

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 23AP-07 (C.P.C. No. 01CR-3612)
Michael Lee Gordon,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 6, 2023

On brief: *G. Gary Tyack*, Prosecuting Attorney, and
Kimberly M. Bond, for appellee.

On brief: *Michael Lee Gordon*, pro se.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, P.J.

{¶ 1} Defendant-appellant, Michael Lee Gordon, appeals the June 21, 2022 decision of the Franklin County Court of Common Pleas denying his February 28, 2022 petition for postconviction relief and sundry attached motions.

{¶ 2} On February 21, 2003, a jury found Gordon guilty of two counts of involuntary manslaughter, felonious assault, and kidnapping, all with attached firearm specifications. He was subsequently sentenced to an aggregate term of 28 years of incarceration. He timely appealed, and on May 24, 2004, this court affirmed his convictions. *See State v. Gordon*, 10th Dist. No. 03AP-281, 2004-Ohio-2644.

{¶ 3} On July 6, 2004, Gordon filed his first postconviction petition; the trial court denied that petition without a hearing on September 3, 2004. His appeal of that decision was filed late, on May 8, 2006, and this court dismissed his appeal on July 25, 2006.

{¶ 4} Gordon filed a second postconviction petition on November 6, 2004, and the trial court summarily denied that petition on December 30, 2004. It does not appear that Gordon appealed that decision. But he did file a third postconviction petition on March 28, 2008, and the trial court denied that petition, along with several other motions that Gordon had filed, on August 19, 2008. He appealed, and this court affirmed the trial court's judgment on March 24, 2009. *See State v. Gordon*, 10th Dist. No. 08AP-791, 2009-Ohio-1330. On September 21, 2021, he filed a fourth postconviction petition, which was denied on November 3, 2021. He did not appeal this decision. Instead, he filed several other motions (for appointed counsel, for disclosure of discovery, for reduction in sentence, to strike a response by the state, and for an evidentiary hearing) on February 23, 2022 as well as a fifth postconviction petition, on February 28, 2022. The trial court denied his fifth petition and all motions on June 21, 2022, and he filed a notice appealing those decisions on November 15, 2022.

{¶ 5} App.R. 4(A)(1) provides that “[s]ubject to the provisions of App.R. 4(A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.” Noncompliance with App.R. 4 deprives the appellate court of jurisdiction over the appeal. Gordon, however, asserts that he did not receive notice of the June 21, 2022 entry until November 8, 2022, and that therefore his time for filing has been extended pursuant to App.R. 4(A)(3) (“In a civil case, if the clerk has not completed service of notice of the judgment within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service.”). (See Appellant’s Reply Brief at 1.) Without deciding whether the denial of a postconviction petition filed in a criminal case requires that the clerk make “service of notice of the *judgment*” as stated in App.R. 4(A)(3) and Civ.R. 58(B), we observe that the case docket does not contain any notation of service of the denial entry, despite the trial court’s clear direction to serve Gordon at his current place of residence in the Iowa State Penitentiary. (See June 21, 2022 Order at 4.) For these reasons, we assume (without deciding) that App.R. 4(A)(3) applies to the trial court’s order, and we accept Gordon’s assertion that the clerk did not make timely service. We will therefore address the merits of his appeal.

{¶ 6} R.C. 2953.21(A)(1)(a) through (A)(1)(a)(i) authorizes a person who has been convicted of a criminal offense “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 * * * [to] 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.” We have observed that although it is filed in the criminal case, “[a] petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment.” *State v. Sidibeh*, 10th Dist. No. 12AP-498, 2013-Ohio-2309, at ¶ 8, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). Postconviction relief “ ‘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.’ ” *Id.*, quoting *State v. Murphy*, 10th Dist. No. 00AP-233, 2000 Ohio App. LEXIS 6129 (Dec. 26, 2000). A petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *Sidibeh* at ¶ 13, citing *State v. Jackson*, 64 Ohio St.2d 107, 110-13 (1980). To warrant an evidentiary hearing, the petitioner bears the initial burden of providing evidence demonstrating a cognizable claim of constitutional error. *Id.*, citing R.C. 2953.21(C); *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 24. The trial court may deny a postconviction petition without 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.” *Sidibeh* at ¶ 13, citing *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus. This court reviews a trial court’s decision denying a postconviction petition without a hearing for an abuse of discretion. *See, e.g., State v. Howard*, 10th Dist. No. 15AP-161, 2016-Ohio-504, ¶ 15-21 (citing and quoting cases). An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Further, “a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *Sidibeh* at ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58.

{¶ 7} Additionally, R.C. 2953.21(A)(2) provides that a postconviction petition must 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.” Moreover, pursuant to R.C. 2953.23(A), the trial court “*may not entertain* a petition filed after the expiration of the period prescribed in division (A) of [R.C. 2953.21] or a second petition or successive petitions for similar relief” unless the petitioner demonstrates either: (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation. (Emphasis added.) R.C. 2953.23(A)(1)(a). And even if the petitioner can satisfy one of those two conditions, in order to obtain relief, the petitioner must also demonstrate that but for constitutional error at trial, no reasonable finder of fact would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶ 8} Gordon has asserted seven assignments of error with the trial court’s judgment denying his his fifth postconviction petition. But we need not address each assignment of error separately, as this is plainly both a late petition and a “successive” petition as described in R.C. 2953.23(A), and he has not shown he fits within the exceptions to the jurisdictional bar set forth in that statute. As the trial court correctly held:

Ohio law provides a “limited gateway” for filing a successive petition. *Id.* citing R.C. 2953.23(A)(1). His newest petition, like its predecessors, fails to navigate the “limited gateway.” * * * In an attempt to provide jurisdiction, Mr. Gord[o]n argues he has “cause and prejudice” that prevented him from raising these arguments in his first petition. However, his “cause and prejudice” argument is inapplicable to R.C. 2953.23. Rather, “cause and prejudice” is a standard used in federal courts for habeas corpus petitions. It is not an exception to R.C. 2953.23’s time requirements which this Court has already found Mr. Gord[o]n cannot meet.

(Citations omitted.) (June 21, 2022 Order at 2-3.)

{¶ 9} On review of the trial record, the court’s docket, and the petition and brief filed by Gordon, we must concur with the trial court’s analysis. Even assuming Gordon established “cause and prejudice”—a standard which is inapplicable to R.C. 2953.23’s analysis, *see, e.g., State v. Pough*, 11th Dist. No. 2003-T-0129, 2004-Ohio-3933, ¶ 10-15—his petition does not even allege that he was unavoidably prevented from discovering the facts necessary for the claim for relief or that the United States Supreme Court has

recognized a new federal or state right that applies retroactively to him, as required by R.C. 2953.23(A). Indeed, a review of his arguments reveals that they all rest upon factual events that occurred prior to and at his trial and assert that he received ineffective assistance of counsel and abridgement of his rights prior to and at his trial. He does not even allege that the facts supporting his claims were recently discovered, let alone that he was “unavoidably prevented” from discovering them. Similarly, he relies exclusively on caselaw that is long-established rather than asserting that the Supreme Court has recognized a new right or retroactively applied a right to him.

{¶ 10} In sum, Gordon’s failure to allege and establish that his claims fit within the “limited gateway” provided by R.C. 2953.23(A)(1) rendered the trial court unable to entertain the merits of the claims he presented in his petition, just as the trial court held. And because all of his other motions address procedural matters and necessarily presume that the court would address the merits of his postconviction petition, they too lack merit and must fail.

{¶ 11} For these reasons, all of Gordon’s assignments of error lack merit and are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DORRIAN and MENTEL, JJ., concur.
