

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

STATE OF OHIO,	:	APPEAL NO. C-081047
Plaintiff-Appellee,	:	TRIAL NO. C-05TRC-29622
vs.	:	JUDGMENT ENTRY.
JAMES M. GANGLOFF,	:	
Defendant-Appellant.	:	

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

Defendant-appellant, James M. Gangloff, presents on appeal a single assignment of error, challenging the Hamilton County Common Pleas Court's judgment overruling his motion for a new trial and denying his postconviction petition, without a hearing or findings of fact and conclusions of law. Because the court had no jurisdiction to entertain either the motion or the petition, it had no obligation to conduct a hearing or to make findings of fact and conclusions of law.

In July 2005, the Hamilton County Municipal Court, following a bench trial, convicted Gangloff of speeding and of operating a vehicle while under the influence of alcohol. He unsuccessfully challenged his convictions in appeals to this court and to the Ohio Supreme Court.²

While his direct appeal was pending before this court, Gangloff sought relief from his convictions in the form of a new trial under Crim.R. 33(A)(1) or, in the alternative, postconviction relief under R.C. 2953.21 et seq., on the ground that he had been denied the effective assistance of trial counsel. After the supreme court had declined to accept

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

² See *State v. Gangloff*, 1st Dist. Nos. C-060481 and C-060536, 2007-Ohio-4463, appeal not accepted for review, 116 Ohio St.3d 1477, 2008-Ohio-153, 879 N.E.2d 785.

Gangloff's appeal there, the municipal court overruled the new-trial motion and denied the postconviction petition. This appeal followed.

A Crim.R. 33 motion seeking a new trial on grounds other than newly discovered evidence may be filed either by right, within 14 days of the return of the verdict, or by leave of court, "within seven days from the order of the court finding [by clear and convincing proof] that [the movant had been] unavoidably prevented from filing such motion within the [14 days] provided * * *."³ A Crim.R. 33 motion filed within 14 days after the verdict's return tolls the running of the 30-day period for filing a notice of appeal until the trial court overrules the motion.⁴

But an appeal from a judgment of conviction divests a trial court of jurisdiction over the case, unless the appellate court remands the case to the trial court for a ruling on a pending motion, or the trial court's exercise of jurisdiction is in aid of the appeal or is otherwise "not inconsistent with [the jurisdiction] of the appellate court to review, affirm, modify or reverse the final order, judgment or decree from which the appeal has been perfected."⁵ And the trial court does not regain jurisdiction after the appellate court has decided the appeal, unless the appellate court remands the case.⁶

Here, Gangloff's appeal of his convictions divested the municipal court of jurisdiction to entertain his new-trial motion. While his appeal was pending, we did not restore the municipal court's jurisdiction by remanding the case for a ruling on the motion, and an order by the municipal court granting a new trial would have been inconsistent with our jurisdiction to review, affirm, modify, or reverse his convictions. And after our decision affirming Gangloff's convictions and the supreme court's decision declining to accept his appeal, the municipal court did not regain jurisdiction to entertain his new-trial motion.⁷ Accordingly, Gangloff's Crim.R. 33 motion was subject

³ Crim.R. 33(B).

⁴ See App.R. 4(A) and 4(B)(3); Crim.R. 33(B).

⁵ See *In re Kurtzhalz* (1943), 141 Ohio St. 432, 48 N.E.2d 657, paragraph two of the syllabus; accord *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207; *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162.

⁶ See *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 97.

⁷ See *id.*

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to dismissal for lack of jurisdiction.⁸ And the municipal court cannot be said to have abused its discretion in declining to conduct a hearing on the motion⁹ or to have erred in not journalizing findings of fact and conclusions of law.¹⁰

Nor could Gangloff advance his challenge to his trial counsel's effectiveness in a postconviction petition. R.C. 2953.21(C) and 2953.21(E) require an evidentiary hearing on a postconviction petition if the petition and the record "show the petitioner is * * * entitled to relief." And an entry denying a postconviction petition must include findings of fact and conclusions of law.¹¹

But R.C. 2953.21 confers jurisdiction over a postconviction petition only upon a common pleas court, not a municipal court.¹² And if a court is without jurisdiction to address a postconviction petition on its merits, it need not conduct a hearing or journalize findings of fact and conclusions of law.¹³ We, therefore, hold that, because the municipal court had no jurisdiction to entertain Gangloff's postconviction petition, the petition was subject to dismissal without a hearing and without findings of fact and conclusions of law.

Accordingly, we overrule the assignment of error. Upon the authority conferred by App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect a dismissal of the motion and the petition. And we affirm the judgment as modified.

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

HILDEBRANDT, P.J., PAINTER and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 26, 2009

per order of the Court _____
Presiding Judge

⁸ See *State v. Lemker* (Mar. 23, 2001), 1st Dist. No. C-990331.

⁹ See *State v. Howard* (June 25, 1986), 1st Dist. No. C-850755.

¹⁰ See *State ex rel. Collins v. Pokorny* (1999), 86 Ohio St.3d 70, 70, 711 N.E.2d 683; *State v. Elliott*, 1st Dist. No. C-020736, 2003-Ohio-4962, ¶11.

¹¹ R.C. 2953.21(G)

¹² See *State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583, 805 N.E.2d 1085.

¹³ See R.C. 2953.21(E); *State ex rel. Carroll v. Corrigan* (1999), 84 Ohio St.3d 529, 705 N.E.2d 1330; accord *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155, ¶16.