

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

STATE OF OHIO,	:	APPEAL NO. C-0900218
Plaintiff-Appellee,	:	TRIAL NOS. B-0503954 B-0507911
vs.	:	<i>JUDGMENT ENTRY.</i>
GABRIEL GORDON,	:	
Defendant-Appellant	:	
	:	

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

Defendant-appellant Gabriel Gordon appeals the order of the trial court overruling his postconviction motion to vacate his convictions. For the reasons to follow, we affirm.

Gordon was indicted for having weapons under a disability, carrying concealed weapons, and possession of cocaine under case no. B-0503954. He pleaded guilty to two of the charges in exchange for a sentence of one year's incarceration and a dismissal of the concealed-weapons charge. Prior to Gordon's sentencing hearing, the trial court permitted Gordon two weeks to get his affairs in order. During those two weeks, Gordon was indicted on two new charges of carrying concealed weapons and having weapons under a disability in case no. B-0507911. Gordon was subsequently found guilty by a jury of the two new counts in case no. B-

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

0507911. He was sentenced to six and one-half years' incarceration for the counts in case no. B-0507911, along with six and one-half additional years for the counts he had previously pleaded guilty to in case no. B-0503954. The sentences were consecutive for a total of 13 years.

Gordon appealed and this court upheld the convictions.² Gordon then filed an application with this court to reopen his appeal. In his application, Gordon claimed ineffective assistance of appellate counsel in failing to assign as error prosecutorial misconduct. This court overruled Gordon's application, explaining in part that Gordon's allegations were based upon facts outside the record, and informing Gordon that the proper procedure would be to file a postconviction petition with the trial court.

Gordon filed a postconviction petition with the trial court, which the court subsequently overruled. The trial court's reasoning was that Gordon had filed his petition beyond the 180-day limit set by R.C. 2953.21(A)(2). In this appeal, Gordon now asserts two assignments of error that essentially challenge the judgment of the trial court denying his postconviction petition.

As an initial matter, Gordon misconstrues our entry overruling his application for reopening his appeal. This court was not giving Gordon legal advice or informing him to file a postconviction petition with the trial court. This court was simply informing him why we were not considering his ineffective-assistance argument at that particular time. Whether Gordon was within the time limit established by R.C. 2953.21(A)(2) was not before us at that time, and we did not consider it in overruling his application.

² *State v. Gordon*, 1st Dist. Nos. C-060234 and C-060240, 2007-Ohio-1177, affirmed, 114 Ohio St.3d 1510, 2007-Ohio-4285, 872 N.E.2d 951.

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Now that the issue is properly before us, it is abundantly clear from the record that Gordon filed his petition well after the time prescribed by R.C. 2953.21(A)(2). He did not demonstrate that he had been unavoidably prevented from discovering the facts upon which his petition depended. Nor did he predicate his claims upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the prescribed time had expired. Thus, R.C. 2953.23 precluded the trial court from considering his petition.

Accordingly, we overrule the assignments of error and affirm the trial court's judgment.

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.

HENDON, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 9, 2009

per order of the Court _____.

Presiding Judge