

[Cite as *State v. Ward*, 2017-Ohio-2990.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105001

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVE WARD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575203-A

BEFORE: S. Gallagher, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: May 25, 2017

FOR APPELLANT

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SEAN C. GALLAGHER, J.:

{¶1} Dave Ward appeals the denial of his motion for postconviction relief. We affirm.

{¶2} “In June 2013, Ward was indicted on 31 counts, including aggravated murder charges, in violation of R.C. 2903.01, as well as numerous assault and firearm charges.” *State v. Ward*, 8th Dist. Cuyahoga No. 101041, 2014-Ohio-4579, ¶ 2. “The incident involved a teenage party that turned deadly when multiple partygoers[, including Ward,] fired shots into opposing crowds of teenagers, killing one and wounding others.” *Id.* at ¶ 3. “Ward pleaded guilty to amended charges of involuntary manslaughter, felonious assault, discharge of a firearm on or near prohibited premises, aggravated rioting, all with one- and three-year firearm specifications, and having a weapon while under disability.” *Id.* Involuntary manslaughter is defined as causing the death of another as a proximate result of committing or attempting to commit any felony offense. R.C. 2903.04(A). Ward agreed to a 7- to 16-year prison term as part of the plea deal. *Ward* at ¶ 3. The court imposed a term of nine years. *Id.* at ¶ 4. The convictions were affirmed with the panel noting that “Ward admitted to being at the party on the night of the shooting, to having a gun on his person, and to shooting the gun during the melee. His own admissions * * * resulted in the charges contained in the amended complaint” to which he pleaded guilty. *Id.*

{¶3} In June 2016, Ward filed a petition for postconviction relief claiming that he recently discovered a witness who was able to demonstrate Ward’s innocence, that she

was threatened by detectives to implicate Ward for that murder, and that the codefendants conspired to include Ward in order to get a better plea deal. Ward latched onto language in the direct appeal that noted there was evidence that Ward was not guilty of murder because ballistics proved the fatal shot came from another weapon. Although involuntary manslaughter is colloquially known as felony murder, involuntary manslaughter punishes the offender for any death caused as a proximate result of felonious activity. The state does not need to prove the offender was the person who actually killed the victim. This “newly discovered” witness’s testimony does not actually address any of the crimes to which Ward pleaded guilty. *See Ward* at ¶ 18-19. Ward admitted to committing felonies, and there was no dispute that someone died as a proximate result of those acts. *Id.* Nevertheless, Ward’s petition is untimely, and the trial court lacked jurisdiction to entertain the merits of the request.

{¶4} R.C. 2953.21 provides an offender the ability to file a petition for postconviction relief no later than 365 days after the date on which the trial transcript is filed in the direct appeal of the judgment of conviction. R.C. 2953.21(A)(2). In this case, the transcript was filed in May 2014, and Ward filed his petition in June 2016. The petition is per se untimely. *State v. Orr*, 8th Dist. Cuyahoga No. 100166, 2014-Ohio-501, ¶ 6; *State v. Alexander*, 8th Dist. Cuyahoga No. 95995, 2011-Ohio-1380, ¶ 14. The trial court did not err in denying Ward’s petition for postconviction relief. *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155,

¶ 13; *State v. Jones*, 8th Dist. Cuyahoga No. 104667, 2017-Ohio-1052, ¶ 17 (S. Gallagher, J., dissenting).

{¶5} In fact, under R.C. 2953.23(A), the trial court may not even entertain a petition filed after the expiration of the 365-day period unless the petitioner demonstrates that (1) he was unavoidably prevented from discovering the facts upon which the petitioner must rely to present a claim for postconviction relief or (2) the United States Supreme Court recognizes a new federal or state right that retroactively applies to the petitioner. If the petitioner demonstrates such, he must then show by clear and convincing evidence that “but for the constitutional error at trial,” no reasonable factfinder would have found him guilty of the offense. R.C. 2953.23(A)(1)(b). *State v. Rackley*, 8th Dist. Cuyahoga No. 102962, 2015-Ohio-4504, ¶ 13. This two-part exception is not available to offenders who plead guilty or no contest to the charges underlying their convictions.

{¶6} “The time limit for filing a petition for postconviction relief is jurisdictional.” *State v. Kleyman*, 8th Dist. Cuyahoga No. 93896, 2010-Ohio-3612, ¶ 35; *Rackley* at ¶ 14, citing *State v. Johns*, 8th Dist. Cuyahoga No. 93226, 2010-Ohio-162, ¶ 8.

“Unless a defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider an untimely petition for postconviction relief.” *Id.*, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 99972, 2014-Ohio-1512, ¶ 8; and *State v. Carter*, 2d Dist. Clark No. 03CA-11, 2003-Ohio-4838, ¶ 13.

{¶7} The only exception to the 365-day time limit is unavailable to a defendant in Ward's position because of the second prong of the conjunctively drafted exception under R.C. 2953.23(A)(1). Ward pleaded guilty and thus can never demonstrate that, but for the error at trial, no reasonable trier of fact would have found him guilty. Ward's guilty plea limits his ability to file a petition for postconviction relief to one year.¹ His petition was not filed within that period, and the trial court lacked jurisdiction to consider the merits of his claim. The petition was rightfully denied.

{¶8} We must affirm.

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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR

¹The only other exception, pertaining to an offender for whom DNA testing was performed, is also inapplicable in this case. See R.C. 2953.23(A)(2).