

[Cite as *State v. Wallace*, 2008-Ohio-620.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2007-CA-4
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2004-CR-487
v.	:	
	:	(Criminal Appeal from
RICHARD WALLACE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....  
OPINION

Rendered on the 15<sup>th</sup> day of February, 2008.

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ANTHONY E. KENDELL, Atty. Reg. #0067242, Miami County Prosecutor’s Office, 201 West Main Street, Safety Building, Troy, Ohio 45373  
Attorney for Plaintiff-Appellee

RICHARD WALLACE, A-518-339, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601  
Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-Appellant Richard Wallace appeals from the dismissal of his petition for post-conviction relief. Because the trial court properly dismissed the petition as untimely, the judgment of the trial court is Affirmed.

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{¶ 2} In September, 2005 Wallace was indicted on one count each of Attempted

Rape, Aggravated Burglary, Kidnapping, and Felonious Assault. All charges arose from an incident involving Wallace and his ex-wife in her Troy, Ohio home. A jury found Wallace not guilty of Attempted Rape, but guilty of Aggravated Burglary, Kidnapping, and the lesser-included charge of Negligent Assault. Wallace was sentenced to a ten-year term of imprisonment. Wallace filed a direct appeal, presenting several issues involving his right to a speedy trial. We affirmed his convictions and sentence. *State v. Wallace*, Miami App. No. 06CA20, 2007-Ohio-2346.

{¶ 3} On December 4, 2006 Wallace filed a petition for post-conviction relief, which the trial court dismissed as untimely. Wallace now appeals from the order dismissing his petition.

II

{¶ 4} Wallace's First and Second assignments of error are as follows:

{¶ 5} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR POST-CONVICTION RELIEF, WHERE THE TRIAL COURT FAILED TO INVOKE ITS SUBJECT MATTER JURISDICTION TO ENTERTAIN THE PETITION.

{¶ 6} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN DISMISSING PETITION FOR POST-CONVICTION RELIEF, WHERE 'GOOD CAUSE' FOR THE DELAY IN FILING WAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE."

{¶ 7} In these assignments of error, Wallace contends that the trial court should have accepted his untimely petition for post-conviction relief because he had "good cause" for his failure to have timely filed his petition. Because Wallace does not

demonstrate any of the statutorily prescribed justifications for late filing, the trial court properly dismissed his petition as untimely.

{¶ 8} When a petitioner for post-conviction relief is also pursuing a direct appeal of his conviction, his petition must be filed no later than 180 days after the trial transcript is filed in the court of appeals. R.C. §2953.21(A)(2). Wallace’s trial transcript was filed on May 18, 2006, which means that his petition was required to have been filed no later than November 14, 2006. However, Wallace did not file his petition until December 4, 2006, three weeks after the 180-day deadline. Failure to file on time negates the jurisdiction of the trial court to consider the petition, unless the untimeliness is excused under R.C. §2953.23. *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851.

{¶ 9} Pursuant to R.C. §2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief if he is unavoidably prevented from discovering the facts upon which he relies to present his claim or if the United States Supreme Court recognizes a new right that petitioner alleges applies retroactively to his situation. If one of these conditions is satisfied, the petitioner then must show by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder could have found him guilty. R.C. §2953.23(A)(1)(b).

{¶ 10} Wallace fails to meet either of the conditions set forth in R.C. §2953.23(A)(1)(a), but claims “good cause” for his untimely filing. Wallace explains that the State Public Defender’s Office was supposed to file a petition for post-conviction relief on his behalf, and he did not learn until November 3<sup>rd</sup> that the office had not done so. At Wallace’s request, he received the documents he needed from the Public

Defender's Office four days later, giving him one week to prepare and file his own petition. Wallace then asserts that the prison mail system failed to promptly forward the petition, which he put in the mail system on December 28<sup>th</sup>.

{¶ 11} Wallace fails to address the fact that by that time, the petition was already two weeks beyond the filing deadline. Because Wallace failed to demonstrate the requirements set forth in R.C. §2953.23(A)(1)(a) that could excuse an untimely filing, the trial court properly dismissed his petition for post-conviction relief. Wallace's First and Second assignments of error are overruled.

### III

{¶ 12} Wallace's Third Assignment of Error is as follows:

{¶ 13} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING PETITIONER A SUBSTANTIAL RIGHT TO COLLATERAL ATTACK OF THE CONSTITUTIONALITY OF THE TRIAL COURT PROCEDURES UPON JURY SELECTION AND VOIR DIRE CHALLENGES GOVERNING HIS SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I, SECTION(S) 10 AND 16, WHERE HE WAS NOT GIVEN A FAIR TRIAL BY AN IMPARTIAL JURY DUE TO JURY MISCONDUCT."

{¶ 14} In his Third Assignment of Error, Wallace asserts that the trial court should have accepted his untimely petition for post-conviction relief, because he was denied a fair trial due to juror misconduct. Specifically, Wallace says that one of the jurors failed to disclose during voir dire the fact that he lived next door to Wallace's ex-wife. This issue could have been raised on direct appeal, and is therefore barred by the doctrine of

res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. Accordingly, Wallace's Third Assignment of Error is overruled.

IV

{¶ 15} All of Wallace's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and DONOVAN, JJ., concur.

Copies mailed to:

Anthony E. Kendell  
Richard Wallace  
Hon. Jeffrey M. Welbaum