

[Cite as *State v. Yates*, 2017-Ohio-8321.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105427

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PIERRE YATES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-04-460767-A

BEFORE: Celebrezze, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 26, 2017

FOR APPELLANT

Pierre Yates, pro se
Inmate No. A484276
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Amy Venesile
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Pierre Yates, appeals from the denial of his successive petition for postconviction relief. He argues that amendments to R.C. 2901.09(B) apply retroactively to his case and should result in the vacation of his conviction for murder. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Appellant was convicted of murder in 2005, for which he received a prison sentence of 23 years to life. His conviction and sentence were affirmed by this court in 2006. *State v. Yates*, 8th Dist. Cuyahoga No. 86631, 2006-Ohio-3004.¹ Over the intervening years, appellant filed several petitions for postconviction relief, which were denied by the trial court.

{¶3} In July 2016, appellant filed an “amended petition to vacate or set aside judgment of conviction or sentence under R.C. 2953.21 and R.C. 2953.23.” Appellant argued that statutory amendments created a retroactive right that should now be applied to his case. The trial court denied the motion in a journal entry without exposition.

{¶4} Appellant then filed the instant appeal, assigning two errors for review:

1. [The] trial court committed constitutional error and abused its discretion [by] denying a hearing on [appellant’s] petition under R.C. 2953.23 for application [of] newly amended R.C. 2901.05(B) and R.C. 2901.09(B) when [a] new federal holding of U.S. Supreme Court gives retroactive effect [sic] to new substantive rule of constitutional law.
2. No reasonable juror would convict [appellant] of [the] firearm

¹ A detailed recitation of the underlying facts of this case can be found here.

specification for discharging a firearm from a motor vehicle under R.C. 2941.146 if [the] jury instruction for R.C. 2901.09(B) was retroactively given and applied to [appellant's] sentence and conviction.

II. Law and Analysis

A. Successive Petition for Postconviction Relief

{¶5} Both of appellant's assignments of error address the requirements for a successful petition for postconviction relief. Therefore, they will be addressed together.

{¶6} Appellant's motion before the trial court advanced the elements of a postconviction relief petition under R.C. 2953.23. Under this statute, a petitioner can seek leave to file a successive or untimely petition for postconviction relief by satisfying two requirements. First, the petitioner must show that he or she was unavoidably prevented from discovering evidence or facts that demonstrate a claim for relief or the United States Supreme Court recognizes a new federal or state constitutional right that applies retroactively. R.C. 2953.23(A)(1)(a). If one of these two threshold requirements are satisfied, then the petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty. R.C. 2953.23(A)(1)(b). This court then reviews the trial court's decision for an abuse of discretion. *State v. Harris*, 8th Dist. Cuyahoga No. 89156, 2008-Ohio-934, ¶ 19.

{¶7} Here, appellant cannot satisfy any of the requirements. He advances an incoherent argument about statutory amendment and recognition of a new federal right by

the United States Supreme Court. He asserts that amendments to R.C. 2901.09(B), that he admits occurred after his case, should be applied retroactively. The enactment of R.C. 2901.09(B), an expansion of Ohio's Castle Doctrine by removing a duty to retreat from one's automobile from the affirmative defense of self-defense, has no retroactive application, and there is no indication that the legislature intended the law to apply retroactively. More importantly, this is not a recognition of a new constitutional right by the United States Supreme Court or the belated discovery of evidence or facts that entitle appellant to relief.

{¶8} Appellant fails to point to a new substantive constitutional right that would require retroactive application. Appellant's citation to a recent Supreme Court decision does not aid him. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). *Montgomery* deals with an Eighth Amendment prohibition — the retroactive application of the holding that a mandatory life without parole sentence for juvenile offenders is constitutionally prohibited. *Id.* applying *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Appellant's case does not involve this issue.

{¶9} There is no basis to argue that appellant's convictions are impacted by a new constitutional right. The amendment of the statute appellant cites does not create a new constitutional right. Therefore, appellant's first assignment of error is overruled.

{¶10} Appellant's second assignment of error argues the second requirement for a successful successive petition for postconviction relief. In it, he asserts the jury would

have found him not guilty of the firearm specification if instructions pursuant to amended R.C. 2901.09(B) were given at trial. The amendments appellant points to provided for an expansion of the law for the affirmative defense of self-defense by removing a duty to retreat from one's automobile. However, appellant did not argue self-defense at trial. It is unclear why appellant asserts that no reasonable juror would have found him not guilty of the firearm specification for discharging a firearm from a vehicle. Further, appellant did not meet the first requirement under R.C. 2953.23(A)(1)(a), so an analysis under R.C. 2953.23(A)(1)(b) is not required. Therefore, this assignment of error is overruled.

III. Conclusion

{¶11} The trial court did not err in denying appellant's successive petition for postconviction relief where appellant did not advance any plausible theory that would entitle him to relief. The statutory amendment of R.C. 2901.09(B), two years after appellant's trial, did not create a constitutional right that should be retroactively applied to him.

{¶12} Judgment affirmed.

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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

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