

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

STATE OF OHIO,	:	APPEAL NO. C-100236
Plaintiff-Respondent-Appellee,	:	TRIAL NO. C-07CRB-18559
vs.	:	<i>JUDGMENT ENTRY.</i>
KELLY MCMILLAN,	:	
Defendant-Petitioner-Appellant.	:	

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

Defendant-appellant Kelly McMillan appeals from the Hamilton County Municipal Court's judgment denying McMillan's postconviction petition and overruling his motion for a new trial. We affirm the court's judgment, as modified, upon our determination that the municipal court had no jurisdiction to entertain either the petition or the motion.

In July 2007, the municipal court convicted McMillan of violating a protection order. He unsuccessfully challenged his conviction in appeals to this court and to the Ohio Supreme Court.²

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

² See *State v. McMillan* (May 14, 2008), 1st Dist. No. C-070602, appeal not accepted for review, 119 Ohio St.3d 1486, 2008-Ohio-5273, 894 N.E.2d 1244.

In February 2010, McMillan sought relief from his conviction in a petition under R.C. 2953.21 et seq. seeking postconviction relief on the ground of trial counsel's ineffectiveness and in a Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence. The municipal court denied the postconviction petition and overruled the new-trial motion. This appeal followed.

We overrule McMillan's first assignment of error, in which he challenges the municipal court's failure to conduct an evidentiary hearing on his 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." But R.C. 2953.21 does not confer upon a municipal court the jurisdiction to entertain a postconviction petition.³ It follows that if a court is without jurisdiction to address a postconviction petition on its merits, it need not conduct a hearing on the petition.⁴ Thus, because the municipal court had no jurisdiction to entertain McMillan's postconviction petition, the petition was subject to dismissal without a hearing.

We also overrule the second assignment of error, challenging the municipal court's failure to conduct an evidentiary hearing on McMillan's new-trial motion. Crim.R. 33(A)(6) plainly contemplates a hearing.⁵ But it does not mandate an evidentiary hearing, and the decision whether to conduct an evidentiary hearing depends on the circumstances and is committed to the sound discretion of the trial

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

⁴ 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, ¶6.

⁵ See Crim.R. 33(A)(6) (requiring the defendant to "produce at the hearing on the motion * * * the affidavits of the witnesses by whom such evidence is expected to be given" and permitting the state to "produce affidavits or other evidence to impeach the affidavits of such witnesses").

court.⁶ McMillan failed to file his new-trial motion within the time prescribed by Crim.R. 33(B), and he did not seek leave to file his motion out of time. His appeal of his conviction to this court had divested the municipal court of jurisdiction in his case.⁷ Because our disposition of the appeal did not require us to remand the case, the municipal court did not regain jurisdiction after we had decided the appeal.⁸ And although a trial court retains jurisdiction to correct a void judgment,⁹ the new-evidence claim advanced in McMillan's new-trial motion, even if demonstrated, would not have rendered his conviction void. Thus, because McMillan's new-trial motion was subject to dismissal for lack of jurisdiction, the municipal court cannot be said to have abused its discretion in declining to conduct an evidentiary hearing on the motion.

Accordingly, upon the authority conferred by App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect a dismissal of the petition and the motion. 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.

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

To the Clerk:

Enter upon the Journal of the Court on February 9, 2011

per order of the Court _____.

Presiding Judge

⁶ See *State v. Gaines*, 1st Dist. No. C-090097, 2010-Ohio-895, ¶4.

⁷ 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.

⁸ See *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 97.

⁹ See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.