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

STATE OF OHIO,	:	APPEAL NO. C-190323 TRIAL NO. B-1404265
Plaintiff-Respondent-Appellee,	:	
vs.	:	
ALEX PENLAND,	:	*JUDGMENT ENTRY.*
Defendant-Petitioner-Appellant.	:	

We consider this appeal on the accelerated calendar, 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-petitioner-appellant Alex Penland presents on appeal two assignments of error challenging the Hamilton County Common Pleas Court's judgment denying the relief sought in his 2019 "Motion to File New Trial Instanter" and "Motion for New Trial Based on Newly Discovered Evidence and/or Postconviction Relief under Crim.R. 33 or R.C. 2953.23." We affirm the court's judgment.

Penland was convicted in 2015 of murder, having weapons under a disability, and drug trafficking. He unsuccessfully challenged his convictions on direct appeal and in a postconviction petition filed with the common pleas court in 2018. *State v. Penland*, 1st Dist. Hamilton Nos. C-150414 and C-150413 (May 6, 2016); *State v. Penland*, 1st Dist. Hamilton No. C-180330 (July 26, 2019).

In 2019, Penland filed the motions from which this appeal derives, seeking leave under Crim.R. 33(B) to move for a new trial out of time and a new trial under Crim.R. 33(A) or, in the alternative, relief under R.C. 2953.21 et seq., governing the proceedings on a postconviction petition. In support of those motions, Penland offered as "newly

discovered evidence" documents showing that the city had denied renewal of the liquor license for a bar owned by state's witness Steven James Breunig upon consideration of the shootout between Penland and the victim in the bar's parking lot. Penland also offered a recording of Breunig's 911 call containing his statement that he had heard gunfire, but had not seen the shooter. Citing *Brady v. Maryland*, 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), Penland argued that he had been denied a fair trial by prosecutorial misconduct in (1) failing to disclose in discovery the liquor-license evidence, which he asserted, showed Breunig's "propensity to change his statements to law-enforcement when there is a pecuniary interest involved," and (2) knowingly using, and failing to correct, Breunig's testimony at trial that he had seen Penland go to his car, get a gun, and begin shooting, when, Penland insisted, Breunig's 911 statement showed that testimony to be false. And he argued that his trial counsel had been ineffective in failing to investigate and to use the liquor-license evidence and 911 statement to impeach Breunig's credibility at trial.

A new trial may be granted under Crim.R. 33(A)(2) on the ground of prosecutorial misconduct, *State v. Judy*, 1st Dist. Hamilton No. C-843704, 1986 WL 8100 (July 23, 1986), under Crim.R. 33(A)(1) or 33(E)(5) on the ground of ineffective assistance of counsel, *State v. Norton*, 1st Dist. Hamilton Nos. C-840415 and C-840896, 1985 WL 8950 (July 24, 1985), or under Crim.R. 33(A)(6) on the ground that "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at trial." A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence must be filed either within 120 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted, and leave may be granted only upon "clear and convincing proof that the defendant [had been] unavoidably prevented from [timely] discovering the evidence." A motion for a new trial on other grounds must be filed either within 14 days of the return

of the verdict or within seven days after the granting of leave, and leave may be granted only upon "clear and convincing proof that the defendant [had been] unavoidably prevented from [timely] filing [his new-trial] motion." Crim.R. 33(B). A reviewing court may not overturn a decision on a motion for leave that is supported by some competent and credible evidence. *State v. Schiebel,* 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990).

The record shows that the state provided a recording of Breunig's 911 call in discovery and questioned him at trial concerning the nonrenewal of his liquor license. Thus, Penland failed to sustain his burden of proving by clear and convincing evidence that he had been unavoidably prevented from timely discovering that evidence or from timely seeking a new trial on the grounds of prosecutorial misconduct or ineffective assistance of counsel concerning that evidence.

Nor did the common pleas court err in denying Penland relief on those grounds under the postconviction statutes. Penland's motion for postconviction relief was his second and was filed well after the time prescribed by R.C. 2953.21(A)(2) had expired. A common pleas court has jurisdiction to entertain a late or successive postconviction claim only upon satisfaction of R.C. 2953.23. Thus, Penland was required to show either that he had been unavoidably prevented from discovering the facts upon which his postconviction claims depend or that his claims were predicated upon a new retrospectively applicable right recognized by the United States Supreme Court since the time for filing the claims had expired. And he was required to show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted * * *." R.C. 2953.23(A)(1).

Penland's claims were not predicated upon new retrospectively applicable rights. And, again, the record cannot be said to show that he had been unavoidably prevented from discovering the facts upon which those claims depend. Because he failed to satisfy the R.C. 2953.23 jurisdictional requirements for entertaining his late and successive

postconviction claims, the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain those claims.

Finally, a court always has jurisdiction to correct a void judgment. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. But Penland's claims, even if demonstrated, would not have rendered his convictions void. *See State v. Wurzelbacher*, 1st Dist. Hamilton No. C-130011, 2013-Ohio-4009, ¶ 8; *State v. Grant*, 1st Dist. Hamilton No. C-120695, 2013-Ohio-3421, ¶ 9-16 (holding that a judgment of conviction is void only to the extent that a sentence is unauthorized by statute or does not include a statutorily mandated term or if the trial court lacks subject-matter jurisdiction or the authority to act); *see also State v. Hayes*, 1st Dist. Hamilton No. C-130450, 2014-Ohio-1263, ¶ 5 (holding that the ineffective assistance of counsel does not render a conviction void).

We, therefore, hold that the common pleas court properly denied the relief sought in Penland's "Motion to File New Trial Instanter" and "Motion for New Trial Based on Newly Discovered Evidence and/or Postconviction Relief under Crim.R. 33 or R.C. 2953.23." Accordingly, we overrule the assignments of error and affirm the 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.

MOCK, P.J., BERGERON and **WINKLER, JJ.**

To the clerk:

Enter upon the journal of the court on April 8, 2020,

per order of the court_____.

Presiding Judge