

[Cite as *State v. Wright*, 2009-Ohio-4651.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 08AP-1095
	:	(C.P.C. No. 92CR03-1483)
v.	:	
	:	(REGULAR CALENDAR)
Dwaine Wright,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Dwaine Wright, pro se.

APPEAL from the Franklin County Court of Common Pleas.

CONNOR, J.

{¶1} Defendant-appellant, Dwaine Wright ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his coram nobis petition for postconviction relief. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On March 20, 1992, appellant was indicted on one count of burglary and one count of theft. Both offenses were indicted with a specification for a prior conviction. On August 6, 1992, appellant pled guilty to the stipulated lesser included offense of burglary without specification, a felony of the third degree and a violation of R.C. 2911.12. The trial court imposed a one-year determinate sentence. Appellant did not file a timely

notice of appeal. Appellant filed the instant petition for a writ of coram nobis on November 17, 2008, more than 16 years after he entered his plea of guilty. The trial court denied appellant's petition on December 3, 2008 without holding a hearing. This appeal followed.

{¶3} Appellant presents two issues for appeal, which we shall construe as his assignments of error.¹ These assignments of error are presented as follows:

1) The doctrine of res judicata does not bar consideration of Wright's issues due to the fundamental nature of the issues, and, the elements of res judicata not being met; therefore, the court erred in not considering the merits of the issues presented by Wright.

2) Wright adopts and/or incorporates the five (5) issues presented within his Coram Nobis petition within this instant appeal, since, said issues were never decided on the merits.

{¶4} First, appellant argues the trial court erred in denying his postconviction petition as untimely and in finding the doctrine of res judicata applied to bar consideration of his petition on the merits. Second, appellant argues the trial court erred by ignoring the existing precedent that requires courts to liberally construe pro se submissions and to decide cases on their merits. For ease of analysis, we shall consider these two assignments of error together.

{¶5} Appellant presents several claims which he argues should be decided on their merits. Appellant contends he is not competent due to his limited I.Q. and therefore, he was not capable of waiving his constitutional rights and entering a guilty plea August 1992. Thus, appellant argues his plea agreement is not valid or binding because he did

¹ Appellant has failed to set forth assignments of error in the manner required by App.R. 16. Appellant has presented issues for review instead of separately stating his assignments of error. Nevertheless, we shall attempt to consider each issue for review as if it did raise an issue of some error on the part of the trial court.

not knowingly, intelligently, and voluntarily waive his rights. Appellant also argues his counsel was ineffective in failing to inform the trial court of his competency issues and in failing to file an appeal, thereby violating his constitutional rights. Additionally, appellant requests a nunc pro tunc competency determination hearing.

{¶6} "Coram nobis" is a "writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact." *Perotti v. Stine*, 113 Ohio St.3d 312, 2007-Ohio-1957, ¶2. The Supreme Court of Ohio has previously found that writs of coram nobis are no part of the law in Ohio. *State v. Perry* (1967), 10 Ohio St.2d 175, 180, citing *State v. Hayslip* (1914), 90 Ohio St. 199. However, we shall address appellant's petition as simply a postconviction petition. See *State v. Schlee*, 117 Ohio St.3d 153, 156, 2008-Ohio-545, ¶12 ("Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged."). See also *State v. Reynolds*, 79 Ohio St.3d 158, 160-61, 1997-Ohio-304 (a motion meets the definition of a petition for postconviction relief under R.C. 2953.21(A)(1) where it was filed subsequent to the defendant's direct appeal; the defendant claimed a denial of constitutional rights; the defendant sought to render the judgment void; and the defendant requested that the judgment and sentence be vacated).²

{¶7} The right to seek postconviction relief is governed by R.C. 2953.21(A)(1)(a) which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child 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

² Appellant did not file a direct appeal from his original conviction. However, he has claimed a violation of his constitutional rights and has sought to have the judgment rendered void and to have both the judgment and sentence vacated.

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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶8} The postconviction relief process is a collateral civil attack on a criminal judgment, not an appeal of a judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. It is a way to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233. Appellant does not have a constitutional right of postconviction review. Postconviction relief is a narrow remedy that affords appellant no rights beyond those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. A postconviction petition does not provide appellant a second opportunity to litigate his conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321.

{¶9} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun* at 282. The trial court "shall determine whether there are substantive grounds for relief" before granting a hearing on a postconviction petition. R.C. 2953.21(C). Pursuant to R.C. 2953.21(C), a trial court properly denies a postconviction petition without an evidentiary hearing if the petition, supporting documents, and court record "do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun* at 291.

{¶10} We apply an abuse of discretion standard when reviewing a trial court's decision to deny a postconviction petition without a hearing. *State v. Campbell*, 10th Dist.

No. 03AP-147, 2003-Ohio-6305, ¶14, citing *Calhoun* at 284. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} A trial court may dismiss a petition for postconviction relief without holding an evidentiary hearing when the doctrine of res judicata bars the claims raised in the petition. *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337. Res judicata is applicable in all postconviction relief proceedings. *Id.* at 95. Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.* at 96; *Reynolds* at 161, 1997-Ohio-304. In order to avoid dismissal of the petition under the doctrine of res judicata, the evidence supporting the claims must be competent, relevant, and material evidence outside the trial court record, and it must not be evidence that existed or was available for use at the time of the trial. *State v. Cole* (1982), 2 Ohio St.3d 112, syllabus; *State v. Lawson* (1995), 103 Ohio App.3d 307, 315; *State v. Gordon*, 10th Dist. No. 08AP-791, 2009-Ohio-1330. "A mere hypothesis of a constitutional claim upon further discovery is not sufficient to warrant an evidentiary hearing." *State v. Coleman* (Mar. 17, 1993), 1st Dist. No. C-900811. See also *State v. Whiteside* (Sept. 29, 2000), 10th Dist. No. 00AP-223.

{¶12} We find appellant's petition is barred by the doctrine of res judicata.

{¶13} Appellant was represented by counsel at the time of the plea hearing. While appellant did not provide this court with a transcript of the trial court proceedings in this action, a review of the court file reveals a motion requesting an examination of

appellant to assess his mental condition was filed in April 1992. (R. 15.) An entry ordering said evaluation was filed on April 21, 1992. (R. 17.)

{¶14} In *Dusky v. United States* (1960), 362 U.S. 402, 402, 80 S.Ct. 788, 789, the United States Supreme Court held that in determining competency, a trial court must ascertain whether the defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has both a rational and factual understanding of the proceedings against him. The competency standard for entering a plea of guilty is the same as it is for standing trial. See *State v. Mink*, 101 Ohio St.3d 350, 359, 2004-Ohio-1580, ¶57, citing *Godinez v. Moran* (1993), 509 U.S. 389, 399, 113 S.Ct. 2680, 2686.

{¶15} In the case at bar, whether or not the evaluation was actually performed and, if it was, the outcome of the evaluation, are both unknown, perhaps due in part to the lack of a transcript of the plea hearing. However, it is apparent that the competency issue was raised at some point prior to trial and that evidence may have existed or been available for use at the time of the trial or plea hearing.

{¶16} It is appellant's burden to have the transcript prepared for inclusion in the record on appeal and to ensure that the record contains everything necessary for the reviewing court to determine the appeal. See App.R. 9. See also *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Because appellant has failed to provide a transcript of the proceedings, we "must presume the regularity of the proceedings below." *State v. Rehaut*, 10th Dist. No. 02AP-570, 2003-Ohio-884, ¶13, citing *State v. Ervin*, 3rd Dist. No. 17-01-14, 2002-Ohio-2177, ¶18.

{¶17} Furthermore, appellant could have (but did not) raise claims regarding ineffective assistance of counsel, a violation of his constitutional rights, or a lack of competency on direct appeal.

{¶18} Instead, appellant has attached unauthenticated documents containing psychological evaluations, a federal pre-sentence investigation, and various mental assessment reports, among other documents, to his petition. Even if we assumed, arguendo, that competency information was not available in 1992, without a proper, signed affidavit to authenticate these documents, they are not competent, relevant, and material evidence and do not establish substantive grounds for relief.

{¶19} Postconviction petitions must also be timely. Am.Sub.S.B. No. 4 imposed time limits on postconviction petitioners. This legislation went into effect on September 21, 1995. Under R.C. 2953.21(A)(2), petitions must be filed "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction[.]" For individuals who were sentenced prior to September 21, 1995, Am.Sub.S.B. No. 4, Sec. 3, required those persons seeking postconviction relief to file within the time frame set forth in R.C. 2953.21(A)(2) or within one year from the effective date of the legislation, whichever was later.

{¶20} In the instant case, appellant's petition was required to be filed by September 21, 1996. However, appellant did not file his petition until November 17, 2008, some 12 years beyond that deadline. Although R.C. 2953.23 provides exceptions to the timely filing requirement, appellant's case does not meet one of the exceptions. Appellant has not presented DNA evidence which establishes his actual innocence. Nor has he sufficiently established that either: (1) he was unavoidably prevented from

discovering the facts upon which he relies to present his claim for relief, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively. Even if he could satisfy one of those two conditions, appellant would also have to demonstrate that, but for constitutional error at trial, no reasonable fact finder would have found him guilty of the offense. Appellant is unable to meet these requirements. Accordingly, we find appellant's petition to be untimely.

{¶21} Even if we looked to the merits of appellant's petition, he would not prevail. There is nothing in the record to show that appellant was not competent to enter into the plea in August 1992. While the materials submitted with his petition suggest that, at some points in time, appellant was limited in some areas, there are other documents which indicate that appellant had been evaluated and found to be competent in Montgomery County. Notably, appellant is also presently serving a criminal sentence in the federal prison system. (See return address listed on appellant's certificate of service.)

{¶22} Furthermore, an I.Q. score alone does not adequately address whether appellant was capable of knowingly, intelligently, and voluntarily waiving his right to trial and choosing to enter a guilty plea. "[M]entally retarded persons frequently * * * are competent to stand trial." *State v. Were*, 118 Ohio St.3d 448, 455, 2008-Ohio-2762, ¶48, quoting *Atkins v. Virginia* (2002), 536 U.S. 304, 318, 122 S.Ct. 2242. See also *State v. Southerland*, 10th Dist. No. 06AP-11, 2007-Ohio-379, ¶20 ("Mental retardation, in itself, is not enough to support a claim of incompetence."); *State v. Beck*, 1st Dist. No. C-020432, 2003-Ohio-5838. Moreover, appellant's request for an evaluation to determine whether or not he is currently competent now would not be useful in showing whether or not he was competent at the time of his August 1992 plea.

{¶23} Finally, appellant has asserted that his trial counsel was ineffective in failing to discover and inform the court of his incompetency and/or mental retardation and in failing to file an appeal on his behalf. We reject this argument.

{¶24} In order to prevail on a claim for ineffective assistance of counsel, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Appellant is unable to meet this standard.

{¶25} First, it is apparent from the record that appellant's counsel requested a competency evaluation, thereby bringing the potential issue to the attention of the court. Because appellant failed to provide this court with a transcript of the proceedings, we cannot determine anything more and must presume regularity in the proceedings. Second, a guilty plea waives all appealable orders except for a challenge asserting that the defendant's guilty plea was not knowingly, intelligently, and voluntarily entered. *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130. A guilty plea is considered to be knowing, intelligent, and voluntary if, prior to accepting the guilty plea, the trial court substantially complies with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 107-08. Also, as previously stated, an I.Q. score alone does not adequately address whether appellant was capable of knowingly, intelligently, and voluntarily waiving his right to trial and choosing to enter a guilty plea. Here, without the transcript, we cannot assess a claimed challenge to a knowing, intelligent, and voluntary plea. Thus, we must presume regularity in the proceedings and therefore presume there was no reason for trial counsel to file an appeal on appellant's behalf.

{¶26} For the reasons cited above, appellant's first and second assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, J., concurs in judgment only.
SADLER, J., concurs separately.

SADLER, J., concurring separately.

{¶27} The trial court correctly denied appellant's petition because appellant filed it untimely. That being a sufficient and complete ground upon which to affirm the trial court's judgment, I would not go on to reach the other issues raised by appellant. Because appellant's postconviction relief petition was untimely, I concur in the disposition of appellant's appeal.
