

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 24CA20
	:	
v.	:	
	:	
Kavin Peeples,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

APPEARANCES:

Kavin Lee Peeples, Chillicothe, Ohio, appellant, pro se.

Jayme Hartley Fountain, Pickaway County Prosecuting Attorney, and Robert A. Chamberlain, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for appellee.

Smith, P.J.

{¶1} Appellant, Kavin Peeples, appeals the judgment of the Pickaway County Court of Common Pleas overruling his Civ.R. 60(B) motion for relief from his 1992 sentencing order, as well as his Amended Civ.R. 60(B) motion for relief from his 1992 sentencing order. The trial court overruled the motions after reclassifying them as untimely and/or successive petitions for postconviction relief. On appeal, appellant raises five very lengthy assignments of error, which will be

set forth below, verbatim. However, finding no merit to any of the arguments raised by appellant, the judgment of the trial court is affirmed.

FACTS

{¶2} The subjects of appellant’s underlying conviction, sentence, and post-conviction motions are now before this Court for the fifth time. The last time this Court considered arguments from appellant on these issues was in 2006, when we affirmed the trial court’s denial of appellant’s petition for postconviction relief which was, at that time, appellant’s third petition for postconviction relief. *See State v. Peeples*, 2006-Ohio-218 (4th Dist.) (“*Peeples IV*”). In *Peeples IV*, we observed the following facts and procedural history related to appellant’s underlying convictions and litigation history:

Appellant was incarcerated at the Orient Correctional Institute in 1990 when he strangled to death a fellow inmate. He later confessed to the crime, was convicted of aggravated murder and sentenced to life imprisonment. We affirmed that conviction in *State v. Peeples* (1994), 94 Ohio App.3d 34, 640 N.E.2d 208 (“*Peeples I*”).

Appellant filed his first petition for postconviction relief in 1996 and argued that he was denied effective assistance of counsel and expert witnesses because he had a mental disorder that prevented him from revealing that he had hallucinations which, in turn, called his competency into question.¹ The trial court denied his motion on the grounds that appellant submitted no evidence, other than a self-serving affidavit, to substantiate

¹ Appellant claimed that at the time of the murder, he had spectral visits from Nikola Tesla (a Yugoslavian scientist) who (1) “offered to guide [him] in developing a universal equation to describe the properties of all known forces of nature by means of a new sub-atomic theory” and (2) told him it was necessary to kill his fellow inmate before he could complete this sub-atomic theory.

his claims. We affirmed that judgment in *State v. Peeples* (Nov. 7, 1997), Pickaway App. No. 97CA16 (“*Peeples II*”).

Appellant filed a second petition for postconviction relief in 1998 and raised, in essence, the same arguments made in his first petition. The trial court overruled that motion on grounds of res judicata and we affirmed that judgment in *State v. Peeples* (Dec. 30, 1998), Pickaway App. No. 98CA24 (“*Peeples III*”).

Appellant filed his third petition for postconviction relief on May 11, 2005 and claimed that he was denied his constitutional rights because court psychologists did not make “accurate determinations” as to his “mental illness” or “the extent to which that illness caused [his] violent acts.” In an attempt to circumvent the res judicata problem which torpedoed his petition in *Peeples III*, appellant claimed that he was prevented all these years from raising these issues because of the “long term affects [sic] of a serious mental illness.”

The prosecution filed a succinct memorandum in opposition and argued that appellant raised “the same issues which have previously, multiple times, been raised in the [trial court] as well as the Court of Appeals.” No matter how appellant may couch his argument, the prosecution concluded, he was essentially raising the same competency issue that has been raised and decided on a number of occasions since his original conviction.

The trial court apparently agreed and overruled appellant's petition. This appeal followed.

Peeples IV at ¶ 3-8.

In *Peeples IV*, this Court once again found appellant's petition for postconviction relief to be both untimely and successive and affirmed the trial court's judgment overruling the petition. *Peeples IV* at ¶ 15.

{¶3} Most recently, appellant filed another round of motions in the trial court, including the following:

- 1/31/22 Motion to Correct Judicial Error
- 10/5/23 Exhibit - M Amended Motion for Relief from (Sentencing) Order (of 1992) OH.R.CIV.P.R. 60(B)
- 10/20/23 Motion for Relief from (Sentencing) Order (of 1992) w. Appendix Pursuant to Ohio.R.Civ.Proc.R. (60)(B)(4)&(5)
- 1/24/24 Petition for Writ of Habeas Corpus
- 2/23/24 Delayed Motion for Leave to File Amended Motion for Relief from (Sentencing) Order (of 1992)
- 5/9/24 Motion for Summary Judgment

{¶4} Appellant's Civ.R. 60(B) motion and amended motion for relief from the 1992 sentencing order, both handwritten, lengthy, and somewhat repetitive, appear to essentially raise the same claims. His "amended" motion, which was filed first, raised three claims. The first claim appears to have been that since the time of his original conviction, appellant developed a health condition known as leukopenia, which he claimed is likely a symptom of an underlying congenital immunodeficiency disease that his brother was recently diagnosed with, and that the 1992 sentencing order that remained in effect "adversely impacted [his] health by creating a substantial risk of infection and death in the penal setting due to the

lack of necessary medical treatment.”² He argued that he had been denied the medical standard of care of a medical consultation, testing, and medical monitoring.

{¶5} The second claim appears to have been that he had met “all of the criteria of state law regarding release from penal confinement,” as well as the “sentencing order,” because he had been rehabilitated and was remorseful. He further argued that given his medical condition and the risk that existed in the penal setting, “the continued execution of sentence would lead to an outcome contrary to the intent of the trial court sentencing judges who did not sentence [him] to death[,]” but rather intended for him “to return to society upon successful rehabilitation.” The third claim argued that the parole board’s failure to release him denied him “the benefits of post-incarceration rehabilitation.”

{¶6} Appellant’s later-filed motion for relief from the 1992 sentencing order, which he claimed was filed pursuant to Civ.R. 60(B)(4) and (5), set forth the same factual history, but condensed the three claims into the following two claims:

Claim One

The Sentencing Order of 1992 imposes Penal Confinement where I can not recieve necessary medical treatment, in violation of Cruel and Unusual Punishment Prohibition under the Ohio Constitution art. 1, sec 9 & 16; and the U.S. Const. amendes 8th and 14th.

² Appellant also referred to the onset of the COVID-19 pandemic and risk it posed to him as an immunocompromised person in a penal setting.

Claim Two

The 31 years of penal confinement have achieve the purpose and objectives of the sentencing court judges, and continued penal confinement has no justification , necessity, and is contrary to the public interest, in violation of Due Process under the Ohio Constitution article I sec 16; and the U.S. Constitution amend 14th.

The “relief sought” by appellant was 1) to “vacate and set aside sentencing order of 1992;” and 2) “impose new sentence with time served (31 years) granting community service.”

{¶7} The trial court began issuing rulings on some of these motions/petitions on July 25, 2024, starting with its denial of appellant’s motion and amended motion for relief from the 1992 sentencing order. The trial court also denied appellant’s motion to correct judicial error on July 25, 2024. These denials were followed by the later denial of appellant’s motion for summary judgment on October 1, 2024.

{¶8} In denying appellant’s Civ.R. 60(B) motion and amended motion for relief from the 1992 sentencing entry, the trial court treated the motions as claims for postconviction relief, which the court appears to have found to be either late or successive, or both. The trial court also affirmatively found no merit to appellant’s argument that his sentence constituted cruel and unusual punishment. The court further stated that appellant’s claims regarding his “physical condition and his treatment should more properly be placed before ODRC, not this Court.”

{¶9} Appellant filed a notice of appeal from the trial court's denial of both his motion and amended motion for relief on August 16, 2024. Appellant has not appealed the trial court's denial of his motion to correct judicial error, nor his motion for summary judgment. It appears that appellant's petition for a writ of habeas corpus remains pending. Appellant raises the following assignments of error on appeal.

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT OVERRULED THE MOTION FOR RELIEF FROM THE SENTENCING ORDER OF 1992, AFTER IT RULED THAT BECAUSE THE SENTENCE FALL WITHIN THE STATUTORY GUIDELINES, THAT THE SENTENCE WAS CONSTITUTIONAL, AND THEREFORE THE DEFENDANT WAS NOT ENTITLED TO RELIEF IN THE FORM OF A NEW SENTENCING HEARING UNDER CIV.R. 60(B) SEC (4).
- II. THE TRIAL COURT OVERRULED THE MOTION FOR RELIEF FROM THE SENTENCING ORDER OF 1992, AFTER IT RULED THAT THE CLAIMS OF DENIAL OF NECESSARY MEDICAL CARE WHILE IN PENAL CUSTODY WHICH OCCURRED AFTER THE TRIAL COURT PROCEEDINGS, SHOULD HAVE BEEN RAISED UNDER ESTABLISHED CATEGORIES IN POST-CONVICTION STATUTE AND NOT BY A CIV.R. 60(B) SEC (4) MOTION; THAT THE DEFENDANT WAS NOT ENTITLED TO RELIEF IN THE FORM OF UNDER CIV. RULE. 60(B) SEC (4).
- III. THE TRIAL COURT OVERRULED THE MOTION FOR RELIEF FROM THE SENTENCING ORDER OF 1992, AFTER IT RULED THAT THE DEFENDANT'S

STATE AND FEDERAL CONSTITUTIONAL CLAIMS OF THE DENIAL OF NECESSARY MEDICAL CARE WHILE IN PENAL CUSTODY WHICH OCCURRED AFTER THE TRIAL COURT PROCEEDINGS, CANNOT NOW BE RAISED IN STATE COURTS BY A CIV.R.60(B) SEC (4) MOTION; THAT THE DEFENDANT WAS NOT ENTITLED TO RELIEF IN THE FORM OF A NEW SENTENCING HEARING UNDER CIV. RULE. 60(B) SEC (4).

- IV. THE TRIAL COURT OVERRULED THE MOTION FOR RELIEF FROM THE SENTENCING ORDER OF 1992, WITHOUT HOLDING AN EVIDENTIARY HEARING FIRST THAT THE DEFENDANT WAS NOT ENTITLED RELIEF IN THE FORM OF A NEW SENTENCING HEARING UNDER CIV.R. 60(B) SEC (4).
- V. THE TRIAL COURT OVERRULED THE MOTION FOR RELIEF FROM THE SENTENCING ORDER OF 1992, WITHOUT ADDRESSING ALL THE CLAIMS RAISED IN THE MOTION FOR RELIEF, INCLUDING THE CLAIM THAT CONTINUATION OF THE SENTENCE NO LONGER SERVES A LEGITIMATE PENOLOGICAL PURPOSE UNDER STATE LAW AND WOULD BE UNCONSTITUTIONAL PUNISHMENT; THAT THE DEFENDANT WAS NOT ENTITLED TO RELIEF IN THE FORM OF A NEW SENTENCING HEARING UNDER CIV. RULE. 60(B) SEC (4).

ASSIGNMENTS OF ERROR I - V

{¶10} Because appellant's assignments of error are interrelated and all challenge the trial court's decision denying his motions, we address them in conjunction with one another. Appellant contends that he had a right to raise claims regarding the violation of his "right to be free of Cruel and Unusual

conditions” and that he was not required to set forth a constitutional violation in order to prevail upon a Civ.R. 60(B) motion, which he claims the trial court erroneously recast as a petition for postconviction relief. He argues that his claims were not appropriate for a postconviction relief claim, and that the trial court erred by recasting them as such and then dismissing them. The gist of his arguments, analyzing his motions filed below and his arguments on appeal, is that Crim.R. 57(B) permitted him to file a motion under Civ.R. 60(B) seeking relief from judgment on the ground that requiring him to continue serving his prison sentence was “no longer equitable,” in part based upon his health concerns and in part based upon his claim that he had been rehabilitated, and therefore “the judgment [had] been satisfied.”

{¶11} The State contends, on the other hand, that the Pickaway County Court of Common Pleas was not the correct forum for appellant to advance his arguments alleging cruel and unusual punishment, nor was Civ.R. 60(B) the proper mechanism to raise the claims. The State further argues that the trial court properly treated appellant’s Civ.R. 60(B) motions as postconviction relief claims per both Civ.R. 57 and Civ.R. 35.³ It finally argues that appellant’s sentence was otherwise valid, did not result in cruel or unusual punishment, and that appellant was not entitled to a hearing on his motion.

³Crim.R. 35 provides for the filing of petitions for postconviction relief in accordance with R.C. 2953.21.

Standard of Review

{¶12} A trial court’s ruling on a petition for postconviction relief is reviewed for an abuse of discretion. *State v. Carver*, 2022-Ohio-2653, ¶ 11 (4th Dist.). An “abuse of discretion” is more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *See State v. Jayjohn*, 2021-Ohio-2286, ¶ 9 (4th Dist.); *State v. Herring*, 94 Ohio St.3d 246, 255 (2002); *State v. Adams*, 62 Ohio St.2d 151 (1980). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *See Carver, supra*, at ¶ 12; citing *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138 (1991).

{¶13} Further, a criminal defendant seeking to challenge a conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282 (1999), citing *State v. Cole*, 2 Ohio St.3d 112 (1982). Before granting an evidentiary hearing, the trial court must consider the petition, supporting affidavits, documentary evidence, files and records including the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporters transcript, to determine whether there are substantive grounds for relief. R.C. 2953.21(C). If the court concludes that petitioner has failed to set forth operative facts to establish

substantive grounds for relief, no hearing is necessary. *See Calhoun, supra*, at paragraph two of the syllabus; *see also State v. Slagle*, 2012-Ohio-1936, ¶ 14, quoting *State v. Bradford*, 2009-Ohio1864, ¶ 10 (4th Dist.).

Legal Analysis

{¶14} Crim.R. 57(B), relied upon by appellant in filing his motions provides as follows:

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

Appellant argues that this criminal rule permitted him to bring his claims via a Civ.R. 60(B) motion for relief from judgment, or here his 1992 sentencing order. The State argues that there was no need to resort to the civil rules in this instance because Crim.R. 35, which provides for the filing of postconviction petitions, was the appropriate avenue for relief for at least some of appellant's claims. Thus, the State contends the Civ.R. 60(B) motions were improper and the trial court did not err in recasting them as petitions for postconviction relief.

{¶15} The Supreme Court of Ohio has held that “[t]he trial court may recast an appellant’s motion for relief from judgment as a petition for postconviction relief when the motion has been unambiguously presented as a Civ.R. 60(B) motion.” *State v. Schlee*, 2008-Ohio-545, syllabus. Understanding that Schlee’s

motion was labeled as a Civ.R. 60(B) Motion for Relief From Judgment, the Court nevertheless held that “[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which a motion should be judged.” *Id.* at ¶ 12, citing *State v. Bush*, 2002-Ohio-3993, ¶ 10, in turn citing *State v. Reynolds*, 2002-Ohio-2823, ¶ 24.

{¶16} Moreover, this Court has reasoned as follows regarding the recasting of motions seeking to vacate sentences:

The Supreme Court of Ohio has held that “ ‘[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.’ ” *State v. Osborn*, 4th Dist. Adams No. 18CA1064, 2018-Ohio-3866, 2018 WL 4600874, at ¶ 7, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Despite the caption, a motion meets the definition of a petition for postconviction relief set forth in R.C. 2953.21(A)(1), because “it is a motion that was (1) filed subsequent to [defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” *Reynolds* at 160, 679 N.E.2d 1131.

State v. Carver, *supra*, at ¶ 10.

{¶17} We find that based upon our review of appellant’s motions, the trial court did not err in recasting appellant’s motions as petitions for postconviction relief to the extent appellant 1) sought relief from his prison sentence based upon arguments that he had been rehabilitated; 2) sought a resentencing hearing in order

to be placed on some sort of community control or “community service;” and 3) argued that his sentence was void or voidable under the sentencing statutes that were in effect at the time he was originally sentenced back in the early 1990s. As we will discuss in more detail below, however, it is clear the trial court considered appellant’s claims regarding cruel and unusual punishment related to the conditions of his confinement and the effect on his medical condition to have been brought in the wrong forum. It appears the trial court “overruled” those claims on that basis.

Postconviction relief

{¶18} R.C. 2953.21 governs a petition for postconviction relief. Any person convicted of a criminal offense who claims a denial or infringement of rights to such a degree as to render a judgment void or voidable may file a petition for postconviction relief. R.C. 2953.21(A)(1)(a). “[A] postconviction proceeding is not an appeal of a criminal conviction but rather, is a collateral, civil attack on a criminal judgment.” *State v. Broom*, 2016-Ohio-1028, ¶ 28, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994); accord *State v. Betts*, 2018-Ohio-2720, ¶ 11 (4th Dist.); *State v. Brown*, 2022-Ohio-519, ¶ 6 (4th Dist.).

{¶19} Postconviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *State v. Smith*, 2020-Ohio-116 (4th Dist.); *Carver, supra*, at ¶ 11; *State v.*

Brown, 2022-Ohio-519, ¶ 7 (4th Dist.). Postconviction relief is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *Carver* at ¶ 11. This means that “any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly.” *State v. Apanovitch*, 2018-Ohio-4744, ¶ 35.

{¶20} R.C. 2953.21(A)(2) provides that a petitioner must file a postconviction relief petition no later than 365 days after the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction. In the case sub judice, appellant’s petition was filed approximately 31 years after the filing of the transcript in his direct appeal. Thus, the lapse of time alone should bar consideration of appellant’s latest postconviction relief petition. *See State v. Rinehart*, 2018-Ohio-1261, ¶ 13 (4th Dist.) (petition filed 10 years after expiration of 365-day period untimely); *State v. Heid*, 2016-Ohio-2756, ¶ 1 (4th Dist.) (petition filed seven years after expiration of time for filing an appeal untimely); *State v. Mitchell*, 2021-Ohio-4386, ¶ 20 (4th Dist.) (petition filed four years after expiration of 365-day period untimely). Here, the trial court specifically found that appellant had failed to demonstrate why his petitions should not be barred as either late or successive, thus the court appears to have acknowledged the untimeliness of the petitions.

{¶21} Moreover, when a defendant files an untimely petition or a successive petition, R.C. 2953.23(A) prevents trial courts from considering the petition unless both of the following apply: (1) petitioner shows he or she “was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief,” or “the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right;” *and* (2) “[t]he petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty.” R.C. 2953.23(A)(1)(a) and (b).⁴

{¶22} “A defendant is ‘unavoidably prevented’ from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonable diligence, learned of their existence within the time specified for filing his petition for postconviction relief.” *State v. Cunningham*, 2016-Ohio-3106, ¶ 19 (3d Dist.), citing *State v. Holnapy*, 2013-Ohio-4307, ¶ 32 (11th Dist.), and *State v. Ruark*, 2015-Ohio-3206, ¶ 11 (10th Dist.); *see also State v. Brown*, *supra*, at ¶ 9 (4th Dist.). Moreover, “[t]he ‘facts’ contemplated by this

⁴ Another exception, inapplicable here, allows a court to entertain an untimely, second, or successive petition if DNA testing results “establish, by clear and convincing evidence” the petitioner’s “actual innocence.” R.C. 2953.23(A)(2).

provision are the historical facts of the case, which occurred up to and including the time of conviction.” *State v. Williamitis*, 2006-Ohio-2904, ¶ 18 (2d Dist.).

{¶23} A trial court lacks jurisdiction to consider an untimely or a successive petition if the petitioner fails to satisfy R.C. 2953.23(A)(1)(a) and (b). *State v. Parker*, 2019-Ohio-3848, ¶ 19. Furthermore, whether a court possesses jurisdiction to entertain an untimely or a successive petition is a question of law that appellate courts review independently and without deference to the trial court. *Apanovitch, supra*, at ¶ 24; *Brown, supra*, at ¶ 10.

{¶24} In the case sub judice, although appellant did not couch his claims in terms of postconviction relief, he nevertheless went to great lengths to argue that neither his current medical condition nor the COVID-19 pandemic could have been foreseen by the trial court when it imposed his sentence. He further argues that this health condition is a new development. These arguments can be construed as an attempt to try to demonstrate that he has been unavoidably prevented from the discovery of facts upon which he relied to present the claim. However, assuming arguendo that appellant met the first prong required to overcome the untimely filing, he has not satisfied the second prong. More specifically, appellant has not claimed that he was innocent, or that the conviction itself should be overturned. In fact, he has made statements regarding remorse for his crimes and argues he has been rehabilitated. These statements contradict the required showing under the

second prong, which required appellant to show by clear and convincing evidence that but for constitutional error at trial no reasonable factfinder would have found him guilty. Thus, appellant has not established that the trial court could properly address the merits of his untimely petition.

{¶25} Based upon the foregoing, we cannot conclude the trial court erred in recasting appellant's motions as petitions for postconviction relief, which were properly found to be untimely filed. However, rather than "overruling" these claims, the trial court should have dismissed them as it lacked jurisdiction to consider them. The disposition of the reclassified petition was complicated by the varied nature of the claims raised by appellant. As set forth above, the trial court drew a distinction between some of appellant's claims, notably the cruel and unusual punishment claims, stating that "[d]efendant's physical condition and his treatment should more properly be placed before ODRC, not this Court." The State argues that because appellant's claims were based upon arguments that he received inadequate medical treatment while in the custody of ODRC, and thus was subjected to cruel and unusual punishment, appellant should have filed a grievance directly with ODRC rather than filing Civ.R. 60(B) motions in the trial court.

{¶26} In *Waites v. Gansheimer*, 2006-Ohio-4358, ¶ 3, the Supreme Court of Ohio observed that "state prisoners challenging the conditions of their

confinement have an adequate legal remedy by way of an action under Section 1983, Title 42, U.S. Code.’ ” Quoting *Douglas v. Money*, 85 Ohio St.3d 348, 349 (1999). As further noted in *Waites*, “[t]he United States Supreme Court has recognized that deliberate indifference to serious medical needs of prisoners is proscribed by the Eighth Amendment to the United States Constitution and states a cause of action under Section 1983, Title 42, U.S. Code.” *Waites* at ¶ 3. Further, this Court has stated that “[p]risoners who bring Eighth Amendment conditions of confinement claims typically seek civil and equitable remedies, not reversals of criminal convictions and sentence.” *State v. Hiatt*, 1996 WL 422464, *13 (4th Dist. July 15, 1996).

{¶27} Importantly, our research indicates appellant should have understood the proper forum in which to bring these claims in light of a prior 1995 Supreme Court of Ohio decision that issued involving him. *See State ex rel. Peebles v. Anderson*, 73 Ohio St.3d 559 (1995). In that case, appellant had filed a request for writ of mandamus compelling the warden to test and monitor him for HIV after he was attacked by another inmate and exposed to the virus through a blood exposure. *Id.* at 59. In affirming the trial court’s denial of appellant’s request for the writ, the Court stated as follows:

A writ of mandamus will not be issued where there is a plain and adequate remedy in the ordinary course of the law. R.C. 2731.05. A civil rights action under Section 1983, Title 42, U.S. Code constitutes an adequate legal remedy which precludes

extraordinary relief where state prisoners challenge the conditions of their confinement and their claims are limited to alleged violation of their federal constitutional and statutory rights. *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 91-92, 637 N.E.2d 306, 309. Section 1983 constitutes an adequate remedy, since it can provide declaratory, injunctive (both mandatory and prohibitive), and/or monetary relief. 1 Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (2 Ed.1991) 830, Section 16.1.

Peeples challenged the conditions of his confinement. He did not assert any violation of state law in his complaint. In addition, Peeples claims only a deprivation of his federal constitutional rights now on appeal. Further, Peeples has evidently already filed a complaint against the state and the Ohio Department of Rehabilitation and Correction in federal district court concerning related matters. Therefore, since Peeples obviously could not prevail on the facts alleged in his complaint given the availability of a Section 1983 action, the court of appeals did not err in sua sponte dismissing the action.

Id. 560-561.

In any event, however, the claims challenging the conditions of his confinement and alleging cruel and unusual punishment were not appropriately brought in a Civ.R. 60(B) relief from judgment, nor were they cognizable through postconviction relief.

{¶28} Based upon the foregoing, we conclude appellant's claims were properly handled, in part, as untimely postconviction relief claims and in part, as claims brought in an improper form. Furthermore, we cannot conclude, based upon this record, that appellant was entitled to a hearing on his motion. However, rather than overruling the claims and essentially denying them on their merits, the

trial court should have dismissed them as it lacked jurisdiction to entertain them.

This Court has recently reminded trial courts that when an appellant has not established that any exception applies, a court cannot entertain a second postconviction petition and lacks jurisdiction to consider the petition. *See State v. McDaniel*, 2023-Ohio-3051, ¶ 21, citing *Brown*, 2022-Ohio-519, ¶ 14 (4th Dist.).

The same rationale that applies to successive petitions applies to untimely petitions. As in both *Brown* and *McDaniel*, in the case at bar the trial court “technically erred” by overruling appellant's petition rather than issuing a dismissal for lack of jurisdiction. *Id.*, citing *State v. McManaway*, 2016-Ohio-7470, ¶ 16 (4th Dist.). Thus, under App.R. 12(A)(1)(a), we modify the trial court's judgment to reflect the dismissal of appellant's postconviction petition. *Id.*, *see also State v. Daboni*, 2021-Ohio-3368, ¶ 22 (4th Dist.); *McManaway*, *supra*, at ¶ 19.

{¶29} Accordingly, based upon the foregoing reasons, we overrule all of appellant's assignments of error and affirm the trial court's judgment as modified.

JUDGMENT AFFIRMED AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED AS MODIFIED and costs be assessed to appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.