

[Cite as *State v. Porter*, 2018-Ohio-1200.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106032

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT M. PORTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585728-A

BEFORE: Jones, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 29, 2018

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant Robert Porter, pro se, appeals from the trial court's July 7, 2017 judgment denying his petition to vacate or set aside judgment of conviction and sentence. For the reasons that follow, we affirm.

{¶2} In 2012, Porter was charged with several crimes relative to the aggravated robbery and murder of Curtis Marks. In August 2014, on the day the case was set for trial, Porter pleaded guilty to involuntary manslaughter with a three-year firearm specification, that was an amended charge of Count 3, aggravated murder. He also pleaded guilty to Count 4, aggravated robbery. The remaining counts and specifications were nolle. As part of the plea agreement, Porter and the state agreed to recommend to the trial court a prison sentencing range of 10 to 20 years. Further, Porter agreed as part of the plea agreement to testify against his codefendant, Julius Webster.

{¶3} In January 2015, Webster's case proceeded to trial; Porter refused to testify, however. In February 2015, Porter filed a motion to withdraw his plea. The trial court held a hearing, at which Porter testified that Webster had threatened to retaliate if he testified against him, and that he had a new concern he did not have at the time of his plea, that his identity as a confidential informant would be known if he testified. Porter maintained that these circumstances caused him to fear for his own and his family's safety. Moreover, Porter claimed innocence in the crimes. He told the court that he would testify against Webster, but that he wanted to change his plea. The trial court denied his request.

{¶4} The trial court sentenced Porter to ten years incarceration for involuntary manslaughter plus three years for the firearm specification; seven years for aggravated robbery; and four years incarceration for violating his community control on another case.

The sentences were run consecutively for a total of 24 years. The trial court also ordered five years of mandatory postrelease control.

{¶5} Porter appealed, challenging the denial of his motion to withdraw his plea and the imposition of the four-year sentence on the other case. He also claimed that counsel was ineffective for not advising him that he could be subject to additional prison time on the other case. This court affirmed the trial court's judgment denying Porter's motion to withdraw his plea, but vacated the four-year prison term on the other case and remanded for resentencing. *State v. Porter*, 8th Dist. Cuyahoga No. 103185, 2016-Ohio-5832, ¶ 15, 23.

{¶6} In June 2017, Porter filed a petition to vacate or set aside his judgment of conviction and sentence that is a petition for postconviction relief. He alleged in his petition that his trial counsel was ineffective for failing to timely file a motion to withdraw his plea. The trial court denied his petition as untimely, and Porter now appeals, setting forth the following two assignments of error for our review, that we consider together:

I. The trial court erred, and due process was denied, when the court failed to include findings of fact and conclusions of law into the judgment denying appellant's postconviction petition, and further, in rendering said judgment before appellant's time to reply to the state's response had expired.

II. The trial court abused its discretion in failing to grant appellant's

postconviction petition, or at the very least, in failing to hold an evidentiary hearing on said petition.

{¶7} There are strict time limits for defendants seeking postconviction relief under R.C. 2953.21. Under subsection (A)(2) of the statute, a petition for postconviction relief must be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal or, if no appeal is taken, no later than 365 days after the expiration of time for filing the appeal.

{¶8} If a defendant's petition is untimely under R.C. 2953.21(A)(2), then it must comply with R.C. 2953.23(A)(1). Under that section, a trial court may not consider a delayed postconviction relief petition unless the petitioner satisfies two requirements.

{¶9} First, the petitioner must demonstrate either that (1) he or she was unavoidably prevented from discovering the facts upon which he relies in the petition or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner. R.C. 2953.23(A)(1)(a). Second, the petitioner must establish by clear and convincing evidence that no reasonable factfinder would have found him or her guilty but for constitutional error at trial. R.C. 2953.23(A)(1)(b).

{¶10} The time limit for filing petitions for postconviction relief is jurisdictional. *State v. Johns*, 8th Dist. Cuyahoga No. 93226, 2010-Ohio-162, ¶ 8. Thus, unless a defendant demonstrates that the required findings under R.C. 2953.23(A) apply to him or her, the trial court lacks jurisdiction to consider an untimely postconviction relief petition.

State v. Thomas, 8th Dist. Cuyahoga No. 99972, 2014-Ohio-1512, ¶ 8, citing *State v. Carter*, 2d Dist. Clark No. 03CA-11, 2003-Ohio-4838, ¶ 13, citing *State v. Beuke*, 130

Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998). There is no need for a trial court to conduct an evidentiary hearing when it dismisses an untimely postconviction relief petition. *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 23. There is also no need for a trial court to issue findings of fact and conclusions of law for an untimely petition. *State v. Dilley*, 8th Dist. Cuyahoga No. 99680, 2013-Ohio-4480, ¶ 9.

{¶11} The transcripts in this case were filed with this court on August 24, 2015. Thus, for Porter's petition to have been timely filed, it would have had to been filed by August 24, 2016. He did not file his petition until June 2017, however, and, thus, it was untimely.

{¶12} We next consider whether he complied with R.C. 2953.23(A)(1). The petition did not allege that his claim involved a new federal or state right that retroactively applied to his case.

{¶13} In support of his petition, Porter attached a letter from his trial counsel, in which counsel stated that "shortly after," and "within days" of Porter entering his plea, Porter contacted him and requested that he file a motion to vacate his plea. Counsel stated that Porter's sentencing was "delayed due to the terms of his plea agreement," and that he filed a motion to withdraw the plea on Porter's behalf on February 2, 2015.

{¶14} The letter, however, does not demonstrate that Porter was unavoidably prevented from discovering the facts upon which he relies on in his petition. Indeed, at the hearing held on his motion to withdraw his plea, Porter testified that a "couple of days" after entering his plea, he told defense counsel that he wanted to withdraw it

because he “felt * * * [he] shouldn’t have to go to jail for another man’s actions because [he was] innocent.” “Unavoidably prevented” means the defendant was unaware of the facts and was unable to learn of them through reasonable diligence. *See State v. Short*, 8th Dist. Cuyahoga No. 82246, 2003-Ohio-3538, ¶ 9.

{¶15} Thus, in light of the above, Porter failed to establish either of the requirements under R.C. 2953.23(A)(1) for an untimely petition.

{¶16} Moreover, Porter also failed to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant’s plea to be less than knowing, intelligent, and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

{¶17} Where a defendant has entered a guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel’s deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *Williams at id.*, citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The prejudice inquiry in the context of a guilty plea requires a “nuanced analysis of all of the factors surrounding the plea

decision,” including the benefits associated with a plea, the possible punishments involved, the weight of the evidence against the defendant and any other special circumstances that might support or rebut a defendant’s claim that he or she would have taken his or her chances at trial. *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-600, ¶ 16.

{¶18} Upon review, Porter failed to demonstrate by clear and convincing evidence that he would not have pled guilty but for being “pressured” by defense counsel and his family to do so, as he averred to in an affidavit in support of his petition. A “[d]efendant’s own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary.” *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983). As mentioned, this court already found that Porter’s plea was knowingly and voluntarily made and that Porter “did not provide a legitimate and reasonable basis for the withdrawal of the plea.” *Porter*, 8th Dist. Cuyahoga No. 103185, 2016-Ohio-5832, ¶ 15.

{¶19} In sum, Porter’s petition was untimely and the alleged claims were known to him by at least February 2015. Thus, the trial court properly denied his petition without a hearing and without issuing findings of fact and conclusions of law. Moreover, the outcome would not have changed had he filed a reply brief to the state’s opposition brief. His two assignments of error are therefore overruled.

{¶20} Judgment affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution.

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

LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR