

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

JOSEPH O'BRYAN :
Petitioner : **CASE NO. 2005 CR 00242**
vs. : **Judge McBride**
STATE OF OHIO : **DECISION/ENTRY**
Respondent :

Joseph O'Bryan, petitioner, 632 Lemonwood Ct., Altamonte Springs, Florida 32714.

David Hoffman, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

The petitioner Joseph O'Bryan filed a "Petition for a Writ of Habeas Corpus and/or Petition Pursuant to Rules 60(B), FED, R (*sic*) of Civil Procedures and/or Reliefs Pursuant to Rules 65(1)(2)." In the petition, O'Bryan states that the writ of habeas corpus is being filed pursuant to 28 U.S.C. § 2243. The petition and accompanying affidavit state arguments of ineffective assistance of counsel, violation of the petitioner's right to speedy trial, and an allegation of fraud upon the court.

28 U.S.C. § 2243 is a federal statute and a writ under that statute must be filed in federal court. Furthermore, even if this court had jurisdiction to hear a petition for a writ under this statute, 28 U.S.C. § 2243 requires that "[t]he writ or order to show cause shall

be directed to the person having custody of the person detained.” There is no evidence in the record that the petitioner complied with this requirement.

Ohio has codified its requirements for habeas corpus relief. Like the federal statute, R.C. 2725.04 requires that the writ specify “[t]he officer, or name of the person by whom the prisoner is so confined or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation [,]” as well as, “[t]he place where the prisoner is so imprisoned or restrained, if known.” Again, the writ before the court is defective on this basis as it includes none of this information. Dismissal of a habeas action is appropriate where the petitioner names the state rather than his actual custodian as the respondent.¹

Furthermore, any petition for habeas corpus is improper in the present case because “[h]abeas corpus will lie only to grant release from some type of physical confinement, such as a prison. Mere probation or post-release control is not sufficient to merit a writ of habeas corpus.”² “Since the purpose of a writ of habeas corpus is not to determine whether a person is guilty of an offense, but to determine the legality of the restraint under which the person is held, it is well-established that the remedy of habeas corpus is available only when the petitioner is presently in state-imposed confinement.”³ This court sentenced the petitioner to a term of community control. No action has been taken by this court since that time to revoke that community control and order the petitioner to be imprisoned. Therefore, it does not appear that the petitioner is presently

¹ *Davis v. Wilson* (2003), 100 Ohio St.3d 269, 798 N.E.2d 379, citing, *Jackson v. State* (Apr. 19, 2002), 8th Dist. No. 81007, 2002-Ohio-2024.

² *State v. Keller* (Aug. 2, 2004), 12th Dist. No. 2003-10-259, 2004-Ohio-3998, ¶ 5.

³ *Id.*

in state-imposed confinement and, consequently, a habeas corpus petition is not appropriate.

The petitioner also purports to file the present petition pursuant to Civil Rules 60(B) and 65. As these Civil Rules are inapplicable to attack a criminal sentence, the court will convert this motion to one for post-conviction relief pursuant to R.C. 2953.21.⁴

In the present case, the petitioner entered a plea of guilty on February 1, 2006 and this court withheld a finding and placed the defendant in the diversion program.⁵ On August 8, 2009, the state filed a motion to terminate the petitioner's participation in the diversion program. On August 26, 2009, this court terminated the petitioner's participation in the diversion program, made a finding that he was guilty of three counts of non-support of a dependent in violation of R.C. 2919.21(B), and ordered a presentence investigation. On September 23, 2009, this court sentenced the defendant to a five-year term of community control.

Petitions for post-conviction relief are governed by R.C. 2953.21, which states in pertinent part as follows:

“(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. * * *

⁴ See, e.g., *State v. Blacker* (Aug. 8, 2011), 12th Dist. No. CA2011-02-012, 2011-Ohio-3916, ¶ 15.

⁵ Journal Entry Accepting Plea of Guilty and Withholding Finding Until Defendant has Successfully Completed, or been Terminated from, the Diversion Program, filed Feb. 9, 2006.

* * *

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

It does not appear from the record of this case that the defendant ever appealed his conviction or sentence. Therefore, any petition for post-conviction relief was required to be filed no later than 180 days after the expiration of the time for filing the appeal.

Due to the fact that the final judgment entry was filed of record on September 28, 2009, the time for filing an appeal in this matter has long since passed. The present petition was filed on September 6, 2011, almost two years after the final judgment entry was filed and, therefore, is clearly untimely.

R.C. 2953.23 provides several exceptions to the 180-day filing period and states as follows:

“(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief,

or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, 'actual innocence' has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and 'former section 2953.82 of the Revised Code' has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code."

The petition in this case fails to establish that: (1) the petitioner was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief; (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right; (3) but for constitutional error at trial, no reasonable factfinder

would have found the petitioner guilty of the offense of which he was convicted; and/or, (4) that DNA testing establishes the petitioner's actual innocence by clear and convincing evidence. While the petitioner did file a contemporaneous "Request for Copies of the Original DNA Tests[.]" this request does not demonstrate that these DNA test results establish, by clear and convincing evidence, the petitioner's actual innocence to the three counts of non-support of a dependent. Therefore, none of the exceptions allowing untimely petitions apply in the case at bar.

Due to the fact that the defendant's petition for post-conviction relief was filed after the expiration of the 180-day period set forth in R.C. 2953.21(A)(2), and because no exception set forth in R.C. 2953.23 applies, the defendant's petition was untimely filed. Consequently, this court is without jurisdiction to consider the merits of the petition.⁶ Furthermore, the petitioner's request for copies of the original DNA tests, which was filed contemporaneously with the writ, is also denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

⁶ *State v. Strunk* (Jan. 31, 2011), 12th Dist. No. CA2010-09-085, 2011-Ohio-417, ¶ 14.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/Regular U.S. Mail this 20th day of January 2012 to all counsel of record and unrepresented parties.
