

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

SCOTT A. JONES,

Defendant-Appellant.

CASE NO. 2022-1506

On Appeal from the Butler County
Court of Appeals, Twelfth
Appellate District

Court of Appeals
Case No. 2022-04-036

**MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO
TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST,
DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY
LEAVE TO APPEAL SHOULD BE DENIED**

Appellant Scott A. Jones seeks discretionary review of the Twelfth District Court of Appeals decision affirming the trial court's denial of Jones' petition for postconviction relief (PCR) filed 141 days out of rule. Jones claims, *inter alia*, that Ohio's Covid-19 emergency legislation (House Bill 197) operated to extend (by approximately 142 days) the September 16, 2020 "due date" for his PCR petition, in spite of and contrary to the express and unambiguous language of H.B. 197 that the tolling provisions applied only to deadlines "*that are set to expire* between March 9, 2020, and July 30, 2020." (Emphasis added.)

In his PCR petition he did not assert that either of the statutory exceptions to his filing deadline for the PCR petition (R.C. 2953.23(A)) applied to him; this issue was never argued, considered or decided by the lower courts. His suggestion, at this stage, he was "unavoidably prevented from discovery of the facts" supporting his PCR petition is without definition, detail, and thoroughly unsupported by the record.

This case is not of public or great general interest. As set forth below only a handful of courts have reached the issue of the application of the tolling provisions to deadlines "outside" the tolling provisions, all of them deciding it did not.

At best one might argue this case involves the application of the clear and unambiguous language of H.B. 197 to Jones' filing; it most certainly does not involve a constitutional question, much less a substantial one.

Leave to appeal should not be granted.

STATEMENT OF THE CASE AND FACTS

Jones was indicted on two counts of felonious assault, both with firearm specifications. In November of 2018, a jury found Jones guilty and the court sentenced him to 11 years in prison.

On direct appeal, the Twelfth District Court of Appeals affirmed Jones' convictions. *State v. Jones*, 12th Dist. Butler Nos. CA2019-01-006 and Butler Nos. CA2019-01-008, 2020-Ohio-2672. In October of 2020, the Ohio Supreme Court declined discretionary review of Jones' *pro se* direct appeal. *State v. Jones*, 161 Ohio St. 3d 1407, 2021-Ohio-106, 161 N.E.3d 693.

Jones then filed an application for reopening his appeal which the Twelfth District also denied. *State v. Jones*, 12th Dist. Butler Nos. CA2019-01-006 and CA2019-01-008 (Jan. 20, 2021) (Entry Denying Application to Reopen Appeal). Jones filed an appeal with this Court which declined discretionary review of the Twelfth District's denial of Jones' application to reopen his appeal. *State v. Jones*, 163 Ohio St. 3d 1418, 2021-Ohio-1606, 167 N.E.3d 979.

The current appeal.

On February 4, 2021, Jones filed a petition for postconviction relief (PCR) in the trial court. The state filed a motion for summary judgment, and after the court granted an extension of time, Jones filed a response. On March 16, 2022, the trial court entered a judgment denying Jones' petition for postconviction relief.

Jones appealed the trial court's denial of his postconviction petition to the Twelfth District, asserting as his sole assignment of error:

“The trial court erred to the prejudice of petitioner-appellant, Scott A. Jones, in overruling his petition for postconviction relief by ruling that it was untimely.”

Relying on the plain language of law, the Twelfth District Court of Appeals rejected Jones argument that although his deadline to file his PCR petition (September 16, 2020) fell *after*

the Covid-19 emergency tolling period (March 9, 2020 to July 30, 2020) he was still entitled to the benefit of the 142 days of the tolling period, rendering timely his PCR petition filed February 4, 2021. *State v. Jones*, 12th Dist. Butler No. CA2022-04-036, 2022-Ohio-3864, ¶ 15.

ARGUMENT

PROPOSITION OF LAW 1:

PETITIONER-APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PREJUDICED, WHEN HIS POST CONVICTION PETITION WAS DENIED AS BEING UNTIMELY, WHERE HE WAS DENIED ACCESS TO HIS INSTITUTION'S LAW LIBRARY AND THE COURT FOR AN ENTIRE YEAR DUE TO THE COVID-19 PANDEMIC AND THE GOVERNOR'S EXECUTIVE ORDER.

If a direct appeal is taken from a defendant's conviction a PCR petition must be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2)(a). If a postconviction relief petition is filed beyond the time limitation, or the petition is a second or successive petition for postconviction relief, a trial court lacks jurisdiction to consider it unless the provisions of R.C. 2953.23(A) apply. *State v. Garcia*, 12th Dist. Butler No. CA2013-02-025, 2013-Ohio-3677, ¶ 12.

The completed transcripts were filed in Jones' direct appeal on September 16, 2019; therefore any PCR petition was due on or before September 16, 2020. Jones did not file his PCR petition until February 4, 2021, 141 days out of rule.

Certain exceptions apply to the "365 day" rule. R.C. 2953.23(A) provides, as is relevant, a trial court may entertain petitions filed after the expiration of the time limit if both of the following apply:

* * *the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief * * *.

The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted * * *.

R.C. 2953.23(A)(1)(a), (b).

On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020-01D and declared a state of emergency in Ohio in response to COVID-19. On March 27, 2020, the Governor signed into law House Bill 197, which immediately tolled all statutes of limitation, time limitations, and deadlines in the Ohio Revised Code and the Ohio Administrative Code until the expiration of the executive order or July 30, 2020, whichever was sooner. The bill stated that “the following *that are set to expire* between March 9, 2020, and July 30, 2020, shall be tolled: * * any other criminal, civil, or administrative time limitation or deadline under the Revised Code.” Am.Sub.H.B.No. 197, Section 22(A). Emphasis added.

On March 27, 2020 this Court issued a tolling order stating that the “[t]he time requirements imposed by the rules of the Court *and set to expire during the term of this order* shall be tolled.” (Emphasis added.) In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court & Use of Tech., 158 Ohio St. 3d 1516, 2020-Ohio-2975, *1517, 145 N.E.3d 299. The term of the order was set to apply “retroactively to the date of emergency declared by Executive Order 2020-01D,” which was March 9, 2020, and was set to “expire on the date the period of emergency ends or July 30, 2020.” *Id.* at *1516.

On April 2, 2020 this Court issued guidance for applying the tolling provisions of Am.Sub.H.B. No. 197 and orders of the Supreme Court:

The legislation and Supreme Court order toll only time requirements set to expire *during* the emergency period. Time requirements that are set to expire after the emergency period are not tolled. (Emphasis sic.)

The Supreme Court of Ohio, Assessing Impact of Tolling Legislation and Supreme Court Order upon Specific Time Requirements. <https://www.supremecourt.ohio.gov/coronavirus/resources/tollingAnalysis040220.pdf> [4/2/2020].

Jones' deadline to file his PCR petition was set by statute (R.C. 2953.21(A)(2)(a)), so his argument falls within the purview of House Bill 197 (which tolled all statutes of limitation, time limitations, and deadlines in the Ohio Revised Code), rather than this Court's tolling order of March 27, 2020 applying to rules of the Court. His deadline to file of September 16, 2020 clearly excludes him from the provision tolling deadlines "set to expire between March 9, 2020, and July 30, 2020."

As found by the Twelfth District, in rejecting Jones' argument below:

The language of both House Bill 197 and the Ohio Supreme Court's tolling order makes clear that the order applied only to time requirements, time limitations, and deadlines that were set to expire between March 9, 2020, and July 30, 2020. The tolling order "effectively [froze] time, from March 9 until the expiration of the order. For example, if a deadline was set to expire on March 19 (10 days after the effective date of the order), then the deadline [would] expire 10 days after the end of the emergency period." *State v. Jackson*, 2nd Dist. Montgomery No. 29226, 2022-Ohio-1522, ¶ 26.

State v. Jones, 2022-Ohio-3864, ¶ 15.

In *State v. Bender* the Third District Court of Appeals rejected claims similar (if not identical) to those made by Jones, holding that since the deadline [to file the PCR petition] fell after the emergency period ended on July 30, 2020, the law tolling statutory time requirements did not apply, and since the appellant did not file within the 365 days from the date on which the transcripts were filed for his direct appeal, his petition was not timely filed. *State v. Bender*, 3d Dist. Union No. 14-21-01, 2021-Ohio-1931, ¶ 10. See also *Johnson v. Ohio Dep't of Rehab. & Correction*, 10th Dist. Franklin No. 22AP-61, 2022-Ohio-2155, ¶ 10: “[t]hus, the tolling legislation tolled deadlines between March 9 and July 30, 2020, but had no effect on time requirements which expired after July 30, 2020.”

This Court’s duty in construing a statute is to determine and give effect to the intent of the General Assembly as expressed in the language it enacted. *State v. J.M.*, 148 Ohio St.3d 113, 2016-Ohio-2803, 69 N.E.3d 642, ¶ 7. If the language of a statute is plain and unambiguous and conveys a clear and definite meaning, then there is no need for this Court to resort to the rules of statutory interpretation; instead, the Court applies the statute as written. *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12.

The language of H.B. 197 is clear and unambiguous; the deadline for Jones’ PCR petition was clearly not “set to expire” during the Covid-19 tolling period. Both the trial and appellate courts applied the statute “as written.” There is no constitutional question in this case, much less a substantial one.

And as to Jones’ suggestion he was “denied access to his institution’s law library and the court for an entire year” (Proposition No. 1, above), the state responds:

1. Jones’ did not raise this issue in his PCR petition. He rested the timeliness of his petition on the Covid-19 tolling provisions alone.

2. In the court below Jones alleged the law library at the Lebanon Correctional Institution was closed from April 1, 2020 to April 1, 2021, claiming he had “no access to any legal materials or any legal resources.” Appellant’s Brief, pp. 1-2.
 - a. Jones’ claims as to “no access” (from April 1, 2020 to April 1, 2021) to legal materials or resources are belied by the record. During this claimed period of “no access” Jones managed to research, prepare and file in the trial court his 45 page-plus PCR petition and affidavit, a motion for expert assistance, a motion for investigator, and a motion for appointment of counsel. During this same period of “no access” Jones managed to file in this Court a notice of appeal, motion for delayed appeal and memorandum in support of jurisdiction (Case No. 2020-1225), and a notice of appeal and memorandum in support of jurisdiction (Case No. 2021-0270).
 - b. Jones’ did not raise an issue of his alleged lack of access to necessary legal resources until May 4, 2021 (three months after filing his PCR petition), and in the context of his seeking an extension of time to respond to the state’s motion for summary judgment on his PCR petition. Jones’ untimely, unsworn, unsupported, and uncorroborated assertions in the trial court were insufficient to create an issue, much less preserve it.
3. The above notwithstanding, Jones assertions as to lack of legal resources (however unsupported or contradicted by the record as they may be) are irrelevant in light of Jones’ failure to claim, and demonstrate, in the trial court, any requisite exception as found in R.C. 2953.23(A)(1), and his “failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive

postconviction petition.” *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 22. See also *State v. Taylor*, 11th Dist. Lake No. 2018-L-091, 2019-Ohio-842, citing *Apanovitch* in rejecting appellant’s claim, *inter alia*, of lack of legal resources as excuse for untimely filing of PCR petition in absence of demonstrated R.C. 2953.21(A) exceptions. *Id.*, ¶¶ 10-11.

Jones’ Proposition No. 1 does not merit review.

PROPOSITION OF LAW 2:

PETITIONER-APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PREJUDICED, WHEN HIS POST CONVICTION PETITION WAS DENIED AS BEING UNTIMELY, WHERE HE WAS UNAVOIDABLY PREVENTED FROM THE DISCOVERY OF THE FACTS UPON WHICH HE RELIED IN HIS PETITION AND HE WAS DENIED ACCESS TO HIS INSTITUTION’S LAW LIBRARY FOR AN ENTIRE YEAR DUE TO THE COVID-19 PANDEMIC AND THE GOVERNOR’S EXECUTIVE ORDER; PETITIONER ASSERTS CLAIM BASED ON THAT RIGHT, PURSUANT TO RC. 2953.23(A)(1).

To the extent this Proposition “overlaps” Proposition No. 1 above, the state incorporates its argument and authority set forth above as if fully rewritten herein.

Jones’ did not assert he was “unavoidably prevented from the discovery of the facts upon which he relied in his petition” when he filed his petition.

Jones’ misstates the legal standard. Memorandum in Support, p. 14. Though he quotes R.C. 2953.23(A)(1)(a) (“unavoidably prevented”) he omits the second requirement:

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted * * *.

Other than vague allusions to the governor’s executive order “essentially” (yet not completely?) closing his law library and “businesses around the area” Jones gives not a hint of

what “facts” he was prevented from discovering or how he was “unavoidably” prevented from discovering those facts. Inasmuch as he did not raise this issue in his PCR petition, the record is glaringly devoid of argument and *any* evidence (much less clear and convincing evidence) of constitutional error at trial, in the absence of which no reasonable factfinder would have found him guilty of the offense.

It is more than well-settled that a reviewing court will not consider a question not presented, considered or decided by a lower court. *Kalish v. Trans World Airlines* (1977), 50 Ohio St.2d 73, 79, 362 N.E.2d 994, 998. Jones did not make his “unavoidably prevented” argument in the trial court, it was not an issue assigned or decided on appeal, and it is therefore not properly before this court.

CONCLUSION

This case is not of public or great general interest, it does not involve a substantial constitutional question, and leave to appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Response of Appellee State of Ohio to Appellant's Memorandum in Support of Jurisdiction was sent to the following by regular U.S. mail postage prepaid this 4th day of January, 2023:

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