

[Cite as *State v. Parsons*, 2011-Ohio-1094.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-685
Plaintiff-Appellee,	:	(C.P.C. No. 88CR-01-279)
v.	:	
John L. Parsons,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 10, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

John L. Parsons, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} John L. Parsons, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court denied his motion for post-conviction relief.

{¶2} On January 28, 1988, defendant was indicted on two counts of aggravated murder, one count of arson, and three counts of unlawful possession of a dangerous ordnance. The indictment stemmed from the shooting death of Michael Gustin on December 13, 1987. The court severed the counts alleging aggravated murder and arson

from the counts relating to the unlawful possession of a dangerous ordnance. The counts relating to aggravated murder and arson were eventually tried to a jury, which found appellant guilty. The court sentenced appellant to serve an imprisonment term of 30 years to life. This court affirmed the convictions in *State v. Parsons* (Feb. 13, 1992), 10th Dist. No. 91AP-84.

{¶3} Appellant also entered a no contest plea to the counts relating to unlawful possession of a dangerous ordnance, and the trial court found him guilty. Appellant was sentenced to imprisonment terms of 18 months on each of the three counts. This court affirmed the convictions in *State v. Parsons* (1990), 68 Ohio App.3d 323.

{¶4} On April 16, 2010, appellant filed a delayed petition for post-conviction relief and a motion for leave to file verified delayed petition for post-conviction relief. On May 6, 2010, appellant filed a motion instanter for judgment as a matter of law denying appellee's motion for leave to file answer and motion to dismiss instanter. On June 21, 2010, the trial court denied appellant's petition for post-conviction relief as being untimely filed, and denied his May 6, 2010 motion. Appellant appeals the judgment of the trial court and asserts the following two assignments of error:

[I.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S PETITION FOR POST-CONVICTION RELIEF FILED PURSUANT [TO] R.C. §2953.23(A)(1).

[II.] APPELLANT'S CONVICTIONS UNCONSTITUTIONALLY REST UPON DOUBLE JEOPARDY VIOLATION RIGHT NOT TO BE TWICE PUT INTO JEOPARDY FOR THE SAME OFFENSE.

{¶5} We will address appellant's assignments of error together. The trial court found appellant's petition was untimely filed. A petition for post-conviction relief under

R.C. 2953.21 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-Ohio-111. "It 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* (Dec. 26, 2000), 10th Dist. No. 00AP-233. R.C. 2953.21 affords a prisoner post-conviction relief only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio or United States Constitutions. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. 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; *Murphy*.

{¶6} Post-conviction petitions must be timely filed. Am.Sub.S.B. No. 4, which went into effect September 21, 1995, amended R.C. 2953.21 and imposes time limits on post-conviction petitioners. R.C. 2953.21(A)(2) provides:

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 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, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

In an uncodified section of S.B. No. 4, the General Assembly included a more generous limitations period for persons convicted prior to the effective date of the act. See *State v. Bird* (2000), 138 Ohio App.3d 400. Section 3 of S.B. No. 4 provided that such persons

shall file a petition within the time required in R.C. 2953.21(A)(2) or within one year from the effective date of this act, whichever is later. *State v. Jones*, 10th Dist. No. 08AP-551, 2008-Ohio-6515, ¶7.

{¶7} However, R.C. 2953.23(A)(1) permits a court to entertain a petition filed after the expiration of the period prescribed in R.C. 2953.21(A) if one of the following exceptions apply: (1) the petitioner shows that he or she was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief; or (2) subsequent to the period prescribed in R.C. 2953.21(A)(2) or to the filing of an earlier petition, 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. If the petitioner were able to satisfy one of those two conditions, R.C. 2953.23(A)(1)(b) requires he or she also demonstrate that, but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offenses of which he or she was convicted.

{¶8} In the present case, because appellant was convicted prior to the effective date of the act, appellant was required to file his petition within one year of September 21, 1995. Appellant filed his petition in April 2010; therefore, it was untimely. Furthermore, although R.C. 2953.23(A)(1) provides exceptions to the one-year limitation, appellant has failed to meet the requirements of this section and has failed to even argue that any exceptions apply. The facts upon which appellant bases his petition were known to or discoverable by him at the time of the trial court's original judgments. Appellant contended in his petition that his indictment was defective; there was insufficient evidence to convict him; there existed ex post facto violations; his trial attorney committed fraud upon the

court by failing to disclose material information with regard to his indictment and trial; and his trial attorney provided ineffective assistance. These circumstances were all either known to appellant or discoverable by him at the time of the judgments. Furthermore, appellant does not claim that the United States Supreme Court recognized a new federal or state right that applies retroactively to his situation, and his petition did not assert any claims based upon any such rights.

{¶9} Therefore, insomuch as appellant neither filed his petition within one year of the effective date of S.B. No. 4 nor satisfied the first prong of R.C. 2953.23(A)(1), the petition was not timely. Thus, as we have found the trial court did not err in denying appellant's petition because it was untimely filed, his first and second assignments of error are overruled.

{¶10} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
