

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93592

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER BERRY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466432

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.

RELEASED: July 22, 2010

JOURNALIZED:

APPELLANT

Christopher Berry, Pro Se
Inmate No. 494-051
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430-0901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Thorin Freeman
Asst. County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Christopher Berry appeals pro se, the trial court's denial of his petitions for postconviction relief. He sets forth seven assigned errors.¹

{¶ 2} We affirm the denial of Berry's petitions on the grounds that they were untimely; thus, the trial court was without jurisdiction to consider the merits.

¹See appendix.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Berry for three-counts: aggravated murder, kidnapping, and tampering with evidence. The aggravated murder and kidnapping counts had a notice of prior conviction and a repeat violent offender specification. The jury found Berry guilty of the lesser-included offense of murder, kidnapping, and tampering with evidence. The trial court sentenced Berry to a total of 21 years in prison.

{¶ 4} Berry directly appealed to this court, and we affirmed his conviction, but vacated his sentence and remanded for resentencing. *State v. Berry*, Cuyahoga App. No. 87493, 2007-Ohio-278. The trial court resentenced Berry to 21 years in prison. Thereafter, Berry filed an appeal from the resentencing; this court affirmed the sentence. *State v. Berry*, Cuyahoga App. No. 90094, 2008-Ohio-3142.

{¶ 5} While the first appeal was pending, Berry filed a petition for postconviction relief, which was not ruled upon at the time the second notice of appeal was filed. After this court issued its opinion in the second appeal, Berry filed a motion to amend or supplement his petition for postconviction relief alleging errors occurred during his original trial; he also argued his attorney that filed the first petition for postconviction relief was involved in a

conspiracy to prevent him from arguing a valid defense. The trial court denied both petitions.

Untimely Petition for Postconviction Relief

{¶ 6} 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 or adjudication.” R.C. 2953.21(A)(2). When a petition is untimely and no recognized exceptions to the 180-day deadline apply, a trial court is without jurisdiction to entertain the petition. R.C. 2953.23(A); *State v. Wells*, Cuyahoga App. No. 90753, 2009-Ohio-223; *State v. Gresham*, Cuyahoga App. No. 90433, 2008-Ohio-4248; *State v. Schultz*, Cuyahoga App. No. 85430, 2005-Ohio-6627.

{¶ 7} In order for a trial court to consider an untimely postconviction relief petition, the petitioner must demonstrate either that he “was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, * * * 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) and (b). Alternatively, an untimely postconviction petition may be considered when DNA testing establishes the petitioner’s “actual innocence.” R.C. 2953.23(A)(2).

{¶ 8} In the present case, the trial transcript in Berry's direct appeal was filed on March 27, 2006. Perry's original petition was filed on September 25, 2006. Thus, it was not filed until 182 days after the trial transcript was filed in his direct appeal; therefore, the petition was untimely filed. Berry does not claim to meet one of the statutory exceptions in R.C. 2953.23(A)(1) or (2); therefore, the trial court was without jurisdiction and properly denied the petition.

{¶ 9} The court also did not have jurisdiction to consider Berry's amended or supplemental petition. Although Berry filed the amended petition after this court determined his resentencing was valid, the substance of his amended petition concerned his original trial. It is well established that the time limit for a postconviction relief petition runs from the original appeal of the conviction, and that a resentencing hearing does not restart the clock for postconviction relief purposes as to any claims attacking the underlying conviction. *State v. Seals*, Cuyahoga App. No. 93198, 2010-Ohio-1980; *State v. Haschenburger*, 7th Dist. No. 08-MA-223, 2009-Ohio-6527; *State v. O'Neal*, 9th Dist. No. 08CA0028-M, 2008-Ohio-6572; *State v. Casalicchio*, Cuyahoga App. No. 89555, 2008-Ohio-2362. Berry's amended or supplemental petition attacked his underlying conviction.

{¶ 10} Therefore, the trial court did not err by denying Berry's petitions because it lacked jurisdiction to consider them. We note that the trial court

did not deny the petitions on the basis of lack of jurisdiction. However, a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof because such error is not prejudicial. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172; *State v. Payton* (1997), 124 Ohio App.3d 552, 557, 706 N.E.2d 842, appeal not allowed (1998), 81 Ohio St.3d 1511, 692 N.E.2d 617.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANNE DYKE, J., CONCUR

Appendix

“I. The trial court erred when it forgot that Berry asked for leave of court to amend/supplement a petition for postconviction relief.”

“II. Appellant was denied due process and equal protection of the law under the 14th Amendment of the United States Constitution when he, being indigent, was denied access to trial transcripts in order to fairly litigate his case on appeal.”

“III. Appellant was denied due process and equal protection of the law under the 14th Amendment to the U.S. Constitution when the complete record was not filed on appeal.”

“IV. Petitioner was denied the effective assistance of trial counsel in violation of the VI and XIV Amendments to the U.S. Constitution when counsel failed to file a motion to suppress all of the search warrants and only argued one search warrant during the suppression hearing held before trial.”

“V. Petitioner was denied the effective assistance of trial counsel when counsel failed to obtain a defense expert and a private investigator to examine the questionable blood evidence in this case in support of a ‘police fabrication of evidence’ defense violating the petitioner’s right to compulsory process, due process, and a fair trial in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.”

“VI. The trial court erred when it dismissed Berry’s petition for postconviction relief without holding a full evidentiary hearing.”

“VII. Petitioner was denied the effective assistance of trial counsel when counsel failed to alert the trial court of prosecutorial misconduct when the state actively recruited jail house informants to build a case.”