

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

STATE OF OHIO,	:	APPEAL NO. C-070438
Respondent-Appellee,	:	TRIAL NO. B-0507406
vs.	:	
GLEN E. BATES,	:	<i>JUDGMENT ENTRY.</i>
Petitioner-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Petitioner-appellant Glen E. Bates presents on appeal a single assignment of error in which he challenges the Hamilton County Common Pleas Court’s judgment denying his postconviction petition and overruling his motion for a new trial. We affirm the court’s judgment.

Bates was convicted in December of 2005 of felonious assault. On appeal, we rejected challenges to his trial counsel’s effectiveness, to the trial court’s refusal to instruct the jury on the lesser-included offense of aggravated assault, and to the weight and sufficiency of the evidence. But we sustained his challenge to the trial court’s failure to comply with R.C. 2929.19(B)(3) in notifying him concerning

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

postrelease control. Accordingly, we vacated his sentence and remanded to the trial court for resentencing.<sup>2</sup>

On remand, the trial court resentenced Bates and, as directed by R.C. 2929.191, entered judgment “correct[ing]” his judgment of conviction nunc pro tunc to December of 2006. Bates unsuccessfully appealed the sentence imposed on remand.<sup>3</sup> And he filed with the common pleas court his “untimely petition for Post-Conviction Relief pursuant to R.C. 2953.21(A)(1)(a), Crim.R. 33, motion for new trial newly discovered evidence.”

In support of his joint petition and motion, Bates offered a copy of a receipt, signed by the victim three months before the assault, for a certified letter from the Hamilton County Juvenile Court addressed to Bates at the victim’s home. He also asserted, without evidentiary support, that he had repeatedly told his trial counsel that the Adult Parole Authority had approved his cohabitation with the victim. This evidence, he insisted, would have impeached the victim’s testimony that they had not been romantically involved and that he had harassed her for eight months before the assault. He sought relief from his conviction on the grounds that his trial counsel had been ineffective in failing to discover and to present this evidence, and that the victim’s false testimony had been the product of prosecutorial and witness misconduct.

A postconviction petition must be filed within 180 days of the date on which the trial transcript was filed in the direct appeal.<sup>4</sup> Through the claims advanced in his May 2007 petition, Bates asked the common pleas court to set aside the

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<sup>2</sup> *State v. Bates* (Dec. 13, 2006), 1st Dist. No. C-050973.

<sup>3</sup> *State v. Bates* (Dec. 12, 2007), 1st Dist. No. C-070088.

<sup>4</sup> R.C. 2953.21(A)(2).

December 2005 judgment of conviction entered upon the jury's verdict finding him guilty of felonious assault. In his direct appeal from his conviction, the trial transcript was filed in March of 2006. In that appeal, we remanded for resentencing. But that remand did not implicate the jury's guilty verdict.<sup>5</sup> Thus, his January 2007 resentencing did not resurrect his right to collaterally challenge that verdict in an R.C. 2953.21 postconviction petition. And his May 2007 petition was, as he concedes, late.

Bates asserted in his petition that he had been unavoidably delayed in advancing his claims. In support, he submitted a letter from the juvenile court sending him the copy of the certified-mail receipt, a letter from his appellate counsel sending him a copy of his trial transcript, and an affidavit in which he averred that he had not received the receipt and the transcript until the week before he had filed his petition. But Bates admitted at trial that he had assaulted and seriously injured the victim. And he testified to, and defense counsel cross-examined the victim and her mother concerning, the nature of their relationship. Therefore, even if Bates could fairly be said to have been unavoidably prevented from discovering the facts underlying his claims, the record would not permit a conclusion that, but for his trial counsel's alleged deficiencies or the alleged prosecutorial or witness misconduct, no reasonable factfinder would have found him guilty of felonious assault.<sup>6</sup>

Because Bates failed to satisfy the time strictures of R.C. 2953.21 and the jurisdictional requirements of R.C. 2953.23, the common pleas court had no

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<sup>5</sup> See *State v. D'Ambrosio*, 73 Ohio St.3d 141, 143, 1995-Ohio-129, 652 N.E.2d 710; see, also, *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, at ¶12 (holding that a criminal defendant cannot raise in an appeal from a resentencing order issues that could have been raised in his initial appeal).

<sup>6</sup> R.C. 2953.23.

jurisdiction to entertain his postconviction petition. Accordingly, the court properly denied the petition.

Our determination that Bates’s “newly discovered” evidence was not outcome-determinative is also dispositive of his challenge to the overruling of his Crim.R. 33 motion for a new trial. Bates moved for a new trial well after the time prescribed by Crim.R. 33(B). And even if he could fairly be said to have been “unavoidably prevented from discovering the evidence” within the prescribed time,<sup>7</sup> he failed to demonstrate a strong probability that the new evidence would change the outcome if a new trial were granted.<sup>8</sup> Therefore, the court did not abuse its discretion in overruling his new-trial motion.<sup>9</sup>

Accordingly, we overrule the assignment of error and affirm the judgment of the court below.

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.

**SUNDERMANN, P.J., HILDEBRANDT and CUNNINGHAM, JJ.**

To the Clerk:

Enter upon the Journal of the Court on May 7, 2008

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>7</sup> See Crim.R. 33(B).

<sup>8</sup> See *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

<sup>9</sup> See *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus.