

[Cite as *State v. Brown*, 2018-Ohio-4991.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA3829
	:	
vs.	:	
	:	
JAMES E. BROWN,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

James E. Brown, Chillicothe, Ohio, pro se.

Shane Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-3-18
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a petition for postconviction relief filed by James E. Brown, defendant below and appellant herein.

Appellant assigns two errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN DISMISSING APPELLANT BROWN’S PETITION FOR POSTCONVICTION RELIEF PURSUANT TO R.C. 2953.21(A)(2), AS BEING UNTIMELY, WHEN IN FACT THE PETITION WAS FILED WITHIN THE 180 DAYS AFTER THE DATE ON WHICH THE TRIAL TRANSCRIPT WAS FILED IN THE COURT OF APPEALS. ADDITIONALLY, THIS FAILURE IS A VIOLATION OF BROWN’S

FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST, FIFTH, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION, WHEN IT APPLIED RES JUDICATA TO A MANIFEST MISCARRIAGE OF JUSTICE CLAIM IN VIOLATION OF APPELLANT’S FIRST, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS TO PETITION THE GOVERNMENT FOR REDRESS OF INJURIES, AND MEANINGFUL ACCESS TO ITS COURT UNDER THE U.S. CONSTITUTION.”

I. Facts and Procedural History

{¶ 2} On April 17, 2013, the Scioto County Grand Jury returned an indictment that charged appellant with: (1) trafficking in drugs/heroin in violation of R.C. 2925.03(A)(2) and (C)(6)(f), a first-degree felony, (2) possession of drugs/heroin in violation of R.C. 2925.11(A)/(C)(6)(e), a first-degree felony, (3) trafficking in drugs/oxycodone in violation of R.C. 2925.03(A)(2) and (C)(1)(d), a second-degree felony, (4) possession of drugs/oxycodone in violation of R.C. 2925.11(A)(C)(1)(c), a second-degree felony, (5) possession of drugs/alprazolam in violation of R.C. 2925.11(A)/(C)(2)(a), a first-degree misdemeanor, (6) possession of drugs/clonazepam in violation of R.C. 2925.11(A)/(C)(2)(a), a first-degree misdemeanor, and (7) tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony. The jury found appellant guilty of all charges, except for a not guilty verdict on the tampering with evidence charge. The trial court sentenced appellant to serve eight years on each trafficking charge (with two of the possession charges merged with the trafficking counts), and one hundred eighty days on the two possession charges. The court further ordered that the trafficking sentences be served consecutively to one

another, and that the possession charges also be served consecutively, for an aggregate prison sentence of sixteen years.

{¶ 3} On November 12, 2013, appellant filed a notice of appeal. In his direct appeal, different counsel argued that the trial court erred by (1) failing to dismiss the charges for a speedy trial violation, and (2) denying the motion to suppress appellant's statements and items obtained from a search.

{¶ 4} On December 20, 2013, appellant filed a Crim.R. 57(B) pro se motion to vacate illegal sentence. On February 19, 2014, the trial court overruled the motion and noted that because appellant had filed a direct appeal in the matter, the trial court had no jurisdiction to rule on the motion. On February 28, 2014, appellant filed pro se objections to the court's February 19, 2014 order. Further, on March 19, 2014, appellant filed a pro se motion for trial discovery. On March 26, 2014, the court again denied appellant's motions for lack of jurisdiction while his direct appeal was pending.

{¶ 5} On April 9, 2014, appellant filed his trial transcript. On October 3, 2014, appellant filed a pro se R.C. 2953.21 petition to vacate or set aside judgment of conviction or sentence and requested an evidentiary hearing. In addition, on the same day appellant filed a pro se motion for expert assistance and requested an evidentiary hearing.

{¶ 6} On direct appeal, this court affirmed the trial court's judgment on March 25, 2016. See *State v. Brown*, 4th Dist. Scioto No. 13CA3585, 2016-Ohio-1453, 63 N.E.3d 509. The Supreme Court of Ohio dismissed appellant's appeal on October 5, 2016. See *State v. Brown*, 146 Ohio St.3d 1515, 2016-Ohio-7199, 60 N.E.3d 7.

{¶ 7} On September 19, 2017, appellant filed a pro se motion that requested the trial court to

rule on the pending 2014 postconviction petition. Appellant noted that the state had not yet responded. On October 25, 2017, the state filed its memorandum contra appellant's petition, and on November 8, 2017, the trial court overruled appellant's 2014 motion as "not well taken." On February 7, 2018, the trial court filed another entry that overruled appellant's petition stating: "Upon further review of Defendant's Motion for Post Conviction Relief, this Court specifically finds Defendant's petition is beyond time limits and is barred by the doctrine of res judicata. Therefore, this Court finds Defendant's motion to be not well taken and therefore overrules the same." This appeal followed.

II. Standard of Review

{¶ 8} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58; *State v. Black*, 4th Dist. Ross No. 15CA3509, 2016-Ohio-3104, ¶ 7. "A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable." *State v. Rinehart*, 4th Dist. Ross No. 17CA3606, 2018-Ohio-1261, ¶ 10, citing *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 19, citing, *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 19.

III. Timeliness

{¶ 9} In his first assignment of error, appellant asserts that "the trial court erred in dismissing Appellant Brown's Petition for Post Conviction Relief pursuant to R.C. 2953.21(A)(2), as being untimely, when in fact the petition was filed within the 180 days after the date on which the trial

transcript was filed in the court of appeals. Additionally, this failure is a violation of Brown's fundamental rights guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution." Appellant contends that he did file his petition within the R.C. 2953.21(A)(2) 180 day time limit because he filed his trial transcripts on April 9, 2014 and filed his petition on October 3, 2014. Thus, appellant argues, the trial court erred by finding that his petition is untimely.

{¶ 10} We agree with appellant that his petition, filed 177 days after the trial transcript, is within the 180 day time limit. Therefore, the trial court incorrectly held that the petition was untimely. Moreover, R.C. 2953.21(E) required the prosecutor to respond by answer or motion "[w]ithin ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown." Nothing in the record explains the delay in responding to appellant's petition or indicates that the trial court extended the time to respond. Also, the trial court's entries do not indicate why the trial court failed to take action on the petition.

{¶ 11} Nevertheless, we conclude that any error concerning the petition's timeliness constitutes harmless error because the trial court properly concluded that the doctrine of res judicata bars consideration of appellant's petition. Crim.R. 52(A) defines harmless error and provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." During a harmless error inquiry, the state must prove that the error did not affect the defendant's substantial rights. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. Further, if there is "a '[d]eviation from a legal rule,'" courts undertake a "'harmless error' inquiry—to determine whether the error 'affect[ed] substantial rights' of the criminal defendant." *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting *United States v.*

Olano, 507 U.S. 725, 732–733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The term “substantial rights” has been interpreted to require that “‘the error must have been prejudicial.’ (Emphasis added.)” *Id.*, quoting *Olano* at 734, 113 S.Ct. 1770. If a court determines that the error did not affect the defendant's substantial rights, then the error is harmless and “‘shall be discarded.’” *Id.*, quoting Crim.R. 52(A). *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23.

{¶ 12} In the case sub judice, the trial court’s statement concerning the timeliness of appellant’s postconviction relief petition did not prejudice appellant because, as we point out below, his claims are also barred by res judicata. “‘Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.’” *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. “‘Res judicata does not, however, apply only to direct appeal, but to all postconviction proceedings in which an issue was or could have been raised.’” *State v. Heid*, 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 18, quoting *State v. Montgomery*, 8th Dist. Cuyahoga No. 99452, 2013-Ohio-4193, ¶ 42. Thus, the trial court’s finding regarding timeliness constitutes harmless error. Moreover, we also point out that the trial court’s dismissal is appropriate because appellant failed to submit supporting affidavits or documentary evidence to satisfy his burden to set forth sufficient operative facts to establish substantive grounds for relief. *State v. Chandler*, 5th Dist. Stark No. 2018CA00046 and 56, 2018-Ohio-3560; *State v. Church*, 5th Dist. Stark 2017CA00216, 2018-Ohio-368; citing *State v.*

Calhoun (1999), 86 Ohio St.3d 279, 714 N.E.2d 905.

{¶ 13} Accordingly, based upon the foregoing reasons we overrule appellant's first assignment of error.

IV. Res Judicata

{¶ 14} In his second assignment of error, appellant asserts that the trial court abused its discretion when it applied res judicata to appellant's claim. Appellant argues that (1) res judicata cannot be applied to a matter that has not been adjudicated, (2) these issues could not be raised on direct appeal because they concerned issues outside the record, and (3) the trial court had discretion not to apply res judicata when to do so would result in injustice.

{¶ 15} Appellant's petition argues that he received ineffective assistance of counsel because counsel failed to (1) engage the services of B.C.I., (2) challenge the state's evidence with independent laboratory testing, (3) engage the services of a video and audio expert to assist his defense, (4) bring evidence to light relating to the tampering with evidence count, and (5) provide effective discovery. The state, however, argues that res judicata applies because appellant's claims pertaining to ineffective assistance could, and should, have been raised and argued during his direct appeal, but were not.

{¶ 16} In the case sub judice, appellant filed his notice of appeal on November 12, 2013, and filed his petition for postconviction relief on October 3, 2014. It appears, however, that none of the claims that appellant raises are outside the record as he argues. One claim involved trial counsel's presentation of evidence pertaining to the tampering with evidence charge (that resulted in a not guilty verdict). The state asserts that all other claims for ineffective assistance could have been raised in his direct appeal with his new counsel.

{¶ 17} R.C. 2953.21(A)(1)(a) provides in relevant part:

Any person who has been convicted of a criminal offense * * * 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.

{¶ 18} As we indicated above, under the doctrine of res judicata issues cannot be considered in postconviction relief proceedings when they have been, or could have been, fully litigated on direct appeal from that judgment. *See Szefcyk*, 77 Ohio St.3d at 95; *Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104. Issues properly raised in a postconviction relief petition are those that could not have been raised on direct appeal because the evidence to support such issues is outside the record. *State v. Milanovich*, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975). “The most significant restriction on Ohio’s statutory procedure for postconviction relief is that the doctrine of res judicata requires that the claim presented in support of the petition represent error supported by evidence outside the record generated by the direct criminal proceedings.” *State v. Monroe*, 10th Dist. Franklin No. 04AP-658, 2005-Ohio-5242. “Our statutes do not contemplate relitigation of those claims in postconviction proceedings where there are no allegations to show that they could not have been fully adjudicated by the judgment of conviction and an appeal therefrom.” *Perry*, id.

{¶ 19} In the case sub judice, we believe that appellant’s claims concerning ineffective assistance of counsel are issues that could have been raised on direct appeal and do not involve evidence outside the record. Consequently, because those claims were not raised at the earliest opportunity res judicata applies. *See Perry, supra; State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857, 811 N.E.2d 561.

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{¶ 20} Therefore, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.