

IN THE SUPREME COURT OF OHIO

23-0924

STATE OF OHIO

Appellee,

v.


**On Appeal from the
Lorain County Court
of Appeals, Ninth
Appellate District**

**Court of Appeals
Case No. 22CA011896**

TERRY LITTLE

Appellant.

**MEMORANDUM IN SUPPORT OF JURISDICTION
BY APPELLANT TERRY LITTLE**



Terry Little #562207

Appellant Pro se

Grafton Correctional Institution

2500 S. Avon Beldon Rd.

Grafton, Ohio 44044

Appellee

J.D. Tomlinson

Lorain County Prosecutors' Office

225 Court Street 3rd Floor

Elyria, Ohio 44035

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents two issues of great interest to the public, and if unchecked creates a detrimental flaw to applying court rules to protect citizens and criminal defendants in their rights under Article I, section 1, 10 of the Ohio Constitution and due process of the 6th and 14th Amendment of the United States Constitution.

The First concern asks this court to address the complex standard of review under Ohio Revised Code 2953.23(A)(1)(a) and ascertain what constitutes unequivocally unavoidable delay. In Little's case the trial court and court of appeals decision was in error and incomplete as it did not completely address the standard of review of R.C.2953.23(A)(1)(a).

This case seeks to determine if a non-participant's surreptitious actions during a trial prevents a defendant from discovering the behavior during trial when mandatory remedial rules to be followed by a trial court, like those directed in Ohio Sup.R.12(C)(2) are not applied to prevent such acts, does the actions of both non-participant's actions and the trial court's failure to safeguard a trial from such influences through the use of mandated prophylactics prevents a defendant from exercising reasonable diligence to discover the non-participant's actions?

For instance, during Little's trial the media surreptitiously recorded and broadcasted just his witness testimony (fair and Public trial, equal protection concerns) without first seeking permission of the trial court judge, and published the recording and broadcast on YouTube before the trial concluded. The media on each request slip (Ex. C2, C3, C4) circled request to photograph on the first and second day of Little's trial. All but one request had no request circled at all (Ex. C3 of Petition). Nonetheless, none asked to record and broadcast which the trial court concluded in its August 8, 2022 decision with no evidence to support they did (Judgment entry pg. 2). Nor does the record indicate that the trial judge permitted such acts. Under Ohio Superintendence Rule

12(C)(2), which these “rules are the law of” Ohio See *State ex rel. Grinnell Communications Corp. v. Love*, 62 Ohio St.2d 399 at 403, mandates trial courts to “...inform victims and witnesses of their right to object to being filmed, videotaped, recorded or photographed.” *State ex rel. National Broadcasting Co. v. Court of Common Pleas* 52. Not one time, before trial or before Little’s witness testimony did the trial court inform Little of such right. And given Little testified in his own defense [he] was similarly situated as other testifying witnesses. Little contended to the court of appeals that because of the media’s surreptitious actions the trial court judge was prevented from informing defendant of the recording and broadcast. This demonstrated that the media abridged Little’s opportunity to protect his fair and public trial rights, and his right to equal protection under the 14th Amendment of the United States Constitution, which would have afforded him such right had Ohio Superintendence Rule 12(C)(2) been ordered. This information did not come to Little’s attention until 2021. The trial court failed to determine if Little met the burden of establishing that the evidence could not have been discovered through the exercise of reasonable diligence. *State v. Pannell*, 1996 Ohio App. Lexis 3967 at 8. Only a hearing could have satisfied this determination.

So it is a contradiction of the Ninth District court appeals to deny Little’s appeal without considering whether Little met the burden of establishing that the information could not have been discovered through the exercise of reasonable diligence. That court and other courts has held that for evidence to qualify as new evidence, information must have been unknown to a defendant or unavailable, or [he] “had no knowledge of the existence of the new evidence and, in the exercise of reasonable diligence, could not have learned of the existence of the evidence within the time prescribed...” *State v. Covender*, 9th Dist. No. 07CA009228, 2008 Ohio 1453, ¶14; see also *State v. Barnes*, 2022 Ohio 4486 at 23. Little demonstrated, learning that the media never had permission

to record and broadcast his witness testimony was new information and could not have been discovered without a statement made by an assistant county prosecutor, Laura Ann Dezort, who revealed during her response to an Ohio Supreme Court Disciplinary Counsel grievance (Ex. B4 of Petition) that the media did not ask for permission to record and broadcast the trial. The trial court claimed otherwise, however, without questioning the original trial judge. But this case highlights the need, for the sake of the public, to address the slippery slope effects that lawless media interferences can have on trial court proceedings and procedures which trickles down to abridging a defendants' constitutional rights?

Second, the public needs to know if outside actors', like the media, commits such surreptitious behavior and deprive a trial court of following a mandated rule like that of Ohio Sup.R.12(C)(2), if such prophylactic is pertinent, or if it isn't followed does a non-participant and trial court abridge a defendant's rights prescribed in Ohio Sup.R.12(C)(2) and deprive him of his liberty without due process and deny him of his right to equal protection following the recording and broadcast of just his witness testimony does it ultimately denies a defendant from enjoying the right to a fair trial?

STATEMENT OF THE CASE

In December of 2009, Terry Little was convicted of aggravated murder R.C. 2903.01(A) and additional charges related to the incident. His conviction stemmed from the death of Lewis Turner, who was shot and killed on July 30, 2007. The trial court imposed a total sentence of 30 years to life with a 3-year gun specification in prison. Little filed a direct appeal to the court of appeals and his conviction was affirmed. Little filed a discretionary appeal to this court and it refused to accept jurisdiction on the matter. State v. Little, 2011 Ohio 768, 2011 Ohio App. Lexis 659.

STATEMENT OF THE FACTS

While his appeal was pending on direct appeal, Little (Little 1) filed a timely petition for Post-Conviction relief. The trial court issued a journal entry with findings of fact and conclusions of law denying the petition. Several years later, on August 11, 2017, Little filed a pro se motion for leave to file a motion for new trial in addition to a pro se motion for new trial based on newly discovered evidence. After reviewing the record and the applicable law, the trial court denied the motion for new trial based on newly discovered evidence. Little appealed the decision in *State v. Little, 9th Dist. Lorain No. 20CA011662, 2021-Ohio-1446, ¶ 2 (Little II)*, the appeals court however, affirmed the decision.

In 2020 Mr. Little filed a pro se “Motion to Correct Void Sentence; Failure to properly impose post-release control pursuant to 2929.191” with the trial court, arguing the trial court improperly imposed post-release control. The trial court entertained and denied the motion in a journal entry filed on July 23, 2020, *Little III* at ¶ 3. Mr. Little appealed the trial court’s denial of his motion to correct void sentence, and this court affirmed, holding it as a successive petition for post-conviction relief. *Id.* at ¶ 7, 13. Then on June 14, 2022, Mr. Little filed what he captioned a “jurisdictional assessment” to demonstrate requirements to be met under R.C. 2953.23(A)(1)(a) and (b) attached to a successive petition for post-conviction relief to the trial court. He raised three errors for review.

On August 8, 2022, the trial court denied both filings. In its journal entry the trial court gave three reasons for its decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW 1

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING LITTLE'S SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF WHEN IT FAILED TO CONSIDER THE EVIDENCE TO DETERMINE IF LITTLE OVERCAME THE THRESHOLD UNDER R.C.2953.23(A)(1)(a) and (b).

In order for a trial court to have jurisdiction to entertain a claim alleged in a successive postconviction petition, a defendant must first satisfy the Jurisdictional requirement in R.C.2953.23(A)(1) or (2), see *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-784, ¶20, 192 N.E. 3d.470. Little ascertained the requirements under R.C.2953.23(A)(1). Under this rule Little had to establish that he was “unavoidably prevented from discovery of the facts on which he relies”. “To meet this standard, courts in Ohio have previously held that a defendant ordinarily must show that he was unaware of the evidence he is relying on and that he could not have discovered the evidence by exercising reasonable diligence. Unavoidably prevented means, a defendant “had no knowledge of the existence of the new evidence and, in the exercise of reasonable diligence, could not have learned of the existence of the evidence within the time prescribed...”, *State v Bethel*, 10th Dist. No. 09AP-924. 2010-Ohio-3837, ¶37; only if a “Petitioner fails to satisfy R.C.§2953.23(A) it deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition” *State v. Lindsey* 2023-Ohio-1846 12 Dist. ¶9. The trial court and District courts’ decisions were wrong, and thus requires this court to reverse the decision.

Little contends that he met such standard required to afford the trial court jurisdiction over his successive petition. First, a defendant is only required to demonstrate that he was unavoidably prevented from discovering the facts to which he relies. This is where the trial court fudges the jurisdictional requirements aspect. Little demonstrated that the media representatives who recorded and broadcasted his witness testimony during trial did so without the trial judge’s

permission and knowledge, this prevented the trial judge from informing Little that he had a right to object to his witness testimony from being recorded and broadcasted as provided by Ohio Sup.R.12(C)(2), which thus prevented Little from exercising reasonable diligence to discover this information and presenting it to the court within the requisite time provided in R.C.2953.21(A) and R.C. 2953.23(A). Therefore, the trial court's decision was arbitrary and unreasonable and Little ask this court to remand the decision of the trial and Ninth District courts, and order the trial court to hold an evidentiary hearing on the matter at issue, as to whether the trial Judge gave the media permission to record and broadcast Little's witness testimony and to determine if the interference prejudiced Little's right to enjoy a fair trial.

Little explained in his Successive Petition for Post-Conviction relief, to support the fact that reasonable diligence could not be exercised, that prison rules prohibits Little, as a prisoner from accessing the internet himself (Ex. E, E1) making it impossible for him to have learned of the YouTube video. He also demonstrated that without the statement made by the assistant county prosecutor in response to an Ohio Supreme Court Disciplinary Counsel Grievance, entered on December 15, 2021 (DC., File No. 1870 and 1871), he could not have discovered through the exercise of reasonable diligence that the media did not have permission to broadcast and record the trial, let alone the fact that his witness testimony was all the media recorded and broadcasted. The truth of this surreptitious behavior could only be determined by the trial judge or some inadvertent revelation, hence the prosecutor's response to the grievance. The media's stealthy actions deprived the trial court from performing its mandated duty to administer Ohio Sup. R. 12(C)(2) and (D) which subsequently caused the rule to abridge Little's due process rights under the 14th amendment to the United States Constitution. The assistant county prosecutor stated in her response to the Disciplinary Counsel grievance, that: "The Elyria Chronicle Telegram did not

record the trial; per then existing Local Rule 24, they merely requested and were granted permission to take photographs of the defendant, parties or any consenting testifying witnesses...” (Ex. B4) This indicates that not even the prosecutor knew the media surreptitiously recorded and broadcasted Little’s witness testimony, and so the question is, how could Little have known the media was not given permission? Thus, this question demonstrates that provided with the evidence that supported Little’s petition the trial court’s decision to insinuate that this information could have been discovered through reasonable diligence within the 180-day deadline under R.C. 2953.21(A) was arbitrary and unreasonable *State v. Hill*, 2022-Ohio-4544 ¶9, even aside of the lack of adherence to Ohio Lorain Cty. Gen. LR 21 and Ohio Sup.R.12(C)(2). This situation was not handled with the care as remedied in accordance with Ohio Superintendence Rule 12(A), (C)(2) and (D), for this reason, Little overcame the relevant showing under 2953.23(A)(1)(a) to satisfy the requirement to give the trial court jurisdiction to hear his untimely successive petition, see *State v. Pannell*, 1996 Ohio App. Lexis 3967 at 8. Consequently, Little established to the appeals court (Brief pg. 5) the trial court’s decision that it was “is crystal clear – The Chronicle was granted leave to record and broadcast which ever parts of the trial (with some limitations) it desired.” (August 8, 2022 Entry, Pg. 5) was also unreasonable because in order for the trial court to make such a claim the trial court would have had to base its decision on an assumption that the original trial judge permitted the recording and broadcasting of only Little’s witness testimony without affording Little the right to object, this despite the overwhelming information that oppose the trial court’s claim, see *Hill Supra*. The only way to determine whether the media was given permission by the trial judge and if it prejudiced Little’s constitutional rights is if a hearing was held, or the trial court offered the trial judge an opportunity to comment on the matter without holding a hearing. The trial court judge did have an opportunity to comment on this issue.

Prior to filing his Successive Petition for Post-Conviction Relief, Little filed an affidavit of disqualification with this court, to recuse the original trial judge from presiding over the Postconviction petition *In re Disqualification of Hon. Raymond J. Ewers Supreme Court Case No. 22-AP-078*, for failing to maintain decorum of the trial in Little's case, and that if a hearing was granted the Judge would potentially be subpoenaed. The trial judge was given 21 days to respond by then Chief Justice Maureen O'Conner, however, in 16 days he declined to respond to the affidavit and instead voluntarily withdrew from the case. The trial judge had an opportunity to answer as to if he did or did not give the media permission to record and broadcast Little's witness testimony.

Did the media's surreptitious behavior prevent the trial judge from administering Ohio Sup. R.12(C)(2), which thus, caused Little to be prevented from exercising reasonable diligence in discovering that the media recorded and broadcasted his witness testimony and published it on YouTube on that very day without the knowledge and permission of the trial judge? And did the trial court reasonably consider whether Little was able to exercise reasonable diligence to discover the information despite the trial judge's failure to follow Ohio Sup.R.12(A), (C)(2) and (D)?

R.C. 2953.23(b)

Little also argued, to overcome the threshold of R.C. 2953.23(b), that the media's failure to adhere to the rules of Ohio Lorain Cty. Gen. LR 21 and Ohio Sup.R.12(A)(C)(2) prejudiced Little's right to a fair and public trial, and his equal protection of the laws. Both the trial court and media representatives denied him these rights when the media without permission recorded and broadcasted and published Little's witness testimony on YouTube on December 10, 2009, before the trial concluded on December 14, 2009, which it confined the public trial aspect to Little's trial testimony. Thus the Ninth district court of appeals erred in its decision to deny Little's appeal.

This court has held "...the setting the courtroom provides is itself an important element of the trial process." *State v. Lane*, 60 Ohio St.2d 112, 119, it is material to a defendant's right to a fair trial. Before Little's trial concluded his witness testimony was viewed by numerous people of the public and published on the same page that made a reference to an article of a murder case where the convicted defendant's name in that case was very similar to Little's first name (Ex A2 bottom of YouTube page "Tori Stafford Killer Terri-Lynne McClintic to..."). The United States Supreme Court held "The fact that...adverse publicity was not evidence in the case is not controlling," that court recognized "that such matters may, in unusual circumstances infect a trial when it enters a courtroom." The media's actions were so unhinged that the evidence Little supplied to the court indicates the judge was not aware of their actions, therefore, the presumption of prejudice must be presumed because there is no telling what other errors occurred beside of the media's disobedience of court rules evading the Judge's eye. For this reason, Little demonstrated that were it not for the media's interference with his due process rights under the sixth and 14th amendment to the United States constitution and Article I, section 1, 10 of the Ohio constitution he would not have testified, and prejudice would not have attached.

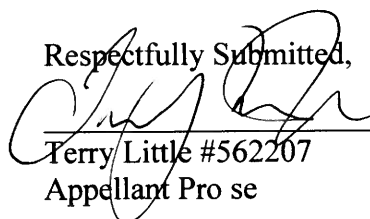
Little also demonstrated that because of the media's actions it prevented the trial court from protecting Little's equal protection rights (pg. 21 of Petition) when the trial judge was prevented from informing Little of his right to object to his witness testimony from being recorded and broadcasted pursuant to Ohio Sup.R.12(C)(2), the evidence and record indicate no other witnesses' testimony was recorded and broadcasted but his. Because of this the media's unsuppressed interference likely caused a litany of unseen influences to the verdict. Did Little provide clear and convincing proof that the media's actions were unprivileged and prejudiced Little's Constitutional rights?

CONCLUSION

In conclusion, the trial court and the Ninth District Court of appeal's decision did not fit the criteria to addressing whether Little met the Jurisdictional requirement under R.C.2953.23(A)(1)(a) and (b). See *State v. Hatton*, 169 Ohio St.3d 446. 2022-Ohio-3991, ¶41, 205 N.E.3d 513. Both courts confined Little's new evidence to what was in the record and not the evidence Little presented to overcome unavoidable delay. Nor did the trial court reasonably assess whether the evidence Little provided in his petition met the burden of proof that the exercise of reasonable diligence to discover that the media tampered with trial court proceedings as they were never authorized to record and broadcast the trial.

Because the trial court made an unreasonable determination in their assessment of whether Little satisfied the jurisdictional requirement under 2953.23(A)(1), the Ninth District court of appeals was required to reverse the trial court's decision, for this reason, Little ask this Honorable court to reverse the trial court and the Ninth District court of appeals decision and order the trial court to hold a hearing in relation to the evidence Little presented in his Successive petition for post-conviction relief. Or in the alternative, Little ask this court to allow him to present the issue before it.

Respectfully Submitted,

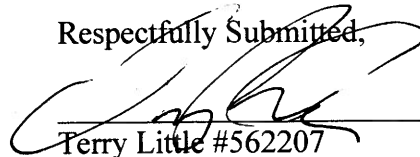


Terry Little #562207
Appellant Pro se

CERTIFICATE OF SERVICE

Appellant, Terry Little, Hereby Certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was serviced by Regular U.S. Mail to the office of the Lorain County Prosecutor J.D. Tomlinson at 225 Court Street 3rd, Elyria, Ohio 44035 on this July, day of 17, 2023.

Respectfully Submitted,



Terry Little #562207

Appellant

Grafton Correctional Institution

2500 S. Avon Beldon Rd.

Grafton, Ohio 44044

APPENDIX

COURT OF APPEALS	
STATE OF OHIO) COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO) Appellee	C.A. No. 22CA011896
9th APPELLATE DISTRICT	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
TERRY LITTLE Appellant	CASE No. 07CR074162

DECISION AND JOURNAL ENTRY

Dated: June 26, 2023

FLAGG LANZINGER, Judge

{¶1} Terry Little appeals from the judgment of the Lorain County Court of Common Pleas denying his petition for postconviction relief. This court affirms.

I.

{¶1} In a prior appeal, this Court set out the pertinent facts and procedural history of this case as follows:

In 2009, Little was convicted of aggravated murder and numerous additional offenses. His convictions stemmed from the death of Lewis Turner, who was shot and killed on July 30, 2007. The trial court imposed a total sentence of 30 years to life in prison. Little filed a direct appeal to this Court and his convictions were affirmed. *State v. Little*, 9th Dist. Lorain No. 10CA009758, 2011-Ohio-768 [{"Little P"}].

While his appeal was pending, Little filed a petition for post-conviction relief. The trial court issued a journal entry with findings of fact and conclusions of law denying the petition.¹

¹ Mr. Little filed a petition to vacate or set aside judgment of conviction on July 29, 2010. The trial court denied the petition on August 16, 2010, and Mr. Little did not appeal its decision.

Several years later, on August 11, 2017, Little filed a pro se motion for leave to file a motion for new trial in addition to a pro se motion for new trial based on newly discovered evidence. After reviewing the record and the applicable law, the trial court denied the motion for new trial.

State v. Little, 9th Dist. Lorain No. 20CA011662, 2021-Ohio-1446, ¶ 2 (“*Little III*”), quoting *State v. Little*, 9th Dist. Lorain No. 17CA011210, 2018-Ohio-5267, ¶ 2-4 (“*Little II*”). “Mr. Little appealed the trial court’s denial of his motion for a new trial, and this Court affirmed.” *Little III* at ¶ 2, citing *Little II* at ¶ 16.

{¶2} In 2020 Mr. Little filed a pro se “Motion to Correct Void Sentence; Failure to Properly Impose Post-Release Control Pursuant to R.C. 2929.191” with the trial court, arguing that the court had improperly imposed post-release control in this matter. The trial court denied the motion in a journal entry filed on July 23, 2020. *Little III* at ¶ 3. Mr. Little appealed the trial court’s denial of his motion to correct void sentence, and this Court affirmed, holding it as a successive petition for postconviction relief. *Id.* at ¶ 7, 13.

{¶3} On June 14, 2022, Mr. Little filed what he captioned a “jurisdictional assessment for post-conviction relief” and a separate successive postconviction petition with the trial court. The trial court denied both motions in a journal entry filed on August 8, 2022. The court explained that Mr. Little’s petition for postconviction relief was untimely and wholly lacking in merit.

{¶4} Mr. Little now appeals from the trial court’s judgment denying his petition for postconviction relief and raises three assignments of error for this Court’s review. We have consolidated his assignments of error because they require the same analysis.

II.

ASSIGNMENT OF ERROR I

TRIAL COURT ABUSED ITS DISCRETION DENYING APPELLANT'S SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING WHEN NEW FACTS REVEALED TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN DUE PROCESS BY DEPRIVING HIM OF THE 6TH AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ARTICLE SECTION 16, WHEN MEDIA REPRESENTATIVES INTERFERED WITH FAIR TRIAL RIGHTS BY RECORDING AND UPLOADING HIS WITNESS TESTIMONY ONTO YOUTUBE WITHOUT PRIOR PERMISSION

ASSIGNMENT OF ERROR II

TRIAL COURT ABUSED ITS DISCRETION WHEN IT MADE AN UNREASONABLE DETERMINATION TO DENY APPELLANT'S SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF WHEN APPELLANT DEMONSTRATED THAT THE TRIAL COURT[']S FAILURE TO FOLLOW THE MANDATED DIRECTIVES OF OHIO SUPERINTENDENCE RULE 12(A) AND (C) WAS UNCONSTITUTIONAL VIOLATING APPELLANT'S DUE PROCESS RIGHTS TO A FAIR PUBLIC TRIAL

ASSIGNMENT OF ERROR III

TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF AND SUPPORTING DOCUMENTS WITH A PREJUDICIAL DECISION AFTER APPELLANT PROVIDED SUBSTANTIAL FACTS TO SUPPORT STRUCTURAL ERROR ATTACHED TO HIS TRIAL WHEN THE MEDIA UNLAWFULLY RECORDED AND PUBLISHED APPELLANT'S WITNESS TESTIMONY ONTO YOUTUBE PROCEDURALLY VIOLATING LITTLE'S OHIO AND UNITED STATES CONSTITUTIONAL RIGHT TO A FAIR TRIAL

{¶5} In his three assignments of error, Mr. Little argues his due process rights were violated when certain media outlets recorded portions of his trial without prior authorization. Mr. Little asserts that the recordings of the trial proceedings were not authorized by the trial court

and therefore affected his right to a fair trial. Mr. Little argues that the trial court erred when it denied his petition for postconviction relief. For the following reasons, this Court disagrees.

{¶6} A postconviction proceeding is a collateral civil attack on a criminal judgment, in which the petitioner receives no more rights than those granted by the statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). R.C. 2953.21(A)(1)(a)(i) states that anyone “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” if that person: “has been convicted of a criminal offense * * * and * * * 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 or the Constitution of the United States[.]”

{¶7} A vaguely titled motion may be treated as a petition for postconviction relief under R.C. 2953.21(A)(1) when the motion was filed after a direct appeal, alleges a denial of constitutional rights, seeks to render the judgment void or voidable, and requests that the judgment and sentence be vacated. *State v. Nichols*, 9th Dist. Summit No. 29228, 2019-Ohio-3084, ¶ 8; *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). Mr. Little’s “jurisdictional assessment for post-conviction relief” meets these requirements and may therefore be considered appropriately as a petition for postconviction relief.

{¶8} This Court generally reviews a trial court’s decision denying a petition for postconviction relief under an abuse of discretion standard. *Nichols* at ¶ 10. “Our standard of review is de novo, however, when the trial court denies a petition solely on the basis of an issue of law.” *Id.* “Whether a defendant’s post-conviction relief petition satisfied the procedural requirements set forth in R.C. 2953.21 and R.C. 2953.23 is an issue of law.” *State v. Childs*, 9th

Dist. Summit No. 25448, 2011-Ohio-913, ¶ 9. Here, the trial court found Mr. Little's petition was untimely. Our standard of review in this matter is therefore de novo.

{¶9} Pursuant to R.C. 2953.21(A)(2)(a), a petition filed under R.C. 2953.21(A)(1)(a), "shall be filed no later than three hundred sixty-five 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[.]" Here, there is no dispute that Mr. Little did not file a timely petition under R.C. 2953.21(A)(2)(a). The trial transcript was filed in Mr. Little's direct appeal on August 6, 2010. He filed his petition in this matter on June 14, 2022, more than ten years after the statutory deadline. Apart from being untimely, Mr. Little's petition is also successive, as the record reveals he filed two other petitions for postconviction relief in 2017 and 2020.

{¶10} "A trial court does not have jurisdiction to hear an untimely petition for postconviction relief unless the requirements of R.C. 2953.23(A) are met." *State v. Dennard*, 9th Dist. Lorain No. 17CA011199, 2019-Ohio-2601, ¶ 6. As this Court has stated, the petitioner must satisfy certain requirements:

First, [he] must show that [he] was unavoidably prevented from discovering the facts [he] relies on or that, subsequent to the R.C. 2953.21(A)(2) deadline, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in [his] situation, and the petition asserts a claim based on that right. R.C. 2953.23(A)(1)(a). Second, [he] must show "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 [he] was convicted * * *."

State v. Burton, 9th Dist. Summit No. 28359, 2017-Ohio-7588, ¶ 8. When dealing with petitions for postconviction relief, Ohio courts have stated that "[t]he phrase 'unavoidably prevented' means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *Id.* at ¶ 9, quoting *State v. McDonald*, 6th Dist. Erie No. F-04-009, 2005-Ohio-798, ¶ 19. See also *State v. Short*, 8th Dist. Cuyahoga No. 82246, 2003-Ohio-3538, ¶ 9.

{¶11} Mr. Little asserts that he was unavoidably prevented from discovering the facts upon which he relies for his claims for relief. Mr. Little argues he was unaware that the media recorded a portion of his trial court proceedings until he recently learned some of those proceedings appeared on YouTube. Mr. Little submitted documents to support his petition which evidenced that Chronicle Telegram submitted media requests to the trial court on December 8, 2009. Both media requests were granted by the trial court and entered onto the docket. “By definition, something that is discernible in the record would not be something a defendant has been unavoidably prevented from discovering.” *State v. Burton*, 9th Dist. Summit No. 28359, 2017-Ohio-7588, ¶ 9, quoting *State v. Beechler*, 2d Dist. Clark No. 2016-CA-44, 2017-Ohio-1385, ¶ 28. Because those documents were made part of the record at the time of Mr. Little's trial, Mr. Little cannot demonstrate that he was unavoidably prevented from discovering the fact that his testimony was recorded. Moreover, YouTube is a public social media platform that has existed since 2005. Mr. Little could have discovered the posted video with reasonable diligence.

{¶12} Mr. Little failed to demonstrate the applicability of an exception under R.C. 2953.23(A). Therefore, the trial court could not consider his untimely and successive petition. The trial court properly denied his petition for postconviction relief on those grounds.

{¶13} For the above reasons, Mr. Little's first, second, and third assignments of error are overruled.

III.

{¶14} Mr. Little's first, second, and third assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

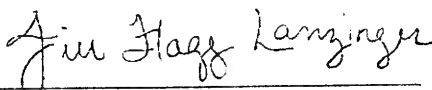
Judgment affirmed.

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(C). 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.


JILL FLAGG LANZINGER
FOR THE COURT

SUTTON, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

TERRY LITTLE, pro se, Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.



LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon James L. Miraldi, Judge

Date Aug 5 2022

Case No. 07CR074162

STATE OF OHIO

Respondent

Lindsey Poprocki

Respondent Attorney

VS

TERRY L. LITTLE

Petitioner

Pro Se

Petitioner Attorney

This matter is before the Court on transfer from the Honorable Judge Raymond J. Ewers.¹

This Court will consider the following pending petitions, motion, and response, to wit:

- 1) Petitioner's Jurisdictional Assessment For Post-Conviction Relief, filed June 14, 2022;
- 2) Petitioner's Successive Petition To Vacate Or Set Aside Judgment Of Conviction Or Sentence, filed June 14, 2022;
- 3) State's Response [In Opposition To Both Petitions], filed June 14, 2022;² and
- 4) Petitioner's Motion For Default Judgment, filed June 28, 2022.

The Petitioner's two petitions are not well-taken and both are DENIED. The Petitioner's motion for default judgment is also not well-taken and DENIED.

See Judgment Entry. No Record.


JUDGE JAMES L. MIRALDI

cc: Poprocki, Asst. Pros. Atty.
Petitioner, Pro Se

¹ See Entry dated June 30, 2022.

² It appears that the State was served with these petitions on or about June 1, 2022, hence the State's response dated the same day that the petitions were docketed.



LORAIN COUNTY COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO

JUDGMENT ENTRY

Hon. James L. Miraldi, Judge

Date Aug 5, 2022

Case No. 07CR074162

STATE OF OHIO

Respondent

Lindsey Poprocki

Respondent Attorney

VS

TERRY L. LITTLE

Petitioner

Pro Se

Petitioner's Attorney

I. INTRODUCTION

This matter is before the Court on the following pending petitions, motion, and response, to wit:

- 1) Petitioner's Jurisdictional Assessment For Post-Conviction Relief, filed June 14, 2022;
- 2) Petitioner's Successive Petition To Vacate Or Set Aside Judgment Of Conviction Or Sentence, filed June 14, 2022;
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- 4) Petitioner's Motion For Default Judgment, filed June 28, 2022.

II. PROCEDURAL HISTORY

On August 16, 2007, the Petitioner, Terry L. Little ("Little"), was indicted for multiple charges, including aggravated murder with firearm specifications. On December 8, 2009, as his jury trial began, the court granted a media request from The Chronicle Telegram to "... broadcast, televise, record, and photograph proceedings ..."³

The matter proceeded to trial and on December 14, 2009, Little was convicted of most of the charges, including the aggravated murder charge and firearm specifications. On December 28, 2009, Little was sentenced to life in prison with the opportunity for parole after serving a mandatory term of 33 years.

Little took a direct appeal to the Ninth District Court of Appeals, which, on February 22, 2011, affirmed his conviction and sentence.

³ See Docket Sheet Entry dated 12/8/2009.



Since his conviction and direct appeal, Little has filed no less than eight motions and appeals to vacate his convictions, for new trials, to correct void sentence, and now the currently pending three pleadings.

Significantly, the Ninth District designated Little's last filing as a successive petition for post-conviction relief.⁴

III. ANALYSIS

POST-CONVICTION RELIEF

STANDARD OF REVIEW

The Ninth District Court of Appeals has repeatedly stated,

The petitioner must . . . show "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)(b).

State v. Higgins, 9th Dist., Summit No. 28215, 2017 –Ohio- 909, at ¶ 5.

And,

A final judgment of conviction bars a * * * defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised * * * on an appeal from that judgment. To obtain post-conviction relief and avoid the preclusive effect of res judicata, a petitioner must present claims in his petition that are based on evidence outside of the original record that existed during direct appellate proceedings. *State v. Bulls*, 9th Dist. Summit No. 27713, 2015–Ohio–5094, ¶ 9.

State v. Tauwab, 9th Dist., Summit No. 28022, 2017-Ohio-81, ¶ 11.

⁴ See: *State v. Little*, 9th Dist., Lorain No. 20CA011662, 2021-Ohio-1446, at ¶ 6. ("*Little III*").



Further,

A trial court may deny a post-conviction relief petition without a hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief. *Res judicata* is a proper basis upon which to dismiss a petition for post-conviction relief without a hearing.

Id. at ¶ 16

A post-conviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279; *State v. Herzberger*, 9th Dist., Lorain No. 16CA010899, 2017-Ohio-491, at ¶ 7.

Finally,

[C]iting Section 2953.21(C) [and] [i]nterpreting that section, the Ohio Supreme Court has explained that “[a]n evidentiary hearing is not automatically guaranteed each time a defendant files a petition for postconviction relief.” *State v. Broom*, 146 Ohio St.3d 60, 2016- Ohio-1028, ¶ 29. “A trial court has the discretion to deny a postconviction petition without discovery or an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate ‘sufficient operative facts to establish substantive grounds for relief.’” *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus. To warrant an evidentiary hearing in a postconviction proceeding, a petitioner must submit evidence outside the record that sufficiently establishes that the petitioner is entitled to relief on one or more asserted constitutional grounds. *Id.*

State v. West, 9th Dist., Summit No. 28668, 2017-Ohio-8474, at ¶13.

In the case at bar, the Petitioner’s petition for post-conviction relief is untimely. But more than that, it is wholly lacking in merit.

THE PETITIONS FOR POST-CONVICTION RELIEF ARE UNTIMELY

Little’s petitions are untimely (or successive) petitions and no R.C. 2953.23(A) exception applies. As such, this Court lacks jurisdiction to consider same.

Regardless, the gravamen of Little’s petitions are that a media outlet, The Chronicle Telegram (“The Chronicle”) recorded part of his trial and posted some of those recordings on a social media platform, YouTube. He argues that 1) these recordings



were unauthorized; and 2) they were prejudicial to him and violated his constitutional rights.

For this Court to even consider the merits of Little's arguments or grant a hearing, he has to demonstrate that he was "unavoidably prevented" from discovering this information and this, he cannot do.

First, as noted *infra*, the court granted The Chronicle permission to ". . . **broadcast**, televise, **record**, and photograph proceedings . . ." in its order of December 8, 2009. As such, the fact that The Chronicle could record and broadcast the proceedings (i.e., post on social media) was part of the record and easily attainable for anyone. (Emphasis added.)

Moreover, YouTube is a public, social media platform that has been around since February, 2005,⁵ hence, there was nothing that "prevented" Little from searching YouTube (or any other social media website) to see if anything relative to his trial was posted. As such, reasonable diligence most certainly would have disclosed the posting thus the petitions are untimely with no justifiable excuse.

THE PETITIONS FOR POST-CONVICTION RELIEF LACK MERIT

Assuming, *arguendo*, that the petitions meet an exception for their untimeliness, they nevertheless lack merit.

First, the recordings and posting on YouTube did not violate the judge's order. The order of December 8, 2009, is crystal clear – The Chronicle was granted leave to record and broadcast which ever parts of the trial (with some limitation) it desired. As "broadcast" clearly encompasses "posting on social media platforms" such as YouTube, The Chronicle did not violate any court order.

Secondly, even if there is an exception for the late filing and the postings were unauthorized, Little still must overcome a very high hurdle of demonstrating, by clear and convincing evidence, that but for the postings, "no reasonable factfinder would have found him guilty of the offenses for which he was convicted."

Here, Mr. Little's argument falls far short of meeting this burden. He now claims that had he known his testimony was going to be recorded, he would not have testified. He was advised of his right not to testify in an open court with a court reporter. He was fully aware there would be a record of his sworn testimony and that such testimony could be shared with the public. As such, the petitions must be dismissed.

⁵ Google.



THE MOTION FOR DEFAULT JUDGMENT LACKS MERIT

Finally, Little moves this Court for default judgment on the basis that "... defendant⁶ has failed to answer or otherwise reasonably defend against plaintiff's pending successive petition for postconviction relief ..."

As noted, *infra*, this assertion is inapposite.

On June 14, 2022, the State of Ohio filed a pleading captioned, "State's Response To Defendant-Petitioner's Jurisdiction Assessment For Post-Conviction Relief And His Successive Petition to Vacate Or Set Aside Judgment Of Conviction Or Sentence." This document was served on Little on June 14, 2022, and contains a comprehensive recitation of the "Statement of the Case," "Statement of Facts," "Law and Argument," and "Conclusion."

Without a doubt, the State is not in default of answering Little's untimely, successive, post-conviction petitions.

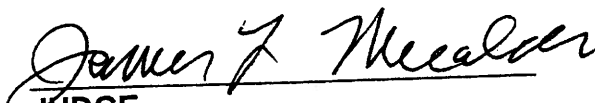
IV. CONCLUSION

In the case at bar, the Petitioner, Little, has filed two out-of-rule petitions for post-conviction relief without demonstrating an exception to overcome untimeliness. Moreover, his petitions lack merit as the complained of events were sanctioned by the court and caused him no prejudice.

Finally, the State clearly responded to both petitions and thus, is not in default.

The petitions for post-conviction relief are dismissed and the motion for default judgment is over-ruled.

IT IS SO ORDERED. No Record.


JUDGE

⁶ Presumably, Respondent, the State of Ohio.