

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-220110
	:	TRIAL NO. B-1406013B
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MAURICE SMITH,	:	
Defendant-Appellant.	:	

The court sua sponte removes this case from the regular calendar and places it on the court’s accelerated calendar, 1st Dist. Loc.R. 11.1.1(A), and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Maurice Smith appeals the Hamilton County Common Pleas Court’s judgment denying his postconviction “Motion to Vacate or Set Aside a Void Conviction and Sentence Due to Subject Matter Jurisdiction.” We affirm the court’s judgment as modified to dismiss the motion for lack of jurisdiction.

In 2016, Smith, following a jury trial, was convicted of trafficking in cocaine, possession of cocaine, possession of marijuana, burglary, and tampering with evidence and sentenced to an aggregate 16-year prison term in the case numbered B-1506673. Based on these 2016 convictions, Smith was found guilty of violating his community-control sanctions in the case numbered B-1406013B. The trial court imposed a 12-month prison term for the community-control violation to be served consecutively to the sentences imposed in the case numbered B-1506673.

On direct appeal, we affirmed Smith's sentence for his community-control violation but vacated his sentences for the allied offenses of possession of cocaine and trafficking in cocaine in the case numbered B-1506673 and remanded the cause so the state could elect which offense to pursue for resentencing. *State v. Smith*, 2017-Ohio-8558, 99 N.E.3d 1230, ¶ 65 (1st Dist.), *appeal not accepted*, 152 Ohio St.3d 1462, 2018-Ohio-1795, 97 N.E.3d 499. After resentencing, Smith again appealed, and this court vacated the consecutive sentences and remanded for the trial court to make the necessary findings to support consecutive sentences. *State v. Smith*, 1st Dist. Hamilton No. C-180165, 2019 Ohio App. LEXIS 1436 (Apr. 10, 2019). On remand, Smith's sentence for his community-control violation was ordered to be served concurrently to the sentences imposed under the case numbered B-1506773. He is currently serving an aggregate 16-year prison term.

On December 2, 2021, Smith filed a postconviction motion seeking to vacate his convictions and sentences under the cases numbered B-1406013B and B-1506673. Smith contends that his due-process rights to a fair trial were violated when the trial judge who was originally assigned the two felony cases improperly transferred those cases to a visiting judge, and due to the improper assignment, the visiting judge lacked subject-matter jurisdiction or the authority to judicially act in those cases, rendering Smith's convictions and sentences void.

On January 27, 2022, in open court, the common pleas court stated it was considering Smith's "motion to vacate or set aside a void conviction and sentence due to subject matter jurisdiction" in the cases numbered B-1506673 and B-1406013B. After the state informed the court that it would not be making any argument, the common pleas court placed of record in each underlying case an entry denying Smith's motion.

Smith has only appealed from that judgment entered in the case numbered B-1406013B. Before considering Smith's appeal, we note that Smith properly filed his December 2021 motion under both trial numbers but due to a clerical error the clerk of courts only docketed the motion under the case numbered B-1506673. However, the common pleas court, presumably recognizing the error, stated in open court it was considering the December 2021 motion under both trial numbers, and that transcript of proceedings, which includes the common pleas court's consideration of the motion under both case numbers, is included in the appellate record transmitted for our review.

In this appeal, Smith raises two assignments of error, challenging the common pleas court's denial of his motion. We address the assignments of error together, and we overrule them upon our determination that the common pleas court had no jurisdiction to grant that relief.

Smith did not designate in his motion a statute or rule under which the postconviction relief sought may be afforded, leaving the common pleas court to "recast" the motion "into whatever category necessary to identify and establish the criteria by which the motion should be judged." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 and syllabus. Because Smith sought relief from his conviction based on alleged constitutional violations during the proceedings resulting in his conviction, his motion was reviewable under the standards provided by R.C. 2953.21 et seq., governing the proceedings upon a petition for postconviction relief. See R.C. 2953.21(A)(1)(a); *State v. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 113 (1997) ("[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.”).

A defendant must file a postconviction-relief petition within 365 days from the filing of the trial transcripts in his direct appeal of his conviction. R.C. 2953.21(A)(2). Given that Smith filed the trial transcripts in his direct appeal in January 2017, his December 2021 petition is filed well outside the statutorily prescribed time. A common pleas court, however, may entertain a late postconviction petition if the petition satisfies the jurisdictional requirements of R.C. 2953.23. The petitioner must show either that the petitioner was unavoidably prevented from discovering the facts upon which the postconviction claims depend, or that the postconviction claims are predicated upon a new and retrospectively applicable right recognized by the United States Supreme Court since the time for filing the petition had expired. R.C. 2953.23(A)(1)(a). And the petitioner must 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. 2953.23(A)(1)(b).

But R.C. 2953.23 did not confer upon the common pleas court jurisdiction to entertain Smith’s late postconviction claims. Smith does not argue, nor can he demonstrate, that he was unavoidably prevented from discovering the alleged improper assignment of his cases to a visiting judge as he was aware of the transfer prior to and at his trial. Nor does he contend that his claims are based on a new right recognized by the United States Supreme Court. And he cannot show that but for any constitutional errors at trial, no reasonable factfinder would have found him guilty of the charged offense.

Additionally, Smith’s convictions were not subject to correction under the common pleas court’s jurisdiction to correct a void judgment. *See Cruzado v. Zaleski*,

111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. The alleged constitutional deprivations, even if demonstrated, would not have rendered his convictions void. *See State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 34-36 (conviction only void if court lacks jurisdiction over case or person and errors in the exercise of jurisdiction render conviction voidable); *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004 (claim of improper assignment can generally be raised by direct appeal); *Rolfe v. Galvin*, 8th Dist. Cuyahoga No. 86471, 2006-Ohio-2457 (improper assignment of judge renders judgment voidable, not void).

Because the common pleas court had no jurisdiction to entertain the late postconviction claims advanced in Smith's motion, the motion was subject to dismissal. Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect the dismissal of the motion. And we affirm the judgment as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MYERS, P.J., CROUSE and BOCK, JJ.

To the clerk:

Enter upon the journal of the court on October 26, 2022,
per order of the court_____.

Administrative Judge