2008 conviction for trafficking in marijuana, a violation of R.C. 2925.03(A)(2) and (C)(3)(f). He was sentenced to eight years in prison. This court affirmed his conviction on August 21, 2009. *State v. Rodriguez,* 6th Dist. No. WD–08–013, 2009–Ohio–4280.

{¶3} On December 16, 2010, appellant filed a motion for postconviction relief. The trial court denied his petition as being untimely. Appellant now appeals setting forth the following assignment of error:

{¶4} "The trial court abused its discretion when it overruled the defendant's postconviction petition for being filed untimely."

{¶5} R.C. 2953.21(A)(1) defines the criteria under which postconviction relief may be sought:

{¶6} "Any person who has been convicted of a criminal offense * * * 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 may file a petition * * * stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence * * *."

{¶7} R.C. 2953.21(A)(2) provides that a petitioner may file a petition for postconviction relief ordinarily no later than 180 days after the transcript is filed in a direct appeal, unless the petitioner can show (1) that he or she was unavoidably prevented from discovering the facts relied upon in support of relief or (2) " * * * 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." R.C. 2953.23(A)(1)(a). The petitioner must also show, by clear and convincing evidence, that but for the error no reasonable factfinder would have found him or her guilty. R.C. 2953 .23(A)(1)(b).

{¶8} The denial of a postconviction petition will not be overturned on appeal absent a finding of abuse of discretion. *State v. Williams*, 165 Ohio App.3d 594, 2006-Ohio-617, ¶ 20. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} Appellant's petition was filed approximately two years after the transcript in the direct appeal was filed. As such, appellant's petition is untimely. However, appellant contends that his untimely filed petition should be considered because of newly discovered evidence that would have prevented a reasonable factfinder from finding him guilty.

{¶10} The evidence at appellant's trial can be summarized as follows. Agent Mark Apple, an investigator with the Ohio Attorney General's Office, Criminal Division, testified that on June 1, 2007, he was working in an undercover capacity when he went to the Meijer's store in Rossford, Ohio with a confidential informant. The informant had arranged a meeting with Luis Melendez. The purpose of the meeting was to purchase

marijuana. In the store, Luis Melendez, accompanied by appellant, told Agent Apple that they had 80 pounds of marijuana for sale for $675. Agent Apple agreed to the price. He told appellant and Melendez that the money was 15 minutes away in Bowling Green, Ohio. At the store, Agent Apple and Ramirez discussed the price of the marijuana with Melendez. Appellant was not a part of the discussion about price; however, Agent Apple testified that afterwards, appellant shook his hand and talked about how they wanted to "get out of there because there were too many cops around."

{¶11} Appellant and his son, Scott Rodriguez, got into a Chevy S 10 pick-up truck. Behind appellant was Agent Apple in his vehicle. Behind Agent Apple were Melendez and his passenger, Kyle Tolka, in a Ford F 150 pick-up truck. The three vehicles headed down I–75 towards Bowling Green.

{¶12} Agent Ackley, a Wood County Sheriff's deputy, testified that he and his team pulled over the S 10 and the F 150 pick-up trucks per instructions to look out for two pick-up trucks, one smaller one and one larger white one. He testified that he was present during the search of both vehicles, and that the marijuana was found in the F 150 truck. The registration for the F 150 truck was found in the S 10 truck, and was in appellant's name. He also testified that appellant had a little over $900 in cash on his person.

{¶13} Melendez testified that he had met appellant in Texas, and that they had known each other for nine years. Melendez testified that he met with appellant, his son,

and Tolka in Indianapolis, and the four of them then traveled to Chicago. He claimed that once in Chicago, appellant and appellant's son left with the F 150 pick-up truck and when they returned it contained the marijuana. Melendez also testified that he received $10,000 from a customer, which he gave to appellant. He claimed that out of that, appellant paid him $2,000 for his role in the drug transaction, and $4,000 was sent via Western Union in four separate transactions by appellant, appellant's son, Tolka, and himself.

{¶14} Appellant contends that Wood County supplemental police report he obtained after his trial exonerates him. In the report detailing Melendez's arrest, Melendez is quoted as saying that he attempted to sell the marijuana himself and that nobody else was involved.

{¶15} We find that the trial court did not abuse its discretion in denying appellant's untimely postconviction petition. First, appellant has not shown that he was "unavoidably prevented" from obtaining the supplemental police report at his trial. Second, and even more importantly, the information in the report in no way exonerates appellant. At trial, there was substantial evidence of appellant's involvement in the crime presented, which included the testimony of Melendez. Therefore, we cannot say that a reasonable factfinder would have been prevented from finding him guilty had the supplemental police report been admitted into evidence. Appellant's sole assignment of error is found not well-taken.

{¶16} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE