

# **IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MONROE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM D. PEYATT,

Defendant-Appellant.

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## **OPINION AND JUDGMENT ENTRY** **Case No. 21 MO 0001**

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Criminal Appeal from the  
Court of Common Pleas of Monroe County, Ohio  
Case No. CRI-2017-186

### **BEFORE:**

Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

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### **JUDGMENT:**

Affirmed

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*Atty. James L. Peters*, Monroe County Prosecutor, 101 N. Main Street, Room 15,  
Woodsfield, Ohio 43793, for Plaintiff-Appellee and

William D. Peyatt, PRO-SE, Inmate #A743049, Belmont Correctional Institute, 68518  
Bannock Road, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated:  
September 16, 2021

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**Donofrio, J.**

{¶1} Defendant-appellant, William D. Peyatt, appeals from a Monroe County Common Pleas Court judgment denying his November 2, 2020 Petition to Vacate or Set Aside Judgment of Conviction or Sentence.

{¶2} On March 22, 2018, a Monroe County Jury found appellant guilty of 6 out of 8 sex crimes involving minors: 4 counts of gross sexual imposition (GSI); one count of attempted GSI; and one count of disseminating matter harmful to juveniles. On March 27, 2018, the trial court sentenced appellant to a total of 270 months in prison. Appellant filed a timely direct appeal and asserted that: insufficient evidence was presented to support his attempted GSI conviction; consecutive sentences were disproportionate; and he was deprived of a fair trial because the court had a blanket policy requiring shackling of defendants in the hallway, the jury saw him shackled, and the trial court failed to give a curative instruction to the jury.

{¶3} On August 28, 2019, this Court found merit to appellant's assignment of error of insufficient evidence to support the attempted GSI conviction. *State v. Peyatt*, 7th Dist. Monroe No. 18 MO 0006, 2019-Ohio-3585. We reversed the conviction on that count and vacated the 18-month sentence on it. Appellant filed a motion for delayed appeal to the Ohio Supreme Court, but that Court did not accept the appeal for review. See *State v. Peyatt*, 158 Ohio St.3d 1408, 2020-Ohio-518, 139 N.E.3d 928(Table) (granting motion for delayed appeal); 158 Ohio St.3d 1465, 2020-Ohio-1393, 142 N.E.3d 701(Table) (not accepting appeal for review); 159 Ohio St.3d 1446, 2020-Ohio-3712, 149 N.E.3d 519(Table) (not accepting appeal for review).

{¶4} On November 21, 2019, appellant filed an App. R. 26(B) application to reopen his appeal. On February 21, 2021, this Court denied appellant's application. *State v. Peyatt*, 7th Dist. Monroe No. 18 MO 0006, 2019-Ohio-1103.

{¶5} On November 2, 2020, appellant filed a petition to vacate or set aside his judgment of conviction and sentence in the trial court. He asserted that trial counsel was ineffective and that deprived him of constitutional due process, a speedy trial, and a fair trial. He asserted that counsel was provided with information and failed to investigate it

and this “newly discovered” evidence would have shown his innocence and his alibi if presented at trial. In his second claim, appellant asserted that he was denied a fair trial because the prosecutor knowingly and intentionally “testified false information to a jury assuring them of his honesty and truthfulness.” Appellant contended that “newly discovered evidence” demonstrated that the prosecutor misled the jury with false information and bolstered his case proclaiming honesty and truthfulness where documentation proves otherwise.” He also filed a motion for the appointment of counsel and a motion for expert assistance.

{¶6} On January 5, 2021, the trial court denied appellant’s petition and his motions for the appointment of counsel and expert assistance. On February 10, 2021, the trial court filed a final appealable order incorporating findings of fact and conclusions of law regarding the denial of appellant’s petition.

{¶7} On March 9, 2021, appellant filed a pro se notice of appeal to this Court. He asserts the following assignments of error:

#### Assignment of Error I

THE TRIAL COURT ERRED WHEN IT DENIED MR. PEYATT’S REQUEST FOR AN EVIDENTIARY HEARING IN HIS PETITION FOR POST-CONVICTION RELIEF.

#### Assignment of Error II

DOCUMENTS, NOT PRESENTED AT TRIAL, DEMONSTRATE THAT COUNSEL APPOINTED TO REPRESENT MR. PEYATT BY THE TRIAL COURT WAS, IN FACT, PROVIDED WITH INFORMATION AND THAT INFORMATION WENT UNINVESTIGATED, DOCUMENTS AND PHOTOGRAPHS WAS NOT PROVIDED, AND WITNESSES AS TO MR. PEYATT’S ALIBI WAS[sic] NOT MADE AVAILABLE AT THE TIME OF TRIAL.

#### Assignment of Error III

DOCUMENTS IN MR. PEYATT’S PETITION FOR POST-CONVICTION RELIEF ESTABLISH THAT THE PROSECUTOR, JAMES L. PETERS, ON

BEHALF OF THE STATE, KNOWINGLY AND INTENTIONALLY PRESENTED FALSE AND MISLEADING INFORMATION TO THE JURY TO BOLSTER THE STATES[sic] CASE AND SECURE A CONVICTION AGAINST MR. PEYATT.

{¶8} In its findings of fact and conclusions of law, the trial court found that R.C. 2953.21(A)(2) required appellant to file his petition no more than 365 days after the trial transcript was filed in this Court for the direct appeal. The court found that appellant timely filed his direct appeal on April 26, 2018, and the trial transcript was filed on October 31, 2018. The trial court held that appellant did not file his post-conviction relief petition until nearly 2 ½ years after the trial transcript was filed, which was well after the statutory time limit. The court further held that appellant did not make any attempt to explain his untimeliness under the exceptions to the 365-day requirement in order to excuse his late filing. The court also explained that it was not required to hold an evidentiary hearing since it lacked jurisdiction to consider the petition because it was untimely.

{¶9} An appellate court reviews a trial court's denial of a petition for post-conviction relief under an abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Abuse of discretion connotes more than an error of law; it implies the trial court acted arbitrarily, unreasonably or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Moreover, a post-conviction petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing on the petition, the trial court shall determine whether there are substantive grounds for relief. R.C. 2953.21(C). The trial court's decision of whether to hold an evidentiary hearing in post-conviction matters is reviewed for abuse of discretion. *State v. Haschenburger*, 7th Dist. Mahoning No. 08-MA-223, 2009-Ohio-6527, ¶ 43.

{¶10} R.C. 2953.21 through R.C. 2953.23 govern petitions for post-conviction relief and provide that “any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to vacate or set aside the judgment and sentence.” *State v. Martin*, 7th Dist. Mahoning No. 12 MA 167, 2013-Ohio-2881, ¶ 13. The relevant portion

of R.C. 2953.21(A)(2) requires that a petitioner file a petition for post-conviction relief within one year after the trial transcripts are filed in the court of appeals:

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall 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\* \* \*

{¶11} R.C. 2953.23 provides a two-part exception to this rule. The petitioner must either show that he: “was unavoidably prevented from discovery of the facts upon which [he] 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.” R.C. 2953.23(A)(1)(a). Once the petitioner establishes one of those two criteria, he must then show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.” R.C. 2953.21(A)(1)(b).

{¶12} The requirement that a post-conviction petition be filed timely is jurisdictional. R.C. 2953.23(A) (“a court may not entertain a petition filed after the expiration of the period prescribed [in R.C. 2953.21]”). Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for post-conviction relief. *State v. Cope*, 7th Dist. Columbiana No. 19 CO 0029, 2020-Ohio-4716, citing *State v. Carter*, 2d Dist. Clark No. 03-CA-11, 2003-Ohio-4838 (citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998)).

{¶13} The trial court properly found that appellant’s post-conviction relief petition was untimely filed. He filed the petition in the trial court on November 2, 2020. He filed his notice of direct appeal on April 26, 2018 and the trial transcript for the direct appeal was filed on October 31, 2018 in this Court. See *State v. Peyatt*, 7th Dist. Monroe No. 18 MO 6. In order to be timely, appellant’s post-conviction relief petition should have been filed no later than October 31, 2019.

{¶14} Further, the trial court did not abuse its discretion when it found that appellant made no attempt to explain the untimeliness of his petition under R.C. 2953.23(A)(1)(a) and (b). While he attached a host of documents to his petition, appellant did not explain how or why he was unavoidably prevented from discovering the facts concerning his claims in order to file his petition on time.

{¶15} In addition, the trial court did not abuse its discretion by finding that no evidentiary hearing was necessary on the petition. R.C. 2953.21(F) provides in relevant part: “Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.” The trial court lacked jurisdiction to hold a hearing since appellant’s petition was untimely and he failed to explain or establish that he was unavoidably prevented from discovering the facts that he relied upon in order to timely present his claims for relief.

{¶16} Moreover, res judicata and/or the law of the case bar appellant’s claims. Pursuant to the res judicata doctrine, “a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.” *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). “Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant’s petition for post-conviction relief.” *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus. The law of the case doctrine provides that a reviewing court’s decision in a case remains the law of the case on legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). Thus, “the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781.

{¶17} The “newly discovered” evidence that appellant wished to present in post-conviction could have been obtained for his direct appeal. Further, his claims of ineffective trial counsel and improper comments by the assistant prosecutor at trial should have and could have been brought on direct appeal since the facts concerning these claims occurred during the trial. Appellant would have been aware before filing his appeal that his alibi defense was not presented in the manner that he wanted. He would have also been aware of the prosecutor’s comments made during opening and closing that he wished to challenge. Appellant was represented by new counsel on appeal. He did not present these claims.

{¶18} Further, appellant’s post-conviction petition claims were similar to those he presented in his App.R. 26(B) application. In the App. R. 26(B) application, appellant asserted appellate counsel’s ineffectiveness for not raising the ineffective assistance of his trial counsel. He alleged in the App. R. 26(B) application that his right to a fair trial was violated due to cumulative errors by trial counsel. Those cumulative errors included failing to obtain records showing that he had an alibi, including a hospital record and documents showing that he was in West Virginia during some of the times when the crimes occurred. Appellant also asserted appellate counsel’s ineffectiveness for not raising claims that the prosecutor poisoned the jury with his opening statements and made unsupported and improper comments in his closing.

{¶19} In denying the App. R. 26(B) application, this Court held that trial counsel was not ineffective. We reasoned that it may have been counsel’s reasonable trial strategy not to raise an alibi defense because appellant’s mother and sister, who were defense witnesses, testified that while appellant did live in West Virginia from 2007-2014, he would return to visit and the victims would be around him during those visits. These witnesses also testified that in 2015 or 2016, appellant moved back to Monroe County and the victims and appellant were around each other during these times. These are the relevant times that the crimes were committed. Thus, we held that trial counsel’s sound trial strategy may have been to show that the victims were lying since appellant’s mother and sister testified that when the victims were around appellant during his visits and thereafter, they acted normally and were not scared of appellant. We found that this was not deficient performance on the part of trial counsel.

**{¶20}** As to the prosecutor’s statements at opening and closing, we held that no prosecutorial misconduct existed as considerable latitude is given to opening and closing statements and the prosecutor may make statements in good faith at opening as to what he expects to prove at trial. We further held that upon review of the closing statement in its entirety, the statements summarized the evidence and drew conclusions based upon the evidence presented at trial. We further found that the remarks did not constitute prosecutorial misconduct or otherwise prejudice appellant.

**{¶21}** Thus, we had already ruled on the issues that appellant raised in his post-conviction relief petition, and res judicata and/or the law of the case applies to bar appellant’s post-conviction relief petition claims.

**{¶22}** Accordingly, all of appellant’s assignments of error are without merit and are overruled.

Waite, J., concurs.

D’Apolito, J., concurs.



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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**