

FILED

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

2016 APR 25 11:12:13
BARBARA J. WINDLEY
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO :
Plaintiff : **CASE NO. 2012 CR 00839**
vs. : **Judge McBride**
ISOME E. STURGILL, : **DECISION/ENTRY**
Defendant :

Nick Horton, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103;

Daniel B. Startzman III, assistant Clermont County public defender, counsel for the defendant Isome E. Sturgill, 302 East Main Street, Batavia, Ohio 45103;

Defendant Isome Earl Sturgill, #A676-140, Madison Correctional Institution, P.O. Box 740, 1851 St. Route 56, London, Ohio 43140.

This cause is before the court for consideration of a motion for new trial filed by the defendant Isome E. Sturgill. The matter has been fully briefed by the parties, and neither side requested either an evidentiary hearing or oral argument.

Upon consideration of the motion, 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 E. Sturgill was indicted on November 7, 2012 on four counts of (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 with a prior felony OVI conviction in violation of R.C. 4511.19(A)(1)(a). The fourth count contained was accompanied by 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 counts and further found that the defendant had been convicted of five or more OVI offenses in the past 20 years as set forth in the specification accompanying the fourth count. The defendant was sentenced to 36 months in prison on count one, 60 months in prison on count four, and 60 months in prison on the specification accompanying count four, to run consecutive to one another, for a total of 13 years. The court also ordered 180 day jail sentences on counts two and three to be served concurrently to the 13 year prison term.

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 trial court's decision and sentence. Among the defendant's assignments of error, he argued that the two five-year prison terms he received on count four for the OVI conviction and its accompanying specification were excessive and an abuse of discretion. The appellate court reconciled

Ohio's OVI statute, R.C. 4511.19 with Ohio's general sentencing statute, R.C. 2929.14(A)(3). R.C. 4511.19 authorizes a five year maximum sentence for a third-degree felony OVI. R.C. 2929.14(A)(3) provides for a maximum sentence of three years for third-degree felonies not listed in R.C. 2929.14(A)(3)(a), of which OVI is not specifically listed.

The appellate court ultimately held that both statutes permit a maximum mandatory five year prison term for a third-degree felony OVI offense:

"[W]e find the trial court's imposition of a five-year prison term on count four was not contrary to law, as it falls within the permissible statutory range. Furthermore, as a mandatory additional prison term of one, two, three, four, or five years on the specification is provided for in R.C. 2941.1413, we find no error in the trial court's decision to sentence appellant to five years on the specification."¹

Thereafter, the Twelfth District Court of Appeals overruled *State v. Sturgill* in *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1086. Specifically, the court held that *Sturgill* was overruled to the following extent:

" * * * to the extent it held that when an offender is convicted of a third-degree felony OVI and an accompanying habitual offender specification, R.C. 2929.13(G)(2), 2929.14(B)(4), and 4511.19(G)(1)(e) permit a maximum five-year mandatory prison term for the OVI conviction and that R.C. 2941.1413 governs the sentence for conviction of the habitual offender specification."²

The *Burkhead* Court found that a convicted offender of third-degree felony OVI, who has also been convicted of the habitual offender specification, can be sentenced to a prison term of 9, 12, 18, 24, 30, or 36 months.³ Moreover, the additional term is not a

¹ *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002, CA2013-01-003, 2013-Ohio-4648, ¶ 44.

² *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085, ¶ 13.

³ *Id.* at ¶ 22.

mandatory prison term.⁴ Thus, a convicted offender could be sentenced for a maximum of 36 months for the OVI offense and five years for the habitual offender specification.⁵

Because of a conflict among the appellate districts regarding the sentencing scheme, the Ohio Supreme Court agreed in *State v. South*, 114 Ohio St.3d 296, 2015-Ohio-3930, 42 N.E.2d 734, to resolve the following question:

"When a defendant is convicted of [an] R.C. 2941.1413 specification, does Ohio's OVI statute, R.C. 4511.19[,] prevail so that a five year sentence can be imposed for a third degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?"⁶

The Court ultimately held that "offenders convicted of a third-degree-felony OVI and a repeat-offender specification under R.C. 2941.1413 are subject to the following: (1) for the specification conviction, a one- to five year mandatory prison sentence, which must be served prior to and consecutive to any additional prison term and (2) for the underlying OVI conviction, a discretionary term of 9 to 36 months."⁷

Following *State v. South*, this court resentenced the defendant on November 13, 2015. The court found that the five year prison term for the underlying OVI offense was outside the statutory range, contrary to the statutes, and was outside the court's jurisdiction, rendering the prison sentence *void ab initio*. Therefore the court lowered the sentence for the underlying OVI offense from five years to 36-months. Hence, the defendant's sentence is now 11 years, instead of 13 years.

On November 4, 2015 the defendant filed the instant motion for a new trial pursuant to Crim.R. 33(A)(5), on the basis that an error in law occurred during the trial

⁴ Id.

⁵ Id. at ¶ 24.

⁶ *State v. South*, 114 Ohio St.3d 296, 2015-Ohio-3930, 42 N.E.2d 734, ¶ 6.

⁷ Id. at ¶ 7.

that affected his substantive and constitutional rights to due process and adequate representation. Specifically the defendant submits that the error in law that occurred "is the appropriate maximum sentence on a third degree felony OVI," and "he was erroneously advised as to the possible punishment corresponding to Count Four in the indictment * * * and this erroneous advice deprived him of his constitutional rights to due process and adequate representation."⁸

The defendant's claim regarding ineffective assistance of counsel stems from discussions with his defense counsel regarding sentencing. Before trial, the state offered the defendant a plea agreement if he pled guilty for counts one and four in the indictment. In exchange, the state would forgo returning to the grand jury to re-indict the defendant on the same charges plus an additional specification on count four.⁹

The defendant's counsel advised him that the maximum penalty under the proposed plea agreement was eight years.¹⁰ In calculating the eight years, defense counsel projected the maximum penalty for count one was three years and for count four was five years. Counsel further advised the defendant that if he was re-indicted and convicted at trial, which would include the additional habitual offender specification, the maximum penalty would be 13 years. In calculating the potential maximum sentence of 13 years, defense counsel advised that the maximum penalty for the underlying OVI charge in count four was five years. The defendant rejected the plea agreement and was subsequently found guilty on all counts.

Following the cases of *State v. Burkhead* and *State v. South*, which held that an underlying OVI conviction could be no more than 36-months, the defendant argues that

⁸ Defs. Mem. in Support, pg. 3.

⁹ Defs. Mem. in Support, pg. 1.

¹⁰ Defs. Mem. in Support, pg. 2.

his defense counsel was ineffective in advising him that the underlying OVI conviction carried a maximum sentence of five years. The defendant claims that, had he known the maximum for the OVI was 36 months instead of five years, he would have accepted the plea.¹¹ Instead, as discussed, the defendant rejected the plea offer and was found guilty at trial. After reducing the defendant's original sentence of 13 years, he is now serving an 11 year sentence.

Both the state and the defendant fully briefed this issue, and neither requested oral argument on this matter.

LEGAL ANALYSIS

(I) MOTION FOR NEW TRIAL UNDER CRIM.R. 33(A)

Crim.R. 33 governs motions for a new trial. Pursuant to Crim.R. 33(A), the trial court may grant the defendant a new trial due to an "[e]rror of law occurring at the trial" that affects "materially his substantial rights."¹² The defendant must file an application for a new trial within "fourteen days after the verdict was rendered" unless new evidence was discovered.¹³ This deadline does not apply when:

"it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such a motion."¹⁴

¹¹ Defs. Mem. in Support at pg. 4.

¹² Crim.R. 33(A)(5).

¹³ Crim.R. 33(B).

¹⁴ Crim.R. 33(B).

The defendant has moved for a new trial on the basis that the recent Ohio Supreme Court case of *State v. South* exposes an "error in law" that occurred when his attorney erroneously advised him "of the maximum possible sentence resulting from a guilty plea."¹⁵ Stated differently, had he known the maximum sentence for the proposed guilty plea would be six years, and not eight years, he would have accepted the plea.

However, the Tenth District Court of Appeals has observed that "[n]one of the grounds [in Crim.R. 33(A)] specifically addresses a subsequent Supreme Court case setting forth a new constitutional principal, rule, or right."¹⁶ In this regard, the instant motion is in response to *State v. Burkhead* and *State v. South*, which is new case law. However, newly published case law is not a circumstance contemplated by Crim.R. 33(A) as grounds for a new trial. Accordingly, Crim.R. 33 do not supply the defendant with the right to a new trial in this case.

Even assuming, *arguendo*, that Crim.R. 33 is the proper vehicle for the defendant to seek a new trial, he still fails to demonstrate that his rights were materially affected by ineffective assistance of counsel. To reverse a conviction based upon ineffective assistance of counsel, the defendant must show (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense as to deprive the defendant of a fair trial."¹⁷ Of note, courts may approach an ineffective assistance of counsel inquiry by examining either component first, and if "it is easier to dispose of an

¹⁵ Defs. Mem. in Support, pg. 4.

¹⁶ *State v. Ingram*, 10th Dist. Franklin No. 08AP-937, 2009-Ohio-2755, ¶ 15.

¹⁷ *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

ineffectiveness claim on the ground of lack of sufficient prejudice," then that component should be examined first.¹⁸

With respect to deficiency, the defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."¹⁹ Counsel's performance is assessed by considering whether it was "reasonable considering all the circumstances."²⁰ Further, the court's "scrutiny of counsel's performance must be highly deferential."²¹ The United States Supreme Court has cautioned that it can be "tempting" to "second-guess" the advice of counsel with the assistance of hindsight, and the court may "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."²² Moreover, the court must examine the circumstances "viewed as of the time of counsel's conduct."²³

Courts have held that "an attorney's 'mere inaccurate prediction of a sentence' does not demonstrate the deficiency component of an ineffective assistance of counsel claim."²⁴ Furthermore, when defense counsel fails "to inform his client of the range of sentencing possibilities," the court is not required to reverse the decision.²⁵

¹⁸ *Strickland*, 104 S.Ct. at 2069. See *State v. Johnson*, 12th Dist. Butler No. CA2011-09-169, 2013-Ohio-856, ¶ 48, citing *Strickland* at 697 ("While the appropriate test has two prongs, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing of one.").

¹⁹ *Strickland*, 104 S.Ct. at 2064. See *Johnson*, 2013-Ohio-856 at ¶ 49 quoting *State v. Thomas*, 12th Dist. No. CA2010-10-099, 2012-Ohio-2430, ¶ 46.

²⁰ *Strickland*, 104 S.Ct. at 2065.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 2066.

²⁴ *State v. Bryant*, 1 N.E.3d 879, 2013-Ohio-5105, ¶ 32 (10th Dist.), citing *State v. Boyse*, 3d Dist. No. 15-10-09, 2011-Ohio-1732, ¶ 11. See *State v. Bari*, 8th Dist. Cuyahoga No.90370, 2008-Ohio-3663, ¶ 11, quoting *State v. Williams*, 8th Dist. Cuyahoga No. 88737, 2007-Ohio-5073 (recognizing that "a lawyer's mistaken prediction about the likelihood of a particular

To show prejudice, the defendant must demonstrate that “there exists a reasonable probability that, were it not for counsel’s errors, the result of trial would have been different.”²⁶ A “reasonable probability” means “a probability sufficient to undermine the confidence of the outcome.”²⁷ It is insufficient for the defendant to show merely that “errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission would meet that test.”²⁸ Additionally, “[a]s applied to guilty pleas, in order to establish prejudice a defendant must show that, but for counsel’s errors, he would not have entered a guilty plea.”²⁹

In the instant case, the defendant’s counsel had to advise the defendant on the potential maximum sentence he could receive should he accept the proposed plea agreement and the maximum sentence he could receive should he be found guilty at trial.³⁰ Prior to the Ohio Supreme Court’s recent decision in *State v. South*, which resolved sentencing questions raised by R.C. 2929.14 and R.C. 45.11.19, the Tenth District Court of Appeals observed that “four of Ohio’s appellate courts have addressed

outcome is insufficient to demonstrate ineffective assistance of counsel.”), *Wiant v. United States*, No. 2:04–CV–256, 2005 WL 1651716 (S.D. Ohio 2005) (noting “courts have held that, ‘where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel.’”).

²⁵ *State v. Walker*, 9th Dist. Summitt No. 25185, 2011-Ohio-786, ¶ 27 citing *State v. Lawson*, 8th Dist. No. 69899 (Dec. 12, 1996).

²⁶ *State v. White*, 82 Ohio St.3d 16, 24, 693 N.E.2d 772 (1998), quoting *State v. Bradley*, Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. See *State v. Graham*, 12th Dist. Warren No. CA2013-07-066, 2014-Ohio-1891, ¶ 19, citing *State v. Russell*, 12th Dist. Butler No. CA2012-08-156, 2013-Ohio-3079, ¶ 49 (explaining that the deficient counsel must prejudice the defendant such that “there is a reasonable probability that, but for his counsel’s deficient performance, the outcome of his trial would have been different.”).

²⁷ *Johnson*, 2013-Ohio-856 at ¶ 49, quoting *Strickland* at 694.

²⁸ *Strickland*, 104 S.Ct. at 2067.

²⁹ *Bryant*, 2013-Ohio-5105 at ¶ 29 (10th Dist.), citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992).

³⁰ See *State v. Shaffer*, 9th Dist. Medina No. 12CA0070-M, 12CA0077-M, 2014-Ohio-2461, ¶¶ 13-14 (comparing *Sturgill* to *State v. Owen* to resolve the effect of H.B. 86 on sentencing and ultimately concluding that *Sturgill* employed the correct statutory interpretation).

the interplay between similar statutes and have come to inconsistent conclusions,” specifically the Second, Ninth, Eleventh, and Twelfth districts.³¹

Further, the Ohio Supreme Court in *State v. South* acknowledged that the sentencing statutes at issue were not a model of clarity: “[W]e consider the sentencing statutes applicable to these convictions. Scattered among multiple provisions within four separate statutes, they are repetitive and confusing, to say the least.”³² In fact, even the *South* opinion was not unanimous in its interpretation, as Justice O’Donnell dissented.

Given the complexity of the sentencing statutes at issue, the court cannot conclude that defense counsel’s projection that the proposed plea agreement would maximally carry an eight year sentence, instead of six, is remotely approaching the high standard for ineffective assistance of counsel.

Not only did five appellate districts fail to agree on the sentencing statutes’ interpretation, but even the Ohio Supreme Court could not reach a unanimous decision. In fact, because the Twelfth District Court of Appeals initially affirmed the defendant’s sentence in *State v. Sturgill*, it seems that defense counsel’s advice, at the time he gave it, would have been in accord with the appellate court’s views. In consideration of all the facts and circumstances surrounding this case, it is unreasonable to expect defense counsel to divine the Ohio Supreme Court’s ultimate decision in *State v. South* three

³¹ *State v. Mercier*, 10th Dist. Franklin, No. 13AP-906, 2014-Ohio-2910, ¶ 12, *rev’d*, *State v. Mercier*, – N.E.3d –, 2016-Ohio-128. See *State v. Owen*, 995 N.E.2d 911, 2013-Ohio-2824, ¶ 2 (2013) (trying to resolve the conflict between Ohio’s sentencing statutes, and noting that H.B. 86, which had been recently enacted and reduced the maximum prison sentence for third-degree felonies, created sentencing conflicts that the “General Assembly did not resolve or even address,” and noting the Ohio Supreme Court had not resolved the issue yet).

³² *South*, 2015-Ohio-3930 at ¶ 9.

years before it was issued. Moreover, Ohio courts agree that defense counsel's "mere inaccurate prediction of a sentence" is not tantamount to ineffective assistance.³³

The defendant cites to multiple cases regarding the voluntariness of plea agreements and the mandates of Crim.R. 11, which "ensure that pleas of guilty or no contest are valid," neither of which are at issue in the case at bar.³⁴ Crim.R. 11(C)(2) requires a dialogue between the court and the defendant to determine that the defendant fully understands the consequences of his plea and the penalty that may be imposed.³⁵ To determine whether Crim.R. 11 was abridged, the court must determine whether the defendant would have pled guilty absent the error.³⁶

The defendant's argument to extend the rationales from these rules conclude that defense counsel's failure to properly advise the defendant violated his right to adequate representation, his right to due process, and his right to trial by jury.³⁷ Crim.R. 11 is simply inapplicable to the present case, and its rationales do not change the conclusion that defense counsel's advice fell far short of ineffective assistance of counsel. Accordingly, the defendant has failed to meet the requirements for a new trial under Crim.R. 33.

³³ *Bryant*, 2013-Ohio-5105 at ¶ 32, citing *Boysel*, 2011-Ohio-1732 at ¶ 11. See *Bari*, 2008-Ohio-3663 at ¶ 11, quoting *Williams*, 2007-Ohio-5073, *Walker*, 2011-Ohio-786 at ¶ 27, citing *Lawson, Wiant*, 2005 WL 1651716.

³⁴ *State v. Prom*, 12th Dist. Butler No. CA2002-01-007, 2003-Ohio-6543, ¶ 23.

³⁵ (Citation omitted) *Id.* at ¶¶ 24-25, Crim.R. 11(C)(2).

³⁶ *Id.* at ¶ 25, citing *State v. Caplinger*, 105 Ohio App.3d 567, 664 N.E.2d 959 (1995).

³⁷ Defs. Mem. in Support., pg. 4.

(II) POSTCONVICTION RELIEF UNDER R.C. 2953.21

The court finds that the defendant's motion should be construed as a motion for post-conviction relief under R.C. 2953.21, rather than a motion for new trial under Crim.R. 33(A). A petition for postconviction relief is a motion by the defendant, "subsequent 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."³⁸ The Ohio Supreme Court has advised that a court "may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged."³⁹

It is the motion's "language, not its label" that "determines whether it satisfies the requirements of R.C. 2953.21."⁴⁰ The defendant's motion for a new trial 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."⁴¹

Pursuant to 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

³⁸ *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), at the syllabus.

³⁹ *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).

⁴⁰ *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).

⁴¹ *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12, quoting *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997).

court on direct appeal.” However, under R.C. 2923.23(A)(1) a trial court may entertain an untimely filed petition for post-conviction relief or a second petition for post-conviction 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.”⁴²

If one of these two conditions is satisfied, then the defendant must also show 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.”⁴³

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. However, the defendant filed the instant motion on November 4, 2015, which is well beyond the deadline.⁴⁴

Moreover, the defendant cannot satisfy either exception for untimely filing. The defendant was not unavoidably prevented from discovering the facts necessary for his claim of relief, nor has the United States Supreme Court recognized a new federal or state right that applies retroactively to him. The two narrow exceptions for untimely filing are not satisfied by the argument that the defendant was prevented from filing the

⁴² *Wilkins*, 2013-Ohio-5372 at ¶ 13. Of note, not only was the defendant’s postconviction relief petition untimely, but it is also his second postconviction relief petition.

⁴³ *State v. Chattams*, 12th Dist. Butler No. CA2009-01-011, 2009-Ohio-6172, ¶ 17.

⁴⁴ Of note, the defendant previously filed a motion for postconviction relief based on ineffective assistance of counsel in September 2013.

instant motion until now because it responds to new case law, namely *State v. Burkhead* and *State v. South*.⁴⁵

Numerous Ohio courts, including the Twelfth District Court of Appeals, have held that an untimely postconviction relief petition filed in response to new Ohio case law does not satisfy the narrow exceptions for untimely filing.⁴⁶ This is because R.C. 2923.23(A)(1) refers to new United States Supreme Court decisions, not the Ohio Supreme Court. Therefore, any reliance on Ohio case law is insufficient to meet the requirements necessary to file an untimely petition for postconviction relief. For these reasons, the court denies the defendant's motion.

⁴⁵ The defendant did not set forth any arguments in his motion or reply as to whether he satisfies the strictures for postconviction relief.

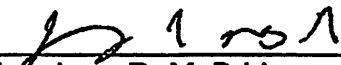
⁴⁶ *Chattams*, 1009-Ohio-6172 at ¶ 18. See *State v. Guthrie*, 2d Dist. Greene No. 08-CA-88, 2009-Ohio-4586, ¶ 9 (rejecting an untimely postconviction relief petition because the untimeliness was due to a newly issued Ohio Supreme Court opinion, not a new federal or state right in a United States Supreme Court opinion); *State v. Lucky*, 5th Dist. Delaware No. 09-CA-39, 2009-Ohio-4737, ¶¶ 21, 25 (denying the defendant's untimely postconviction relief petition because his argument "did not rely on the language in R.C. 2953.23(A)(1)(a) that he was 'unavoidably prevented from discovery of the facts * * *' but rather new case law," nor did he rely on a United States Supreme Court decision, but rather an Ohio Supreme Court decision); *State v. Frazier*, 5th Dist. Fairfield No. 08CA0066, 2009-Ohio-1899, ¶ 21 (denying a postconviction relief petition filed more than twelve years late because its untimely filing was due to an Ohio Supreme Court decision); *State v. Gadson*, 10th Dist. Franklin No. 09AP-268, 2009-Ohio-5715, ¶ 7 (finding that the defendant could not meet the exceptions for an untimely petition for postconviction relief because the new case he relied on was an Ohio Supreme Court case).

CONCLUSION

For the foregoing reasons, the defendant's motion for a new trial is not well-taken and is denied.

IT IS SO ORDERED.

DATED: _____



Judge Jerry R. McBride