

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-109 (C.P.C. No. 07CR-07-5343)
Kemar Campbell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Kemar Campbell, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Kemar Campbell, appeals from a judgment entry entered by the Franklin County Court of Common Pleas denying his motion for relief from judgment filed pursuant to Civ.R. 60(B). For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In 2007, appellant was indicted with one count of murder, two counts of felonious assault, and counts of tampering with evidence and having a weapon while under disability. In 2008, appellant entered a guilty plea to one count of felonious assault and one count of attempted having a weapon while under disability. The other charges were dismissed. The state and appellant's attorney jointly recommended a total prison sentence of 10 years and one month. The trial court accepted appellant's guilty plea,

found him guilty, and imposed the jointly-recommended prison sentence. Appellant did not appeal his convictions.

{¶ 3} In 2011, appellant filed a "Motion for Relief From Judgment" pursuant to Civ.R. 60(B). In the motion, appellant claimed that his judgment of conviction was void as the result of his trial counsel's deficient performance, allied offenses of similar import, and the trial court's improper acceptance of his guilty plea. The state opposed the motion, contending that the motion was, in reality, an untimely petition for postconviction relief that should be denied for that reason. The state also asserted that res judicata barred appellant's claims. The trial court denied appellant's motion. The trial court construed the motion as a petition for postconviction relief and denied it as untimely and barred by res judicata.

{¶ 4} Appellant appeals and assigns the following error:

The appellant was denied the equal protection of the law and due process under the law, when the trial court denied his motion without first holding an evidentiary hearing.

II. The Trial Court Properly Construed Appellant's Motion as an Untimely Petition for Postconviction Relief

{¶ 5} Appellant's assignment of error does not address the preliminary jurisdictional questions that we must address first: did the trial court properly construe his motion as a petition for postconviction relief and, if so, was the petition untimely, so as to deprive the trial court of jurisdiction to address it. We answer both questions affirmatively.

{¶ 6} Appellant's motion, although entitled as one for relief from judgment pursuant to Civ.R. 60(B), was filed after appellant's opportunity to file a direct appeal expired, claimed a denial of his constitutional rights, and sought to render his conviction void. In this situation, a trial court does not err by considering the motion as if it were a petition for postconviction relief. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12; *State v. Frash*, 10th Dist. No. 08AP-870, 2009-Ohio-642, ¶ 6.

{¶ 7} So construed, the trial court went on to deny appellant's motion because it was an untimely petition for postconviction relief. R.C. 2953.21 sets forth the requirements for filing a petition for postconviction relief. Specifically, 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} Because appellant did not appeal from his convictions, appellant had to file his postconviction petition pursuant to this statute no later than 180 days after the expiration of the time for filing an appeal. That date was sometime in December 2008. Appellant did not file his petition until November 29, 2011. Therefore, appellant's petition was untimely.

{¶ 9} 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. Appellant has made no attempt to argue that any of the exceptions to the jurisdictional bar apply to his petition. With regard to R.C. 2953.23(A)(1), appellant has not alleged that he was unavoidably prevented from discovering the facts upon which he relies in his petition or that his claim was based on a new federal or state right recognized by the United States Supreme Court that could be retroactively applied to his case. Nor has he alleged that DNA results establish his actual innocence. R.C. 2953.23(A)(2).

{¶ 10} 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. *State v. Dugger*, 10th Dist. No. 06AP-887, 2007-Ohio-1243, ¶ 10; *State v. Russell*, 10th Dist. No. 05AP-391, 2006-Ohio-383, ¶ 10. Thus, the trial court properly denied appellant's motion, although technically the trial court should have dismissed the motion due to a lack of jurisdiction. *State v. Banks*, 10th Dist. No. 12AP-96, 2012-Ohio-3770, ¶ 11.

{¶ 11} Our disposition of the jurisdictional issue renders moot appellant's assignment of error, which address the merits of his petition. *Id.*; *Hollingsworth* at ¶ 11. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
