

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA009484

Appellee

v.

ANTHONY VILLA, JR.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 04 CR 065158

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 28, 2009

Per Curiam.

INTRODUCTION

{¶1} A jury convicted Mr. Villa of aggravated murder, and the trial court sentenced him to twenty-three years in prison. Mr. Villa appealed, but this court affirmed his conviction. The docket for his direct appeal indicates that the Transcript of Proceedings was filed on January 6, 2006, and the notice of filing the record was filed on January 12, 2006.

{¶2} On July 10, 2006, Mr. Villa filed a petition for post-conviction relief. The trial court dismissed it as untimely under Section 2953.21(A)(2) of the Ohio Revised Code. Mr. Villa has appealed, assigning as error that the trial court incorrectly calculated the 180-day statute of limitations period. Because Mr. Villa did not file his petition until 185 days after the transcript was filed in this Court in his direct appeal, this Court affirms.

STATUTE OF LIMITATIONS

{¶3} Mr. Villa’s assignment of error is that the trial court incorrectly calculated the 180-day limitations period from the date the transcript was filed in the trial court instead of the date it was filed in this Court. Although the transcript of proceedings was also filed in this Court on the same date as in the trial court, Mr. Villa instead argues that the transcript of proceedings was not actually filed in this Court until the entire record on appeal was filed in this Court and the clerk of the appellate court filed the notice of the filing of the record, pursuant to Rule 11(B) of the Ohio Rules of Appellate Procedure.

{¶4} Section 2953.21(A)(2) provides that “a petition [for post-conviction 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” Mr. Villa does not dispute that the transcript of proceedings was filed in this Court on January 6, 2006, and that he did not file his petition for post-conviction relief until more than 180 days later.

{¶5} Mr. Villa focuses his argument on one key question – can the transcript of proceedings be filed before the record is filed? He points to Rules 9 and 10 of the Ohio Rules of Appellate Procedure to support his position that the filing of the transcript must occur at the same moment as the filing of the record on appeal, and, accordingly, the date of the notice of the filing of the record should start the time for filing a petition for postconviction relief. Although the Appellate Rules set out the procedure for transmitting the record from the trial court to the court of appeals, the deadline for filing a postconviction petition established in section 2953.21 does not rely on that procedure. Instead, section 2953.21(A)(2) requires the petition to be filed no later than 180 days after the date the trial transcript is filed in the court of appeals in the direct appeal.

{¶6} Chief Justice Moyer considered this question in his concurring opinion in *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967. He noted that the defendant asked the Court to decide that “trial transcript” meant the filing of the record on appeal. *Id.* at ¶2. Chief Justice Moyer rejected this reading of the statute, concluding that this “would be a reasonable request if it were not inconsistent with the plain words of R.C. 2953.21(A)(2)” *Id.* While there may be “strong policy arguments” in favor of Mr. Villa’s position, see *id.* at ¶3, the language of the statute is not ambiguous and this Court is “restricted by the language of R.C. 2953.21(A)(2), which expressly provides that the limitations period begins on the date the trial transcript is filed.” *Id.*

{¶7} The limitations period language in the statute may cause confusion in some cases, but not this one. Here, the docket reflects the date of the filing of the transcript of proceedings in the court of appeals, January 6, 2006. That filing triggered the 180 day period for Mr. Villa to file his petition. Mr. Villa relied on a different date and filed his petition too late.

{¶8} To learn the triggering date to calculate his petition’s due date, Mr. Villa had several options available to him, including asking the attorney who represented him on direct appeal, contacting the clerk of courts, or reviewing the clerk of court’s on-line docket, a copy of which was attached to his brief in this case. “What he could not do was ignore the [statute’s] filing deadline.” *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, at ¶7.

{¶9} Accordingly, because Mr. Villa did not file his petition for post-conviction relief until 185 days after the trial transcript was filed in this Court, the trial court correctly dismissed it as untimely. His assignment of error is overruled.

CONCLUSION

{¶10} The trial court correctly concluded that Mr. Villa's petition for post-conviction relief was untimely under Section 2953.21(A)(2) of the Ohio Revised Code. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

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 Lorain, 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.

CARLA MOORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

DICKINSON, J.
DISSENTS, SAYING:

{¶11} The majority has noted that the transcript of proceedings was filed in Mr. Villa’s direct appeal “on January 6, 2006, and the notice of filing the record was filed on January 12, 2006.” What it has failed to mention is that what it has called “the notice of filing the record” is labeled “Transcript” on the docket sheet and is described as the “Transcript of Docket & Journal Entries Together with all Original Papers Filed and Received” The clerk’s office sent Mr. Villa a notice, informing him “that the record has been filed in the Court of Appeals . . . on January 12, 2006. The record consists of a transcript of docket and journal entries together with all original papers from [his criminal case].” The clerk did not send Mr. Villa a notice telling him when the transcript of proceedings was filed.

{¶12} Section 2953.21(A)(2) provides that “a petition [for post-conviction 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” The term “trial transcript” is ambiguous. It is not defined in Section 2953.21(A)(2) and is not used in any other sections of the Revised Code. The legislature did not use the terms “transcript of proceedings” or “transcript of the docket and journal entries” to describe what it meant in Section 2953.21, even though it has used those terms elsewhere in the Code. See R.C. 5122.43(A)(9); R.C. 5123.96(I); R.C. 2111.47.1; R.C. 2953.14.

{¶13} The majority has suggested that Mr. Villa could have learned the triggering date for his petition from the lawyer who represented him on direct appeal. That lawyer, however, was appointed to assist Mr. Villa with his direct appeal, not offer advice about his other remedies. The majority also has suggested that Mr. Villa could have contacted the clerk’s office for the triggering date, but it is not authorized to give parties legal advice. Furthermore, while Mr. Villa

could have reviewed the clerk of court's on-line docket, what he would have learned was that the "Transcript" in his direct appeal was filed on January 12, 2006, the same date indicated in the notice he received.

{¶14} Upholding the dismissal of Mr. Villa's petition as untimely denies him the right to due process. See *State v. Hollingsworth*, 118 Ohio St. 3d 1204, 2008-Ohio-1967, at ¶4 (Moyer, C.J., concurring). "[D]ue-process rights are malleable ones that are designed to ensure that individuals are treated with fundamental fairness in light of the given situation and the interests at stake." *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, at ¶35 (citing *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, at ¶ 80-81). Mr. Villa petitioned for post-conviction relief 179 days after the docket sheet in his direct appeal and the notice he received from the court said the transcript had been filed. To conclude that his petition is late under such circumstances violates fundamental fairness.

APPEARANCES:

ANTHONY VILLA, JR., pro se, appellant.

DENNIS WILL, prosecuting attorney, and MARY R. SLANCZKA, assistant prosecuting attorney, for appellee.