

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

STATE OF OHIO,	:	APPEAL NO. C-180200
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-1104759-A
vs.	:	<i>JUDGMENT ENTRY.</i>
LAMAR SIMMONS,	:	
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 Lamar Simmons presents on appeal a single assignment of error challenging the Hamilton County Common Pleas Court's judgments denying his petition under R.C. 2953.21 et seq. for postconviction relief and overruling his Crim.R. 33 motion for a new trial. We overrule the assignment of error and affirm the court's judgment as modified.

Simmons was convicted in 2013 of murder and having weapons while under a disability. In 2014, in his direct appeal, this court reversed the convictions in part and remanded for consecutive-sentencing findings. *State v. Simmons*, 2014-Ohio-3695, 19 N.E.3d 517 (1st Dist.). A series of remands and resentencings culminated in the imposition, in 2018, of consecutive terms of confinement of life without parole for 15 years on the murder charge and 36 months on the weapons charge. He did not timely appeal the 2018 judgment of conviction.

Simmons also challenged his convictions by filing with the common pleas court in 2015 the postconviction motions from which this appeal derives. In his Crim.R. 33 motion, Simmons requested both a new trial under Crim.R. 33(A)(6) and leave under Crim.R. 33(B) to file his new-trial motion out of time. The common pleas court

implicitly granted Simmons leave to file a new-trial motion, when it expressly “den[ie]d [his] Motion for New Trial.” We hold that the court did not abuse its discretion in doing so.

Crim.R. 33(A)(6) permits a trial court to grant a new trial based on the discovery of “new evidence material to the defense [that] the defendant could not with reasonable diligence have discovered and produced at trial.” Simmons sought a new trial on the ground that his trial counsel had labored under a conflict of interest. That claim depended for its resolution upon, but was not supported by, evidence outside the trial record demonstrating the alleged conflict. Thus, the record cannot be said to disclose a strong probability of a different result if a new trial were granted. *See* Crim.R. 33(A)(6); *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus (holding that “newly discovered evidence” must “disclose[] a strong probability that it will change the result if a new trial is granted”); *see also State v. Williams*, 43 Ohio St.2d 88, 330 N.E.2d 891 (1975), paragraph two of the syllabus (holding that a ruling on a Crim.R. 33(A)(6) motion will not be disturbed on appeal in the absence of an abuse of discretion).

Nor did the common pleas court err in denying the relief sought in Simmons’s postconviction petition. In his petition, he sought relief based on the trial court’s alleged errors in failing to conduct sidebar conferences on the record, to make sentencing findings, or to merge his offenses under R.C. 2941.25 and his trial counsel’s alleged ineffectiveness concerning those matters and the alleged conflict of interest.

But Simmons filed his petition 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 postconviction claim: the petitioner must show either that he was unavoidably prevented from discovering the facts upon which the claim depends, or that the claim is predicated upon a new and retrospectively applicable right recognized by the United States Supreme Court since the time for filing the 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). Simmons’s postconviction claims were not based on a new right. And he did not offer outside

evidence to show, nor did the record otherwise demonstrate, that he had been unavoidably prevented from discovering the facts upon which those claims depended. Therefore, the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain the 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 the grounds for relief advanced in Simmons's new-trial motion and postconviction petition, 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. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22-29 (holding that sentences imposed for multiple counts are void only when the sentencing court determined that R.C. 2941.25 required merger, but then imposed separate sentences in disregard of its own ruling); *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).

We, therefore, affirm the common pleas court's judgment overruling Simmons's motion for a new trial. And because the court lacked jurisdiction to entertain his postconviction petition, we modify the court's judgment denying the petition to reflect its dismissal, *see* App.R. 12(A)(1)(a), and affirm that 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.

ZAYAS, P.J., CROUSE and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on September 20, 2019,
per order of the court _____.

Presiding Judge