

[Cite as *State v. Fortson*, 2017-Ohio-2989.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104941

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TIMOTHY FORTSON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-96-341112-ZA

**BEFORE:** Blackmon, J., S. Gallagher, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** May 25, 2017

**FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor

By: Mary McGrath  
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PATRICIA ANN BLACKMON, J.:

{¶1} Timothy Fortson (“Fortson”) acting pro se, appeals from the trial court’s denial of his petition to vacate or set aside judgment of conviction or sentence and assigns the following errors for our review:

I. The petitioner was deprived Equal Protection Sixth and Fourteenth Amendment rights guaranteed under the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution, when the trial court failed to follow the dictates set forth in Ohio Revised Code 2945.10(G).

II. The State violated the petitioner’s right to a speedy trial in violation of the Sixth Amendment to the United States Constitution and Article I, Section 10 and [sic] of the Ohio Constitution.

III. The trial court violated Petitioner’s right to Procedural Due Process right and Equal Protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, when it failed to file a jury verdict form.

IV. The petitioner was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, where the trial court lacked jurisdiction of his case, due to an unsworn complaint of the police officer in his case.

V. The petitioner was denied the right to a fair trial, Due Process, and Equal Protection under the Sixth and Fourteenth Amendment [sic] to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution, when the trial court denied him the right to the compulsory process.

{¶2} Having reviewed the record and pertinent law, we affirm. The apposite facts follow.

{¶3} On December 17, 1996, a jury convicted Fortson of two counts of aggravated murder and one count of aggravated robbery, all with firearm specifications. The trial court sentenced Fortson to life in prison without the possibility of parole. This court affirmed Fortson's convictions and sentence on direct appeal in *State v. Fortson*, 8th Dist. Cuyahoga No. 72229, 1998 Ohio App. LEXIS 6104 (Dec. 17, 1998). Additionally, this court denied Fortson's application for reopening in *State v. Fortson*, 8th Dist. Cuyahoga No. 72229, 2001 Ohio App. LEXIS 245 (Jan. 23, 2001).

{¶4} On January 8, 2016, Fortson filed a petition to vacate or set aside judgment of conviction or sentence, which the trial court denied without a hearing on August 17, 2016. It is from this order that Fortson appeals.

{¶5} Former R.C. 2953.21(A)(2), which was in effect at the time of Fortson's convictions, states that 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 \* \* \*."

{¶6} As the state noted in its appellate brief, it is unclear from the docket in Fortson's direct appeal when the transcript was filed. However, it is apparent that it was filed sometime before December 17, 1998, when this court affirmed Fortson's convictions. *See State v. Fortson*, 8th Dist. Cuyahoga No. 72229, 1998 Ohio App. LEXIS 6104 (Dec. 17, 1998). Construing the facts in a light most favorable to Fortson, the statutory deadline for filing his petition was in mid-1999. Fortson offers no explanation for why he waited over 16 years to file his petition for postconviction relief.

{¶7} Exceptions exist when the court may entertain a delayed petition for postconviction relief. Pursuant to former R.C. 2953.23(A)(1), a petitioner must show that he or she was “unavoidably prevented from discovery” of evidence or that the United States Supreme Court recognized a new retroactive right that applies to the petitioner’s situation. The petitioner must also show “by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty \* \* \*.” Former R.C. 2953.23(A)(2). If the petitioner does not meet this criteria, the court has no jurisdiction to hear an untimely petition.

{¶8} In the instant case, although Fortson claims in the introductory paragraph to his merit brief that he “could not have discovered or produced previously the exculpatory evidence he now presents \* \* \*,” Fortson fails to acknowledge R.C. 2953.23 or that his petition was filed over a decade after the deadline. Furthermore, Fortson fails to identify any exculpatory evidence that may apply to his case, and he fails to detail why or how he was prevented from discovering anything.

{¶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.” *State v. Short*, 8th Dist. Cuyahoga No. 82246, 2003-Ohio-3538, ¶ 9.

{¶10} In the case at hand, Fortson’s arguments are based on: the court failing to properly charge the jury; a speedy trial violation; the court failing to file verdict forms; the absence of a sworn complaint from the police; and ineffective assistance of counsel

for failure to call witnesses who were identified at trial. Fortson was aware of all of these things at the time of his trial and at the time of his direct appeal. None of his arguments qualify as newly discovered evidence; thus, the court had no jurisdiction to entertain a postconviction petition filed outside of the 180-day time limit set forth in R.C. 2953.21.

{¶11} Furthermore, the Ohio Supreme Court has held that “pursuant to *res judicata*, a defendant cannot raise an issue in a motion for postconviction relief if he or she could have raised the issue on direct appeal.” (Emphasis sic.) *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997).

{¶12} We conclude that Fortson’s petition was untimely, and the trial court was without jurisdiction to hear it on the merits. Additionally, Fortson’s arguments are barred by the doctrine of *res judicata*. Therefore, we find no error with the denial of Fortson’s petition for postconviction relief, and his five assigned errors are overruled. *See State v. Travis*, 8th Dist. Cuyahoga No. 86328, 2006-Ohio-802, ¶ 25 (because the defendant’s petition was untimely, “the trial court did not have jurisdiction to consider the merits of the petition. Accordingly, this court is also without jurisdiction to consider arguments relating to the merits of [the defendant’s] petition”).

{¶13} Judgment 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 be sent to 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.

PATRICIA ANN BLACKMON, JUDGE

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SEAN C. GALLAGHER, P.J., and  
LARRY A. JONES, SR., J., CONCUR