FILED

2017 MAY 11 PM 1:52

CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2012 CR 000839**
vs.	:	**Judge McBride**
ISOME E. STURGILL, JR.	:	**DECISION/ENTRY**
Defendant	:	

Lara A. Baron, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Isome Earl Sturgill, Jr. *pro se* defendant, #676140, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601.[1]

This cause is before the court for consideration of a motion styled as a "petition to vacate or set aside judgment of conviction or sentence for postconviction relief" filed by the defendant Isome E. Sturgil on December 27, 2016. This matter has been fully briefed by the parties, and the court now renders this decision.

[1] Although the case caption for the case at bar spells the defendant's last name as "Sturgill," and although the defendant in previous filings with the court has referred to his name as "Isome Earl Sturgill, Jr." the defendant spelled his last name in his petition filed on December 27, 2016 as "Sturgil." The court has elected in referring to the defendant in this Decision to use the name by which the defendant was referred to in the indictment and to which he has been referred to ever since with the exception of his most recent petition.

Upon consideration of the motion, the evidence presented, the record of this case, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The defendant Isome Sturgill, Jr. was indicted on November 7, 2012 on four counts for (1) failing to comply with the order or signal of a police officer in violation of R.C. 2921.331(B), (2) driving under an OVI suspension in violation of R.C. 4510.14(A), (3) driving under a Financial Responsibility Act suspension in violation of R.C. 4510.16(A) and (4) operating a vehicle while under the influence of alcohol ("OVI") with a prior felony OVI conviction in violation of R.C. 4511.19(A)(1)(a). The fourth count contained a specification that the defendant had previously been convicted of five or more OVI offenses within the past 20 years.

The jury returned guilty verdicts on all four counts and further found that the defendant had been convicted of five or more OVIs in the past 20 years. The defendant timely appealed, setting forth four assignments of error.

In *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002, CA2013-01-003, 2013-Ohio-4648, the Twelfth District Court of Appeals affirmed the convictions. Among the defendant's assignments of error, he argued that he had received ineffective assistance of trial counsel.[2]

[2] *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002, CA2013-01-003, 2013-Ohio-4648, ¶ 14. Of note, after the Twelfth District Court of Appeals affirmed the conviction, it overruled the decision in *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1086 regarding a sentencing matter. Then, following an Ohio Supreme Court decision in *State v. South*, 114

While the defendant's appeal was pending, he filed his first petition for postconviction relief on September 6, 2013. The petition argued that his counsel had been ineffective for failing to impeach one of the state's witnesses.

The defendant then filed a supplemental petition on October 15, 2013, alleging that he received ineffective assistance of counsel because his counsel failed to retain a toxicologist. The court denied both the first petition and the supplemental petition, which the Twelfth District Court of Appeals affirmed.[3]

On November 4, 2015 the defendant filed a motion for a new trial pursuant to Crim.R. 33(A)(5), which the court construed as his second petition for postconviction relief. Among other arguments, the defendant posited that he received ineffective assistance of counsel because his counsel erroneously advised him as to his potential sentence. The court found that the defendant did not receive ineffective assistance of counsel, and the defendant did not appeal the court's ruling.

On December 27, 2016, the defendant filed his petition to vacate or set aside judgment of conviction or sentence in which the defendant once again claims he received ineffective assistance of counsel, thereby depriving him of his Sixth Amendment rights for two reasons.

First, the defendant argues that counsel was ineffective because defense counsel did not impeach the state's witness, Sergeant Ronald Robinson, based upon his employment record. The defendant alleges that Sergeant Robinson had been dismissed from the New Richmond Police Department before his encounter with the

---

Ohio St.3d 296, 2015-Ohio-3930, 42 N.E.2d 734, this court resentenced the defendant on November 13, 2015.

[3] *State v. Sturgill*, 12th Dist. Clermont, Nos. CA2014-01-003, CA2014-07-049, 2014-Ohio-5082.

defendant, and that Sergeant Robinson was dismissed from the Goshen Police Department after his encounter with the defendant.

Secondly, the defendant argues that he received ineffective assistance of counsel because defense counsel failed to subpoena a witness, John Henson, who could have testified as to whether the defendant was impaired on the night of June 21, 2011.

On January 26, 2017 the defendant filed a "Memorandum in Support of Evidentiary Hearing," followed by a "Motion for Leave to Amend Defendant's Memorandum in Support of Evidentiary Hearing" on February 13th. On February 9th, the state filed a responsive memorandum in opposition to the defendant's motion. Neither party requested oral argument as to the motion.

LEGAL ANALYSIS

The court finds that the defendant's motion must properly be construed as a petition for postconviction relief under R.C. 2953.21. A petition for postconviction relief is a motion by the defendant "subs equent to his or her direct appeal" that seeks "vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated."[4] The Ohio Supreme Court has advised that a court "may

---

[4] *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), at the syllabus. *See State v. Keith*,12th Dist. Butler No. CA2015-12-213, 2016-Ohio-7359, ¶ 15, quoting *Reynolds*, 79 Ohio St.3d 158 (holding same).

recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged."[5]

It is the motion's "language, not its label" that "determines whether it satisfies the requirements of R.C. 2953.21."[6] The defendant's petition to vacate or set aside judgment of conviction or sentence squarely fits the definition for a petition for postconviction relief under R.C. 2953.21(A)(1) because it was "(1) filed subsequent to [the 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 sentence."[7] Moreover, the defendant refers to the standard for postconviction relief under R.C. 2953.21 at multiple points in his briefing and he further attached the statute to his filings.

The procedure a defendant must use to seek postconviction relief is set forth in R.C. 2953.21 through R.C. 2953.23,[8] which are "the means by which a convicted defendant may seek to have the trial court's judgment or sentence vacated or set aside pursuant to a PCR petition."[9] Unlike an appeal of a criminal conviction, a petition for

---

[5] *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12 citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. *See State v. Wilkins*, 12th Dist. Clinton No. CA2013-05-012, 2013-Ohio-5372, ¶ 10 (finding that where 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).

[6] *State v. Lawson*, 103 Ohio App.3d 307, 312, 659 N.E.2d 362 (12th Dist. 1995) citing *State ex rel. Carrion v. Harris*, 40 Ohio St.3d 19, 20, 530 N.E.2d 1330 (1988).

[7] *Schlee*, 2008-Ohio-545 at ¶ 12 quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).

[8] *Wilkins*, 2013-Ohio-5372 at ¶ 12.

[9] *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 14, citing *State v. Hibbard*, 12th Dist. Butler No. CA2013-03-051, 2014-Ohio-442, ¶ 12. *See State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 15, citing *Bush*, 96 Ohio St.3d 235 ("R.C. 2953.21 is the exclusive remedy by which a person can bring a collateral challenge to the validity of a conviction or sentence in a criminal case.").

postconviction relief "is a collateral civil attack on a criminal judgment."[10] A petition for postconviction relief is not a "second opportunity" for the defendant to litigate the conviction.[11]

R.C. 2953.21 sets forth the general guidelines for postconviction relief:[12]

> "(A)(1)(a) Any person who has been convicted of a criminal offense * * * 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."

Under R.C. 2953.21(A)(2), a petition for post-conviction relief cannot be filed more than 365 days after the date that the trial transcript is filed in the appellate court on direct appeal.[13] There are two exceptions to the timeliness restriction, found under R.C. 2953.23(A)(1), which provides that a trial court may entertain an untimely filed petition for postconviction relief when the defendant demonstrates either:

> "(1) he was unavoidably prevented from discovering the facts necessary for the claims of relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in the petitioner's situation and the petitioner asserts a claim based on that right."[14]

---

[10] *State v. McKelton*, 55 N.E.3d 26, 2016-Ohio-3116, ¶ 6 (12th Dist.), citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). *See State v. Wolf*, 12th Dist. Clermont No. CA2016-05-027, 2016-Ohio-8103, ¶ 7, citing *State v. Peters*, 12th Dist. Clermont No. CA2015-07-066, 2016-Ohio-5288, ¶ 9 ("A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral attack on a criminal judgment.").

[11] *McKelton*, 2016-Ohio-3216 at ¶ 6, citing *State v. Ibrahim*, 10th Dist. Franklin No. 14AP-355, 2014-Ohio-5307, ¶ 8. *See Rose*, 2012-Ohio-5957 at ¶ 16 (holding same).

[12] *Boles*, 2017-Ohio-786 at ¶ 15.

[13] R.C. 2953.21(A)(2).

[14] *Boles*, 2017-Ohio-786 at ¶ 15, citing R.C. 2923.23(A)(1)(A); *See Wilkins*, 2013-Ohio-5372 at ¶ 13 (holding same).

If one of these two conditions is satisfied, then the defendant must also show by clear and convincing evidence that "but for the constitutional error at trial, no reasonable fact-finder would have found him guilty of the offenses of which he was convicted."[15] If the defendant fails to satisfy either the timeliness requirements in R.C. 2953.21 or the timeliness exceptions listed in R.C. 2953.23, then the trial court lacks jurisdiction to consider the merits of the petition.[16]

In the instant case, the defendant filed the trial transcripts with the appellate court on March 15, 2013. Hence, the defendant would have had until March 15, 2014 to file for postconviction relief.[17] However, the defendant filed the instant motion on December 27, 2016, which is well beyond the deadline. Notably, this is the defendant's third postconviction relief petition. He previously filed two earlier petitions, one in September 2013 and one in November 2015.

The defendant does not claim that the United States Supreme Court recognized a new federal or state right that applies retroactively to him. The defendant, however, contends that he was unavoidably prevented from discovering the facts necessary for his claims for relief.

---

[15] *McKelton*, 2016-Ohio-3216 at ¶ 8, citing R.C. 2923.23(A)(1)(b); *See State v. Chattams*, 12th Dist. Butler No. CA2009-01-011, 2009-Ohio-6172, ¶ 17 (holding same).

[16] *McKelton*, 2016-Ohio-3216 at ¶ 17, citing *State v. Strunk*, 12th Dist. Butler No. CA2010-09-085, 2011-Ohio-417, ¶ 14. *See State v. Sheldon*, 12th Dist. Brown No. CA2016-04-010, 2016-Ohio-6984, ¶ 19, quoting *State v. Taylor*, 9th Dist. Lorain No. 14CA010549, 2014-Ohio-5738, ¶ 9 ("A defendant's failure to either timely file a petition for post-conviction relief or meet his burden under R.C. 2953.23(A)(1) deprives the trial court of jurisdiction to entertain the petition.").

[17] The court has calculated the deadline for the defendant-petitioner to file a petition based on the current limit of 365 days listed in 2953.21(A)(2). Of note, the version of R.C. 2953.21(A)(2) in effect when the defendant was convicted only provided for 180 days from the date on which the trial transcript is filed on direct appeal. The deadline was extended to 365 days on March 23, 2015. 2014 Am.Sub.H.B. No. 663. However, under either timeframe, even the significantly more generous 365 days, the defendant's petition is significantly untimely.

Turning first to the defendant's claim that his counsel should have subpoenaed John Henson as a witness, the defendant does not explain how he was unavoidably prevented from discovering the facts necessary for him to bring a claim for ineffective assistance of counsel on this basis. The defendant was the person who told his trial counsel that John Henson knew the defendant was not impaired on the night of June 21, 2011. Considering that the defendant has always known that John Henson had potentially exculpatory information but did not testify as a witness at his trial, there are no new facts that prevented the defendant from filing a postconviction petition for relief by March 2014 based on a claim of ineffective assistance of counsel.

Moreover, the defendant's attached affidavit does not reveal what facts he has newly discovered with respect to this claim that would have previously prevented him from filing a timely petition. The defendant submitted a letter from his defense counsel stating that he attempted to meet John Henson three times, and on his third attempt John Henson told defense counsel that, if subpoenaed, he would not testify regarding his memory of the events on June 21, 2011. The defendant also attached an affidavit from John Henson in which he wrote "No" in response to the question: "Did a man stop by your home 7035 Oakland Rd. Loveland, Ohio 45150 in June 2012 identifying himself as my son's (Isome Sturgill Jr.) attorney (Ed Bardamin or Vardimen)." The defendant's claims in his petition and the evidence he has presented do not identify newly discovered facts that, without which, prevented the defendant from making this ineffective assistance of counsel argument before March 2014.

The defendant additionally claims that his counsel was ineffective for failing to impeach the state's witness, Sergeant Robinson. The defendant claims that Sergeant

Robinson had been dismissed from the New Richmond Police Department before his encounter with the defendant, and that Sergeant Robinson was dismissed from the Goshen Police Department after his encounter with the defendant. The defendant maintains that his counsel should have used this information to impeach Sergeant Robinson on cross examination, as it provided a motive for him to lie.

However, the defendant provides no explanation as to how he was unavoidably prevented from discovering these facts for his ineffective assistance of counsel claim. None of the evidence submitted by the defendant deals with Sergeant Robinson's employment record, nor does the defendant's affidavit reveal how he learned of these facts or why he was prevented from learning of them earlier. Based upon the petition, the defendant's submitted evidence, and the record before the court, the court has no basis to find that either exception in R.C. 2953.23(A)(1) excuses the defendant's untimeliness. Because the defendant has not satisfied the timeliness requirements in R.C. 2953.21 or the timeliness exceptions listed in R.C. 2953.23, the court lacks jurisdiction to consider the merits of the defendant's petition.[18]

In addition to being untimely, the defendant's challenges are barred by *res judicata*. A court may dismiss a petition for postconviction relief on the basis of *res judicata*.[19] *Res judicata* prevents the defendant from raising "piecemeal claims in successive postconviction relief petitions * * * that could have been raised, but were not, in the first postconviction relief petition."[20]

---

[18] *McKelton*, 2016-Ohio-3216 at ¶ 17, citing *Strunk*, 2011-Ohio-417 at ¶ 14; *See Sheldon*, 2016-Ohio-6984 at ¶ 19, quoting *Taylor*, 2014-Ohio-5738 at ¶ 9.
[19] *Sheldon*, 2016-Ohio-6984 at ¶ 30.
[20] *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 53.

"Under the doctrine of *res judicata*, a final judgment of bars a convicted defendant who was represented by counsel 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* conviction *been raised* by the defendant at trial, which resulted in that judgment of conviction, or *on an appeal*, from that conviction."[21]

Hence, a defendant may not raise an issue for postconviction relief when the defendant could have raised the issue on direct appeal.[22] Phrased differently, the doctrine bars the defendant from "re-packaging" the evidence or issues that "either were or could have been raised in trial or direct appeal."[23]

There is an "exception to the res judicata bar when the petitioner presents competent, relevant, and material evidence outside the record *that was not in existence and available to the petitioner in time to support the direct appeal*."[24] As such, evidence that is outside of the record must show that the defendant "could not have appealed the constitutional claim based upon information in the original record and such evidence *must not have been in existence* and available to the petitioner at the time of trial."[25]

In the present case, the defendant has already filed two previous postconviction petitions for relief alleging ineffective assistance of counsel, and he already has

---

[21] (Emphasis original.) *Reynolds*, 79 Ohio St.3d at 161. *See Boles*, 2017-Ohio-786 at ¶ 20, citing *Lawson*, 2014-Ohio-3554 at ¶ 40 (holding same); *Wilkins*, 2013-Ohio-5372 at ¶ 15 (holding same).
[22] *Reynolds*, 79 Ohio St.3d at 161, citing *State v. Duling*, 21 Ohio St.2d 13, N.E.2d 670, 50 O.O.2d 40 (1970).
[23] *Rose*, 2012-Ohio-5957 at ¶ 20.
[24] (Emphasis original.) *Boles*, 2017-Ohio-786 at ¶ 20, citing *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 18. *See Sheldon*, 2016-Ohio-6984 at ¶ 30, quoting *Piesciuk*, 2013-Ohio-3879 at ¶ 18 (holding same).
[25] (Emphasis added.) *Boles*, 2017-Ohio-786 at ¶ 20, citing *Piesciuk*, 2013-Ohio-3879 at ¶ 18.

appealed his case on the basis of ineffective assistance of counsel as well.[26] He has previously claimed that he received ineffective assistance of counsel on the basis that his counsel failed to offer a stipulation to his five prior OVI convictions, his counsel's failure to impeach state witness Samantha Fite, his counsel's failure to present testimony from a toxicologist, and his counsel's failure to correctly advise him as to the maximum possible sentence if found guilty.

As discussed, the defendant claims he received ineffective assistance of counsel due to his counsel's failure to subpoena John Henson as a witness for the defense. The defendant should have been well aware of this issue prior to filing his direct appeal and prior to filing his two earlier petitions for postconviction relief. As the Twelfth District Court of Appeals noted in the appellate decision on his first petition for postconviction relief, "any additional claim that his [the defendant's] trial counsel provided him with ineffective counsel at trial could have, and should have, been raised as part of that appeal."[27] As such, *res judicata* bars the defendant's claim that his counsel was ineffective because counsel failed to subpoena John Henson as a witness.

Additionally, the defendant also claims he received ineffective assistance of counsel due to his counsel's failure to impeach the state's witness, Sergeant Robinson, with his prior employment record. Because Sergeant Robinson's employment record is evidence outside the record, the defendant can avoid the doctrine of *res judicata* if he can show that he "could not have appealed the constitutional claim based upon

---

[26] *See State v. Sturgill*, 12th Dist. Clermont Nos. CA2014-01-003, CA2014-07-049, 2014-Ohio-5082; *State of Ohio v. Sturgill*, Case No. 2012 CR 00839 (C.P. April, 25, 2016).
[27] *Sturgill*, 2014-Ohio-5082 at ¶ 16.

information in the original record and such evidence *must not have been in existence* and available to the petitioner at the time of trial."[28]

The defendant has presented no argument or evidence that Sergeant Robinson's alleged history of being dismissed by two police departments did not exist at the time of trial. Indeed, because the defendant claims Sergeant Robinson had previously been dismissed by the New Richmond Police Department before his encounter with him, that evidence would have necessarily existed before trial. It is unclear from the defendant's petition when he claims Sergeant Robinson was dismissed from the Goshen Police Department. However, since the defendant is claiming that his counsel should have used the record of that dismissal for impeachment purposes, it must have existed before the trial, in which case the exception does not apply.[29] Accordingly, the court finds that, even if the defendant's petition for postconviction relief was not untimely, it is still barred by *res judicata*.

CONCLUSION

For the foregoing reasons, the defendant's petition for postconviction relief is not well-taken and is denied.

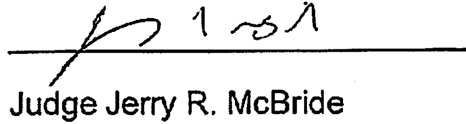
---

[28] (Emphasis added.) *Boles*, 2017-Ohio-786 at ¶ 20, citing *Piesciuk*, 2013-ohio-3879 at ¶ 18.

[29] Alternatively, if Sergeant Robinson was dismissed from the Goshen Police Department after the defendant's trial took place, then the defendant can hardly claim that his counsel was ineffective for failing to impeach Sergeant Robinson using an employment dismissal that had not yet come to pass.

IT IS SO ORDERED.

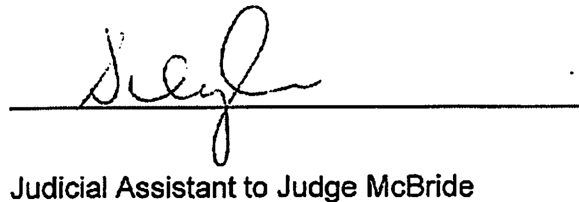
DATED: ___________________



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Decision/Entry were sent on this 11th day of May 2017 by e-mail to Lara Baron, at lbaron@clermontcountyohio.gov, and by regular U.S. Mail to Isome Earl Sturgill, Jr., defendant appearing *pro se*, #A676140, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601.



Judicial Assistant to Judge McBride