

STATE OF OHIO                    )  
                                          )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       24613

Appellee

v.

DAVID C. MORRIS

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 1987-04-0423(A)

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

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WHITMORE, Judge.

{¶1} Defendant-Appellant, David C. Morris, appeals from the judgment of the Summit County Court of Common Pleas, granting the State of Ohio’s motion to dismiss his petition for post-conviction relief (“PCR”). This Court affirms.

I

{¶2} In April 1987, Morris was indicted on one count of aggravated murder, one count of attempted aggravated murder, six counts of aggravated robbery, one count of kidnapping, one count of carrying a concealed weapon, and multiple specifications. Subsequently, Morris pleaded guilty to five counts of aggravated robbery and one count of kidnapping. Morris proceeded to a three-judge bench trial on the remaining counts in his indictment. The judges found Morris guilty of attempted aggravated murder, aggravated murder, aggravated robbery, carrying a concealed weapon, and several specifications. This Court affirmed Morris’ convictions on direct appeal. *State v. Morris* (Apr. 27, 1988), 9th Dist. No. 13366.

{¶3} On November 6, 2008, Morris filed a PCR petition. On December 15, 2008, the State filed a motion to dismiss Morris’ petition. The trial court granted the State’s motion the same day, concluding that Morris’ petition was untimely and did not comply with R.C. 2953.23’s requirements for untimely PCR petitions. The trial court further concluded that even if the petition was timely it would be barred by res judicata. Morris now appeals from the trial court’s dismissal of his petition and raises a single assignment of error for our review.

## II

### Assignment of Error

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING RELIEF UNDER OHIO POST CONVICTION STATUTE, OHIO REVISED CODE, SECTION 2953.23, WHERE THE DEFENDANT IS LEGALLY INNOCENT AS A MATTER OF LAW.”

{¶4} In his sole assignment of error, Morris argues that the trial court erred in dismissing his PCR petition because a defendant may argue that his convictions are void for lack of subject matter jurisdiction at any time. Specifically, Morris argues that he is “legally innocent” of the offenses of aggravated robbery and aggravated murder because his indictment omitted essential elements of those offenses and, therefore, did not “charge an offense” for those crimes.

{¶5} Generally, this Court reviews a trial court’s denial of a PCR petition for an abuse of discretion. *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, at ¶11. When a trial court denies a PCR petition solely on the basis of an issue of law, however, this Court’s review is de novo. *State v. Samuels*, 9th Dist. No. 24370, 2009-Ohio-1217, at ¶3. Whether a defendant’s PCR petition satisfied the procedural requirements set forth in R.C. 2953.21 and R.C. 2953.23 is an issue of law. *Id.* at ¶3-7. Consequently, a de novo standard of review applies. *Id.* at ¶3.

{¶6} R.C. 2953.21(A)(1)(a) provides, in relevant part, that:

“Any person who has been convicted of a criminal offense \*\*\* who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution \*\*\* [may] file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.”

Except as otherwise provided in R.C. 2953.23, such a petition “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). Morris did not file his PCR petition until 2008, approximately twenty years after this Court affirmed his convictions on direct appeal and well beyond R.C. 2953.21(A)(2)’s time limitation. Accordingly, Morris had to satisfy R.C. 2953.23’s requirements to obtain a review of his untimely petition.

{¶7} Pursuant to R.C. 2953.23, a court may not entertain an untimely PCR petition unless both of the following apply:

“(a) Either the petitioner shows that [he] was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, 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.

“(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted[.]” R.C. 2953.23(A)(1)(a)-(b).

If an untimely PCR petition fails to satisfy the foregoing requirements, a trial court lacks jurisdiction to consider the petition. *State v. Hensley*, 9th Dist. No. 03CA008293, 2003-Ohio-6457, at ¶7. The fact that a petitioner raises a defective indictment argument in his petition does not constitute an exception to R.C. 2953.23’s procedural requirements. *Samuels* at ¶6-7.

{¶8} Morris argues that his indictment was defective because it omitted the mens rea of “knowingly” in his aggravated robbery counts and in his aggravated murder count, which was predicated upon his having purposely caused another’s death while in the course of committing, or attempting to commit, aggravated robbery. Morris does not allege, however, that he was unavoidably prevented from discovering these defects in his indictment. Nor does he cite to any new federal or state right enunciated by the United States Supreme Court that would retroactively apply to his case. In fact, Morris relies in part upon inapplicable Ohio Supreme Court law from 1857 and 1932 in support of his defective indictment argument. See *Fouts v. State* (1857), 8 Ohio St. 98; *Harris v. State* (1932), 125 Ohio St. 257. As such, his petition did not satisfy R.C. 2953.23(A)(1)(a)’s requirements.

{¶9} This Court recently rejected an argument similar to Morris’ in *Samuels*. There, the defendant filed an untimely PCR petition, arguing that his indictment was defective because his aggravated robbery count omitted a mens rea element. This Court affirmed the denial of the petition as untimely and concluded that “because the trial court lacked authority to hear Samuels’ [PCR petition], we need not address whether [*State v.*] *Colon*[, 118 Ohio St.3d 26, 2008-Ohio-1624,] is applicable to a [PCR petition] such as Samuels’.” *Samuels* at ¶7. Morris has not explained why this Court should depart from its decision in *Samuels*. Because Morris did not satisfy R.C. 2953.23’s procedural requirements for an untimely PCR petition, the trial court did not err in dismissing his petition on that basis. *Id.* Accord *State v. Brooks*, 9th Dist. No. 24510, 2009-Ohio-2341, at ¶3-10; *State v. Culgan*, 9th Dist. No. 06CA0057-M, 2007-Ohio-764, at ¶5-8 (both concluding that the trial court properly denied untimely PCR petitions that raised defective indictment issues). Morris’ sole assignment of error is overruled.

## III

{¶10} Morris' sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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BETH WHITMORE  
FOR THE COURT

DICKINSON, P. J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

ROBERT E. DAVIS, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.