

[Cite as *State v. Frazier*, 2011-Ohio-3316.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-966
v.	:	(C.P.C. No. 08CR09-6861)
	:	
Kesha R. Frazier,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2011

Kesha R. Frazier, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Kesha R. Frazier, appeals from a judgment of the Franklin County Court of Common Pleas dismissing her petition for postconviction relief. For the following reasons, we reverse that judgment and remand the matter for further proceedings.

Factual and Procedural History

{¶2} In 2009, a jury found appellant guilty of one count of theft in violation of R.C. 2913.02 and two counts of taking the identity of another in violation of R.C. 2913.49. By a

judgment entry dated January 8, 2010, the trial court sentenced her accordingly. On February 8, 2010, appellant filed a notice of appeal from her convictions in this court.¹

{¶3} On August 16, 2010, while her appeal was pending in this court, appellant timely filed in the trial court a petition for postconviction relief pursuant to R.C. 2953.21. The trial court denied the petition based on its belief that it lacked jurisdiction to consider appellant's petition while her appeal was pending with this court. The trial court also denied appellant's motions for appointed counsel and expert assistance.

{¶4} Appellant appeals and assigns the following errors:

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ARBITRARILY, IMPROPERLY, AND/OR WITH BIAS DENIED THE PETITIONER-APPELLANT'S TIMELY FILED MOTION TO VACATE OR SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO R.C. 2953.21, ET SEQ. (POST-CONVICTION RELIEF PETITION), IN VIOLATION OF PETITIONER-APPELLANT'S UNITED STATES AND OHIO CONSTITUTIONAL RIGHTS, AND ACCORDINGLY, THE JUDGMENT OF DENIAL OF POST-CONVICTION RELIEF MUST BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED THE PETITIONER-APPELLANT'S MOTION TO VACATE OR SET ASIDE JUDGMENT OF CONVICTION AND SENTENCE PURSUANT TO R.C. 2953.21 ET SEQ. (POST-CONVICTION RELIEF PETITION), IN A MANNER THAT WAS NOT IN COMPLIANCE WITH R.C. 2953.21 ET. SEQ., AND ACCORDINGLY, THE JUDGMENT OF DENIAL OF POST-CONVICTION RELIEF IS CONTRARY TO LAW AND VOID, AND THEREFORE, MUST BE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ARBITRARILY AND IMPROPERLY

¹ Ultimately, this court affirmed appellant's convictions. *State v. Fraizer*, 10th Dist. No. 10AP-112, 2010-Ohio-4440.

DENIED THE PETITIONER-APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL AND MOTION FOR EXPERT ASSISTANCE REGARDING POST-CONVICTION RELIEF, AND ACCORDINGLY, THE DENIAL OF THESE MOTIONS MUST BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

First and Second Assignments of Error - Trial Court's Denial of Appellant's Petition

{¶5} Appellant contends in these assignments of error that the trial court improperly denied her petition for postconviction relief for lack of jurisdiction. We agree.

{¶6} The trial court denied appellant's petition because appellant had a direct appeal pending in this court from her convictions. However, R.C. 2953.21(C), in pertinent part, provides that "[t]he court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending." As a result, trial courts do have jurisdiction to hear timely filed petitions for postconviction relief, even while direct appeals are pending. *State v. Orr*, 8th Dist. No. 93796, 2010-Ohio-366, ¶13 (quoting *State v. Myers*, 2d Dist. No. 2002-CA-73, 2003-Ohio-915, ¶8); *State v. Reyes*, 6th Dist. No. WD-03-036, 2004-Ohio-1635, ¶4. Accordingly, the trial court erred by denying appellant's timely filed petition. Appellant's first and second assignments of error are sustained.

Third Assignment of Error - Motions for Counsel and Expert Assistance

{¶7} In this assignment of error, appellant also contends that the trial court erred by denying her motions for appointed counsel and expert assistance. In part, we agree.

{¶8} Appellant does not have a right to funding or appointment of expert witnesses or assistance in a postconviction petition. *State v. Madison*, 10th Dist. No. 08AP-246, 2008-Ohio-5223, ¶16. Accordingly, the trial court did not err by denying appellant's motion for expert assistance. However, an indigent petitioner is entitled to

representation by a public defender at an evidentiary hearing on a postconviction petition if the public defender concludes that the issues in the petition have arguable merit. *Id.* at ¶15 (citing *State v. Crowder* (1991), 60 Ohio St.3d 151, 153). Accordingly, the trial court prematurely denied appellant's motion for appointment of counsel without first determining whether appellant is entitled to an evidentiary hearing on her petition.

{¶9} In conclusion, we sustain appellant's first and second assignments of error and sustain in part and overrule in part her third assignment of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to the trial court for further proceedings.

Judgment reversed and cause remanded.

SADLER and CONNOR, JJ., concur.
