

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

STATE OF OHIO,	:	APPEAL NO. C-180330
Plaintiff-Appellee,	:	TRIAL NO. B-1404265
vs.	:	<i>JUDGMENT ENTRY.</i>
ALEX PENLAND,	:	
Defendant-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-appellant Alex Penland presents on appeal a single assignment of error challenging the Hamilton County Common Pleas Court’s judgment overruling his “Civil Rule 60(b) Motion for Relief from Judgment and Request for Evidentiary Hearing.” We overrule the assignment of error and affirm the court’s judgment .

Penland was convicted in 2015 of murder, having weapons under a disability, and drug trafficking, following a jury trial of the charges contained in the consolidated indictments in the cases numbered B-1501523 and B-1404265. We affirmed those convictions on direct appeal. *State v. Penland*, 1st Dist. Hamilton Nos. C-150414 and C-150413 (May 6, 2016).

In 2018, Penland filed his “Civil Rule 60(b) Motion for Relief from Judgment and Request for Evidentiary Hearing.” In that motion, he sought relief from his murder and weapons convictions under Civ.R. 60(B)(5), on the grounds that the state and his trial counsel had perpetrated a “fraud upon the court” with respect to a recording of a 911 call containing state’s witness Steven James Bruenig’s statement that he had heard gunfire, but had not seen the shooter. The state, Penland asserted, failed to disclose that

recording in discovery and then suborned perjury and failed to correct Bruenig's false testimony at trial that he had seen Penland go to his car, get a gun, and begin shooting. And trial counsel, Penland insisted, was ineffective in failing to investigate and use the 911 statement at trial to impeach Breunig's credibility.

Penland's motion sought relief from his convictions based on alleged violations of his constitutionally secured rights to a fair trial and the effective assistance of counsel during the proceedings resulting in his convictions. Therefore, Crim.R. 57(B) did not authorize the court to review the motion under the standards provided by Civ.R. 60(B), and the motion was reviewable under R.C. 2953.21 et seq., governing the proceedings on a petition for postconviction relief. *See State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12 and syllabus; *State v. Carter*, 1st Dist. Hamilton No. C-170655, 2019-Ohio-1749, ¶ 6.

But the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain Penland's postconviction claims. He filed his motion well after the time prescribed by R.C. 2953.21(A)(2) had expired. R.C. 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a late petition: the petitioner must show either that he was unavoidably prevented from discovering the facts upon which his postconviction claim depends, or that his claim is predicated upon a new and retrospectively applicable right recognized by the United States Supreme Court since the time for filing his claim had expired; and he must show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted \* \* \*." R.C. 2953.23(A)(1).

Penland did not submit with his motion a transcript of the 911 call, leaving the common pleas court, in deciding that motion, without the evidence upon which his postconviction claims depended. And consistent with *State v. Ishmail*, 54 Ohio St.2d 402, 405-406, 377 N.E.2d 500 (1978), we overruled his motion here to "supplement the record to add evidence of fraud" in the form of the 911-call transcript. *Id.* at paragraph two of the syllabus (holding that a reviewing court may not add to the record, and then

decide an appeal based on, matter that was not properly before the court below). In the absence of the 911-call transcript, Penland could not demonstrate an outcome-determinative constitutional error. Thus, he failed to satisfy the R.C. 2953.23(A)(1)(b) jurisdictional requirement for a late postconviction petition.

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 prosecutorial-misconduct and ineffective-counsel 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); *State v. Hayes*, 1st Dist. Hamilton No. C-130450, 2014-Ohio-1263, ¶ 5 (holding that ineffective assistance of counsel does not render a conviction void).

Because the common pleas court had no jurisdiction to entertain Penland's postconviction claims, his motion was subject to dismissal without a hearing. *See* R.C. 2953.21(D) and 2953.23(A). Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed to reflect the dismissal of 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.

**MYERS, P.J., CROUSE and WINKLER, JJ.**

To the clerk:

Enter upon the journal of the court on July 26, 2019

per order of the court \_\_\_\_\_.

Presiding Judge