

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 13AP-4
	:	(C.P.C. No. 06CR-02-900)
Aaron L. Carter,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on September 19, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*,  
for appellee.

*Aaron L. Carter*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Aaron L. Carter ("Carter"), appeals from the December 12, 2012 decision and entry of the Franklin County Court of Common Pleas denying his petition for post-conviction relief. Because the trial court properly denied Carter's untimely petition, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} On February 2, 2006, a Franklin County Grand Jury indicted Carter on one count of aggravated murder with gun specifications, an unclassified felony, and one count of having a weapon while under disability, a felony of the third degree. Because the defense raised the issue of Carter's competency to stand trial, a forensic psychologist performed a psychological evaluation of Carter. On June 30, 2006, the trial court found Carter competent pursuant to the psychologist's 18-page written report, the parties'

stipulations as to the psychologist's testimony, and the court's observations of Carter's demeanor during the proceedings.

{¶ 3} On February 27, 2007, Carter pled guilty to having a weapon while under disability and to the lesser included offense of murder with a gun specification. Pursuant to the parties' joint recommendation, the court imposed a prison term of 17 years to life. The court filed its judgment entry imposing sentence on February 27, 2007. Carter did not appeal the court's judgment.

{¶ 4} On April 18, 2009, Carter filed a motion entitled "Nunc Pro Tunc Petition to Set Aside Judgement [sic] of Conviction and Sentence Entered Against Aaron L. Carter." (R. 145.) In the motion, Carter asked the court to set aside his conviction and sentence, alleging a deprivation of his constitutional right to the effective assistance of counsel. Carter asserted his trial counsel rendered ineffective assistance by failing to have Carter evaluated by another psychologist, who would likely have found Carter incompetent to stand trial. The motion stated that it was filed pursuant to R.C. 2953.21. On April 24, 2009, plaintiff-appellee, the State of Ohio ("the State") filed an answer and motion to dismiss Carter's motion, construing the motion as a petition for post-conviction relief.

{¶ 5} Carter filed a "Supplemental Brief" on October 25, 2012, which reasserted his original motion's request for the court to set aside his conviction and sentence based on the ineffective assistance of counsel. The State construed Carter's supplemental brief as a motion to supplement his petition for post-conviction relief and filed a memorandum contra the motion.

{¶ 6} On December 12, 2012, the court issued a decision and entry denying and dismissing the April 17, 2009 motion as supplemented by the October 25, 2012 filing. The court construed the April 17, 2009 motion as a petition for post-conviction relief, denied the petition, and granted the State's motion to dismiss without an evidentiary hearing.

## **II. ASSIGNMENTS OF ERROR**

{¶ 7} Carter appeals, assigning the following errors for review:

[I.] The Trial Court abused its discretion in not ruling on this Appellant's Post-Conviction Petition for nearly four years, yet finding him to be untimely. This violates Rule 35 and the Due Process of Law guaranteed by the 5th and 14th

Amendments, and by Article I, Section 16 of the Ohio Constitution.

[II.] The Trial Court erred in accepting a plea of guilty when the Appellant was mentally incompetent to enter a plea. Accepting a plea from an incompetent defendant violates the 5th, 8th and 14th Amendments [sic] of the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

[III.] The Trial Court erred in not granting relief on this Appellant's Ineffective Assistance of Counsel Claim, as it is clear that Counsel failed several duties owed the Appellant, including [sic] his failure to investigate, his failure to request an expert psychological evaluator for the Defense, as described in *Ake*, his improper advice to plead guilty to murder without a proper competency evaluation, and his improper advice to plead guilty to the Weapons under Disability charge when the weapon in question was not involved in the underlying offense, was not in the possession or control of the Appellant, and was found at the home of that weapon's registered owner. Counsel's failures violated this Appellant's constitutional rights under the 5th, 6th and 14th Amendments of the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

### **III. FIRST ASSIGNMENT OF ERROR—TIMELINESS OF COURT'S RULING**

{¶ 8} Carter's first assignment of error asserts the trial court erred in denying his petition for post-conviction relief, as it took the court nearly four years to issue the entry denying the petition.

{¶ 9} As an initial matter, we find that the trial court properly construed Carter's motion to set aside his conviction and sentence as a petition for post-conviction relief. The motion was filed after the time limit in which to file an appeal, claimed a denial of Carter's Sixth Amendment right to the effective assistance of counsel, and asked the court to vacate his conviction and sentence. *See State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶ 10 (holding that a court must categorize "[s]uch irregular 'no-name' motions \* \* \* in order for the court to know the criteria by which the motion should be judged"); *State v. Hall*, 10th Dist. No. 05AP-957, 2006-Ohio-2742, ¶ 11 (noting that a motion meets the definition of a petition for post-conviction relief in R.C. 2935.21(A)(1) if it: (1) was filed subsequent to the expiration of the time defendant could file a direct appeal, (2) claimed a

denial of constitutional rights, and (3) asked to vacate the sentence). Moreover, the motion expressly stated that it was filed pursuant to R.C. 2953.21.

{¶ 10} Carter asserts that it was an abuse of discretion for the trial court to allow his petition "to languish for nearly four years." (Appellant's brief, 3.) Pursuant to Crim.R. 35(C), a trial court must "file its ruling upon a petition for post-conviction relief, including findings of fact and conclusions of law if required by law, not later than one hundred eighty days after the petition is filed."

{¶ 11} Crim.R. 35(C) "does not specify a jurisdictional requirement" and a "trial court retains jurisdiction to rule on the petition even if the Crim.R. 35(C) time period has elapsed." *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, ¶ 8, 9 (noting that when "a trial court fails to rule on a petition for postconviction relief within 180 days of its filing, a writ of procedendo may be appropriate to compel the trial court to rule"). *See also State v. Batchelor*, 10th Dist. No. 80AP-535 (Apr. 28, 1981) (where the court took one year to rule on a petition for post-conviction relief, this court held that the "time taken by the trial court in reaching its decision [did] not affect the merits of the petition" for post-conviction relief). Thus, despite the nearly four-year delay, the trial court possessed jurisdiction to rule on Carter's petition. Moreover, Carter does not allege any prejudice resulting from the court's delayed ruling.

{¶ 12} Carter's first assignment of error is overruled

#### **IV. SECOND AND THIRD ASSIGNMENTS OF ERROR—PETITION FOR POST-CONVICTION RELIEF PROPERLY DENIED**

{¶ 13} Carter's second and third assignments of error reassert the substantive arguments made in the April 17, 2009 petition and the October 25, 2012 supplemental brief. The trial court denied Carter's petition as an untimely attempt at post-conviction relief.

{¶ 14} The right to seek post-conviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who 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 \* \* \* 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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 15} A petition for post-conviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). A post-conviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 32. Rather, "[i]t is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58.

{¶ 16} A petition for post-conviction relief must be timely. Under R.C. 2953.21(A)(2), petitions must 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." Alternatively, "[i]f 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." R.C. 2953.21(A)(2).

{¶ 17} Carter did not file an appeal from the court's February 27, 2007 judgment entry imposing sentence. Pursuant to App.R. 4(A), Carter's time for filing his appeal expired 30 days after the February 27, 2007 entry. Carter filed his petition for post-conviction relief on April 18, 2009, well beyond the 180-day time limit in R.C. 2953.21(A)(2).

{¶ 18} When a post-conviction petition is untimely, the trial court lacks jurisdiction to consider it unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). See *State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶ 8; *State v. Wells*, 2d Dist. No. 2010 CA 5, 2010-Ohio-3238, ¶ 10 (noting that a trial court "lacks jurisdiction to consider an untimely petition for post-

conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a)"). Pursuant to R.C. 2953.23(A)(1)(a), a trial court may consider an untimely petition if the petitioner shows: (1) he was unavoidably prevented from discovering the facts upon which he relies to present the claim for relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner, and the petition asserts a claim based on that right. Even if one of these conditions is met, the petitioner also must show by clear and convincing evidence that, if not for the alleged constitutional error, no reasonable fact finder would have found him guilty of the subject offense. R.C. 2953.23(A)(1)(b).

{¶ 19} Carter's petition for post-conviction relief asserted that his trial counsel was ineffective by failing to obtain a second psychologist's opinion regarding his competency. Carter did not allege or present any evidence to demonstrate that one of the exceptions found in R.C. 2953.23(A)(1)(a) applied to his case. In denying Carter's petition, the trial court "specifically [found] that defendant has not demonstrated that one of the exceptions to this time limitation applies so as to permit the Court to entertain defendant's otherwise untimely petition." (Dec. 12, 2012 Decision and Entry, 2.)

{¶ 20} Because Carter's petition for post-conviction relief was not timely filed, and because he failed to satisfy one of the exceptions which could overcome this jurisdictional bar, we find the trial court did not err in denying his untimely petition for post-conviction relief. Accordingly, because the trial court properly determined that it lacked jurisdiction to consider Carter's untimely petition for post-conviction relief, his second and third assignments of error are rendered moot.

## **V. CONCLUSION**

{¶ 21} Having overruled Carter's first assignment of error, and rendering his second and third assignments of error moot, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and DORRIAN, JJ., concur.

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