

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-804
v.	:	(C.P.C. No. 05CR-01-146)
	:	
Richard H. Horton,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 8, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Richard H. Horton*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Richard H. Horton, appeals from an entry entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that entry.

**Factual and Procedural Background**

{¶ 2} In 2006, a jury found appellant guilty of a number of charges, including aggravated burglary, aggravated robbery, and kidnapping. As a result, the trial court sentenced appellant to a total prison sentence of 23 years. Following an appeal, this court affirmed. *State v. Horton*, 10th Dist. No. 06AP-311, 2007-Ohio-4309. The trial court subsequently denied appellant's petition for postconviction relief, which this court affirmed on appeal. *State v. Horton*, 10th Dist. No. 10AP-466, 2011-Ohio-1387.

{¶ 3} On July 7, 2011, and then again on July 19, 2011, appellant filed a "Motion for Relief from Judgment" pursuant to Civ.R. 60(B), in which he argued that his

indictment was defective under the Supreme Court of Ohio's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. On August 24, 2011, the trial court filed an entry denying what it mischaracterized as appellant's motion for judicial release filed July 19, 2011.

{¶ 4} Appellant appeals the trial court's August 24, 2011 entry and assigns the following errors:

(1). THE TRIAL COURT ERRORED [sic] IN FAILING TO ADDRESS THE GROUNDS FRO [sic] RELIEF. DEPRIVING APPELLANT OF DUE PROCESS OF LAW.

(2). THE TRIAL COURT ERRED IN REFUSING TO GRANT RELIEF FROM THE JUDGMENT OF CONVICTION OR A CHARGE THAT WAS NEVER PROPERLY ALLEGED.

### **Appellant's Assignments of Error — *Colon* Relief**

{¶ 5} For ease of analysis, we address appellant's two assignments of error together. Appellant argues that the trial court erred by construing his "Motion for Relief from Judgment" as a motion for judicial release and then by denying that motion. The state agrees that the trial court mischaracterized appellant's motion as a motion for judicial release. Nevertheless, we agree with the state that this error is not prejudicial because the record supports the denial of appellant's motion for relief from judgment as a matter of law. *State v. Abdalla*, 10th Dist. No. 01AP-439 (Dec. 18, 2001), citing *State v. Payton*, 124 Ohio App.3d 552, 557 (12th Dist.1997).

{¶ 6} This court, relying on the Supreme Court of Ohio's decision in *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, has consistently construed motions that raise *Colon* arguments filed in a criminal case under Civ.R. 60(B) as petitions for postconviction relief. *State v. Bradley*, 10th Dist. No. 08AP-862, 2009-Ohio-1806, ¶ 6; *State v. Newbern*, 10th Dist. No. 08AP-768, 2009-Ohio-816, ¶ 7; *State v. Smith*, 10th Dist. No. 09AP-46, 2009-Ohio-3244, ¶ 6. So construed, there is no error in denying appellant's petition.

{¶ 7} R.C. 2953.21 sets forth the requirements for filing a petition for postconviction relief. R.C. 2953.21(A)(2) provides:

[A] petition under division (A)(1) of this section 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 or, if the

direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, \* \* \* the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

{¶ 8} Pursuant to this statute, appellant had to file his postconviction petition no later than 180 days after July 6, 2006, the date the trial transcript was filed in his direct appeal of the judgment of conviction to this court. Appellant did not file this motion until July 7, 2011. Therefore, appellant's petition was untimely. *Newbern* at ¶ 10. A trial court lacks jurisdiction to entertain an untimely petition for postconviction relief unless petitioner demonstrates that one of the exceptions in R.C. 2953.23(A) applies. *State v. Hollingsworth*, 10th Dist. No. 08AP-785, 2009-Ohio-1753, ¶ 8, citing *State v. Backus*, 10th Dist. No. 06AP-813, 2007-Ohio-1815, ¶ 5.

{¶ 9} Appellant has made no attempt to argue that any of the exceptions to the jurisdictional bar apply to his petition. Nor do we see any basis for such an argument. Because appellant failed to establish the applicability of an exception that would allow the trial court to consider his untimely petition, the trial court lacked jurisdiction to entertain his petition for postconviction relief. *Bradley* at ¶ 9; *Smith* at ¶ 10. Therefore, the trial court did not err when it dismissed appellant's petition for postconviction relief.

{¶ 10} Accordingly, although the trial court erred by mischaracterizing appellant's motion, that error is harmless, as the record supports the denial of appellant's motion as a matter of law. As a result, we overrule appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., and BRYANT, J., concur.

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