

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

State of Ohio

Court of Appeals No. WD-14-075

Appellee

Trial Court No. 2007CR0212

v.

Jose Rodriguez

DECISION AND JUDGMENT

Appellant

Decided: February 13, 2015

* * * * *

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

Jose A. Rodriguez, pro se.

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SINGER, J.

{¶ 1} Appellant, Jose Rodriguez, appeals the judgment of the Wood County Court of Common Pleas which dismissed his successive 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. Wood No. WD-08-013, 2009-Ohio-4280.

{¶ 3} In 2010, appellant filed a motion for postconviction relief. The trial court denied his petition as being untimely. This court affirmed that decision on December 30, 2011. *State v. Rodriguez*, 6th Dist. Wood No. WD-11-011, 2011-Ohio-6812.

{¶ 4} On August 29, 2014, appellant filed another motion for postconviction relief with the trial court which the court denied on September 18, 2014. Appellant now appeals that decision on our accelerated calendar, setting forth the following assignment of error:

The trial court erred and abused its discretion when it failed to entertain an untimely successive post conviction petition relief predicted upon a claim of withheld material evidence by the state, in which newly discovered evidence required a due process violation analysis under *State v. Reedy*, 1999 Ohio App. LEXIS 4717, further see *Brady v. Maryland*, 373 U. S. 83 S. Ct. 1194, 10 L. Ed. 2D 215

{¶ 5} A petition for postconviction 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.” R.C. 2953.21(A)(2). Here, the trial transcript was filed in 2008.

{¶ 6} “A trial court has no jurisdiction to consider an untimely petition for postconviction relief unless the untimeliness is excused under R.C. 2953.23(A)(1).” *State v. Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728, ¶ 8. Under R.C. 2953.23(A)(1), the time limit is excused if both (1) it can be shown that either the petitioner was unavoidably prevented from discovering the facts relied on in the claim for relief, or that 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; and (2) the petitioner presents clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty.

{¶ 7} 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, 847 N.E.2d 495 (11th Dist.). 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*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} In order for the trial court to entertain an untimely or a successive petition for postconviction relief, both conditions must apply:

- (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.

(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. R.C. 2953.23.

{¶ 9} The trial court found the exceptions did not apply to appellant's untimely, successive petition for postconviction relief. We agree. Appellant has merely repeated the same arguments he asserted in his last postconviction relief petition. Accordingly, we do not find that the trial court abused its discretion in denying appellant's untimely, successive petition for postconviction relief. Appellant's sole assignment of error is found not well-taken.

{¶ 10} 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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:
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