

[Cite as *State v. Taylor*, 2015-Ohio-1314.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102020

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALI TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-11-553483-A

BEFORE: E.A. Gallagher, P.J., McCormack, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 2, 2015

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Ali Taylor appeals the denial of his petition for postconviction relief in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

{¶2} Taylor was found guilty of felonious assault and having a weapon while under a disability in 2012. His convictions were affirmed on direct appeal to this court in *State v. Taylor*, 8th Dist. Cuyahoga No. 98107, 2012-Ohio-5421.

{¶3} On June 26, 2014 Taylor filed a petition for postconviction relief wherein he asserted that his trial counsel failed to present alibi witnesses known to Taylor prior to trial, that his appellate counsel failed to inform him of his postconviction petition rights and that his appellate counsel erred in failing to seek discretionary review of this court's decision denying his appeal with the Ohio Supreme Court. The trial court denied Taylor's petition on September 13, 2014.¹ Taylor appeals, asserting the following four assignments of error:

I. Whether, Appellant, was denied effective assistance of trial counsel where available alibi witnesses, known to trial counsel, were not called, there was no strategic basis for this failure, and appellant was prejudiced as

¹ We note that on November 20, 2013 Taylor filed a petition for a writ of habeas corpus in the United States District Court, Northern District of Ohio, Eastern Division. Taylor's petition alleged grounds for relief that reiterated issues addressed by this court in his direct appeal. On September 9, 2014, the district court dismissed Taylor's petition without prejudice finding that his failure to appeal our decision to the Ohio Supreme Court constituted a procedural default. The district court rejected Taylor's argument that his default could be excused due to his alleged ineffective assistance of appellate counsel in relation to pursuing a discretionary appeal to the Ohio Supreme Court or in filing an App.R. 26(B) motion because he possessed no Sixth Amendment right to counsel at those stages. *Taylor v. Kelly*, N.D. Ohio No. 1:13-CV-02557.

a result.

II. Whether, appellant, was denied effective assistance of appellate counsel where appellate counsel failed to inform Mr. Taylor of his post-conviction petition rights thus prejudicing his ability to challenge his conviction.

III. Whether, appellant, was denied effective assistance of counsel where appellate counsel failed to file a petition to seek discretionary review with the Ohio Supreme Court following the affirmance of Mr. Taylor conviction [sic] by the Ohio Court of Appeals, thus prejudicing Mr. Taylor's ability to seek review of substantive claims that his federal rights were violated.

IV. Whether, the trial court abused its discretion in denying the appellant's motion for post-conviction [sic] relief.

{¶4} A trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). A reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence. *Gondor* at ¶ 58.

{¶5} We are unable to reach the merits of Taylor's petition for postconviction relief because we find that it was untimely filed and, as a result, the trial court lacked jurisdiction to consider it. Pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed within 180 days from the filing of the trial transcripts in the petitioner's direct appeal or, if a direct appeal was not pursued, 180 after the expiration of the time in which a direct appeal could have been filed. In this case, Taylor filed his

postconviction motion more than two years after the transcript was filed in his direct appeal on April 25, 2012.

{¶6} R.C. 2953.23(A)(1) permits a trial court to entertain an untimely or successive petition only if (1) the petitioner was unavoidably prevented from discovering the facts on which the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and the petition asserts a claim based on that new right.

{¶7} If the petitioner is able to satisfy one of these threshold conditions, he or she must then demonstrate that, but for the constitutional error at trial, no reasonable factfinder would have found him or her guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶8} In this case, Taylor has alleged that his trial counsel failed to call alibi witnesses that Taylor brought to his attention prior to trial. By its very nature, Taylor's claim does not qualify as a fact that he was unavoidably prevented from discovering. Nor has Taylor advanced an argument that the United States Supreme Court has recognized a new right that applies to him. Thus his petition does not satisfy the requirements of R.C. 2953.23(A)(1) and was untimely. As such, the trial court lacked jurisdiction to consider his petition for postconviction relief. *State v. Lenard*, 8th Dist. Cuyahoga No. 95317, 2011-Ohio-1571, ¶ 30, citing *State v. Wheatt*, 8th Dist. Cuyahoga No. 77292, 2000 Ohio App. LEXIS 4953 (Oct. 26, 2000).

{¶9} Even if Taylor’s petition was not barred as untimely, his arguments that his appellate counsel provided ineffective assistance of counsel are not cognizable in postconviction proceedings. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 6, citing *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). Such claims must be raised in an application for reopening filed pursuant to App.R. 26(B). *Id.* at ¶ 7. Furthermore, the Ohio Supreme Court has held that an indigent petitioner has neither a state nor a federal constitutional right to be represented by an attorney in a postconviction proceeding. *State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652 (1991), citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

{¶10} We briefly address Taylor’s argument that his appellate counsel failed to inform him of the time constraints for filing a petition for postconviction relief because we note that federal habeas corpus law in this area has developed significantly in the last three years. In *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 1313, 182 L.Ed.2d 272 (2012), the United States Supreme Court recognized an exception to the rule established in *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991): that defendants possess no federal constitutional right to the effective assistance of counsel in postconviction proceedings. In *Martinez*, the court held that because Arizona state law only permitted ineffective assistance of counsel claims to be brought in state collateral proceedings, a state procedural default “will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review

collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez* at 1320. *Martinez*, however, did not establish a free-standing constitutional right to the appointment of counsel in postconviction proceedings. *Martinez* at 1315.

{¶11} In *Trevino v. Thaler*, 569 U.S., _____, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), the court extended *Martinez* to instances where state procedural law may permit defendants to raise ineffective-assistance claims on direct appeal but, due to the particular state’s procedural framework it is highly unlikely that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. *Id.* at 1921.

{¶12} Last year, the United States Court of Appeals for the Sixth Circuit extended the holdings in *Martinez* and *Trevino* to allow an Ohio defendant’s habeas claim on the basis of ineffective assistance of trial counsel to proceed despite the defendant failing to file a petition for postconviction relief within 180 days. *Gunner v. Welch*, 749 F.3d 511 (6th Cir.2014). The court in *Gunner* noted that under Ohio law, a claim of ineffective assistance of counsel that is dependent on facts that are not part of the trial record cannot be raised on direct appeal but must, instead, be raised in a postconviction proceeding. Based on the holdings in *Martinez* and *Trevino*, the court found that because Gunner’s ineffective assistance of counsel claim had arguable merit and could only be brought in a postconviction proceeding, his procedural default in failing to file a petition within the constraints of R.C. 2953.21 was excused and his habeas claim should be allowed to

proceed because the court found that his appellate counsel was ineffective for failing to advise him of the 180-day limitation for pursuing his postconviction petition.

{¶13} Although Taylor does not cite to the Sixth Circuit's decision in *Gunner*, his argument in the present case is similar. Because the alleged ineffective assistance of his trial counsel involved evidence *de hors* the record Taylor's remedy under Ohio law for pursuing this claim appears to have been limited to a petition for postconviction relief. *State v. Speed*, 8th Dist. Cuyahoga No. 85095, 2005-Ohio-4423, ¶ 18-19.

{¶14} However, we do not find *Gunner* to be controlling in the present case for two reasons. First, the holding in *Gunner* is ultimately derived from the United States Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 1313, 182 L.Ed.2d 272 (2012), wherein the court declined to establish a new right to counsel even in instances where a defendant's remedy for alleged ineffective assistance of counsel errors lay in postconviction motion proceedings. Instead, *Martinez* merely allowed federal habeas claims in such instances to proceed in spite of procedural barriers.

{¶15} Secondly, even if we were to read *Gunner*'s interpretation of an Ohio appellate attorney's duties as extending beyond federal habeas proceedings we find its application to the present case to be incompatible with established Ohio law. Decisions of the Ohio Supreme Court are binding upon this court; whereas, decisions of the Sixth Circuit Court of Appeals serve as persuasive authority. *State v. Johnson*, 8th Dist. Cuyahoga No. 42846, 1981 Ohio App. LEXIS 10913 (July 16, 1981). As addressed above, the Ohio Supreme Court has held that ineffective assistance of appellate counsel

arguments are to be raised in accordance with App.R. 26(B) rather than in postconviction proceedings and that an indigent petitioner has neither a state nor a federal constitutional right to be represented by an attorney in a postconviction proceeding. Because we find *Gunner* to be in conflict with these established legal principles we decline to apply it to create an exception to the statutory and jurisdictional time constraints imposed by R.C. 2953.21(A)(2).

{¶16} Taylor's assignments of error are overruled.

{¶17} The judgment of the trial court is affirmed.

It is ordered that appellee recover from 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 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR