

[Cite as *State v. Short*, 2003-Ohio-3538.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 82246

STATE OF OHIO	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
KENNETH W. SHORT, III	:	OPINION
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	JULY 3, 2003
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CHARACTER OF PROCEEDING	Civil appeal from Common Pleas Court Case No. CR-343001
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JUDGMENT	AFFIRMED
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DATE OF JOURNALIZATION	:
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APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor L. CHRISTOPHER FREY Assistant County Prosecutor Justice Center - 8 th Floor 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	KENNETH W. SHORT, III Inmate No. A343-985 Mansfield Correctional Inst.
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P.O. Box 788
Mansfield, Ohio 44901

ANNE L. KILBANE, J.:

{¶1} This is an appeal from an order of Judge Christine T. McMonagle that denied Kenneth W. Short, III's motion for postconviction relief under R.C. 2953.21 and 2953.23. We agree that his petition was untimely and that no exception to the time limitations for filing such a motion applies. We affirm.

{¶2} On November 14, 1997, following a jury trial before Judge William Aurelius, Short was convicted of the aggravated murder of Marvin Hall, Jr., with a firearm specification, and the offense of having a weapon while under a disability. He appealed his conviction to this court, and we affirmed.¹

{¶3} On August 16, 2002, Short filed a "Petition to Vacate or Set Aside Sentence Based on Newly Discovered Evidence," under R.C. 2953.23(A), to which the State responded. In the motion, he argued that a witness for the State, Charles Jones, falsely testified at Short's trial that he had never before been convicted of a "Federal or State [sic] offense," when in reality he was awaiting a probation violation hearing stemming from a 1996 Ohio conviction for misdemeanor burglary.² Had defense counsel impeached Jones on

¹*State v. Short*, (Dec. 17, 1998), Cuyahoga App. No. 73618.

²On appeal, Short alleges that two other witnesses, Percy Allen and Eugene Nathaniel Harris, had also lied regarding their

this point, Short argued, the jury would have disregarded his incriminating testimony, and all other damaging evidence presented by the State, and accepted *his* argument that he killed Hall in self defense.

{¶4} The judge denied Short's motion on the ground that it was untimely, without further elaboration. Short now asserts three assignments of error set forth in Exhibit A.

I. DISMISSING THE PETITION WITHOUT ISSUING FINDINGS
i. OF FACT AND CONCLUSIONS OF LAW.

{¶5} R.C. 2953.21(A)(2) requires an offender to file a petition for postconviction relief no later than 180 days after the date on which trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction. It is undisputed that, in Short's direct appeal, the trial transcript was filed on February 27, 1998. In order to have timely filed his petition, therefore, he should have done so by approximately September 16, 1998. Because the motion was filed almost four years later, it is obviously untimely.

{¶6} However, a judge may entertain a petition filed after the time limits set forth in R.C. 2953.21(A)(2) in certain specified circumstances. R.C. 2953.23(A)(1) permits a court to entertain an untimely petition if either:

"(a) The petitioner shows that the petitioner was

past criminal histories, but, since no argument or evidence relative to these persons was submitted below, we disregard any argument relative to them here.

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

(b) 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."³

{¶7} In addition to establishing one of the above, the petitioner must also establish the following:

"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 ***."⁴

{¶8} Short has not alleged that he is entitled to relief based on a newly recognized federal or state right which applies retroactively to him, but only that he was either unavoidably prevented from learning that Jones had a criminal history, or that the State breached a duty to provide him with the criminal histories of each of its witnesses.

{¶9} The phrase "unavoidably prevented," from discovery of facts warranting postconviction relief means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence.⁵ We cannot see how Short's lawyer would have been unable to simply research the public court docket of Cuyahoga

³Id.

⁴R.C. 2953.23 (A) (2) .

⁵*State v. Brown* (Aug. 21, 1998), Lucas App. No. L-98-1130, *State v. Walden* (1984), 19 Ohio App.3d 141, 145, 483 N.E.2d 859.

County, should he have wanted to learn of the possible criminal history of any witness before trial. We also fail to see any evidence that the State acted in some way to deprive Short of access to this information, or knew of Jones' criminal history and intentionally elicited untrue testimony. We find the allegation that Jones' criminal history constituted "newly discovered evidence" to be a misstatement because public records showing Jones' convictions for misdemeanor drug abuse and misdemeanor burglary were available to Short prior to trial.

{¶10}There was no error in denying Short's postconviction relief petition as untimely because the character of the evidence Short now wishes to introduce does not qualify as "newly discovered evidence," the exception in R.C. 2953.23(A)(1)(a) is inapplicable and the judge was without jurisdiction to evaluate the motion on its merits.

{¶11}Ordinarily, under R.C. 2953.21(G), a judge who denies a petition for postconviction relief without a hearing must file findings of fact and conclusions of law in support of the denial. However, the judge was without jurisdiction to entertain Short's petition because it was untimely.⁶ "Having no jurisdiction to entertain [appellant's] petition, the [judge] was not required to make and file findings of fact and conclusions of law as required

⁶E.g., *State v. Smith*, (Feb. 17, 2000), Cuyahoga App. No. 75793.

in R.C. 2953.21(G)." ⁷ Findings of fact and conclusions of law are not required when a judge rules on a postconviction relief motion under 2953.23. ⁸ The Ohio Supreme Court has recently observed that, unless a petitioner alleges with specificity the facts supporting a claim based on newly discovered evidence, a judge need not issue findings of fact and conclusions of law in denying a postconviction motion under that section. ⁹

{¶12} Here, Short makes no showing whatsoever that Jones' criminal record could not have been discovered in due diligence before trial. To accept Short's argument, we would have to rule that a judge must make findings of fact and conclusions of law on the merits of his motion under 2953.23(A)(1)(a), even if the judge was to find that, according to these findings, he was without jurisdiction to evaluate the merits of the motion. Finding no logic in this argument, we reject it. There was no error in denying Short's motion without separately detailing findings of fact and conclusions of law.

II. A HEARING ON THE PETITION

⁷*State v. Lacking* (Apr. 23, 1999), Montgomery App. No. 17360, citing *State v. Childs* (Feb. 16, 2000), Summit App. No. 19757.

⁸*State v. Davis*, Mahoning App. No. 01 CA 171, [2002-Ohio-2789](#), *State v. Perdue* (Dec. 12, 1999), Mahoning App. No. 98CA156. See, also, *State ex rel. Carroll v. Corrigan* (1999), 84 Ohio St.3d 529, 530, 705 N.E.2d 1226 (holding that findings and conclusions are not required in denying successive petitions, also contained in R.C. 2953.23(A)).

⁹*State ex. Rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, at paragraph 15, [2002-Ohio-7042](#).

{¶13}A judge may dismiss a petition for postconviction relief without first holding an evidentiary hearing.¹⁰ Since Short's petition had no merit on its face, there was no need to hold a hearing before dismissing it, and we see no error.

III. CONSTITUTIONAL RIGHT TO A FAIR TRIAL

{¶14}Short contends that Jones' perjured testimony denied him a fair trial. Because he provided no facts to support his contention that his petition presented newly discovered evidence under 2953.23(A)(1)(a), we need not proceed to evaluate any constitutional claim he has raised under R.C. 2953.23(A)(2). He had not vested the court below with jurisdiction to consider his petition. "Because [the petitioner] has failed to fulfil the showing required under R.C. 2953.23(A)(1)(a), our review is at an end."¹¹

Judgment affirmed.

EXHIBIT A: Short's assigned errors as set forth in his
appellate brief.

¹⁰*State ex rel. Jackson v. McMonagle* (1993), 67 Ohio St.3d 450, *State v. Davis*, supra.

¹¹*State v. Warren* (Dec. 14, 2000), Cuyahoga App. No. 76612.

{¶15}"I. THE TRIAL COURT COMMITTED PREJUDICIAL ERRORS WHEN IT FAILED TO GIVE A SUFFICIENT [sic] AND FINDING OF FACT, PURSUANT TO 2953.21 AND 2953.23. THE TRIAL COURT FAILED TO TELL APPELLANT THE TWO PART TEST THAT APPELLANT DIDN'T MEET."

{¶16}"II. THE TRIAL COURT ERRED BY DEPRIVING APPELLANT OF DUE-PROCESS OF LAW: VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH SIXTH [sic] AMENDMENT AND SECTION 10, ARTICLE I OF [THE] OHIO CONSTITUTION, TO A FAIR TRIAL."

{¶17}"III. THE TRIAL COURT COMMITTED [AN] ABUSE OF DISCRETION BY DENYING APPELLANT'S POST-CONVICTION RELIEF AND EVIDENTIARY HEARING PURSUANT TO R.C. 2953.21 AND 2953.23."

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE JR., J., Concurs

MICHAEL J. CORRIGAN, P.J., Concurs in Judgment Only

ANNE L. KILBANE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)