

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 12AP-516
	:	(C.P.C. No. 07CR-06-4568)
Kim L. Anderson,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 13, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Kim L. Anderson, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Kim L. Anderson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his motion seeking an order to show cause why a witness should not be adjudged in contempt of court ("show cause motion" or "motion"). For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2007, under common pleas case No. 07CR-06-4563, plaintiff-appellee, the State of Ohio ("State"), indicted appellant on one count of engaging in a pattern of corrupt activity, one count of theft, five counts of forgery, five counts of money laundering, one count of identity fraud, and five counts of securing writings by deception. *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566, ¶ 2. Under common pleas case No. 07CR-06-4568, the State indicted appellant on one count each of forgery,

identity fraud, and securing writings by deception. *Id.* The charges in each case related to appellant's participation in a mortgage-fraud scheme. *Id.* at ¶ 3.

{¶ 3} The trial court granted the State's motion to dismiss the securing writings by deception counts in both cases. *Id.* at ¶ 9. The jury was unable to reach a verdict on the remaining counts in case No. 07CR-06-4568 and the court dismissed the case. The jury found appellant guilty of the remaining counts in case No. 07CR-06-4563 and the court sentenced appellant to a total prison term of 15 years imprisonment. *Id.*

{¶ 4} Appellant filed a direct appeal from his convictions raising five assignments of error. On December 15, 2009, this court overruled each assignment of error and affirmed appellant's convictions. *Id.* The Supreme Court of Ohio subsequently affirmed this court's judgment. *In re cases Held for Decision in State v. Hodge*, 128 Ohio St.3d 234, 2011-Ohio-228, ¶ 6.

{¶ 5} On December 17, 2010, under case No. 07CR-06-4568, appellant filed the show cause motion, asking the court to enter an order requiring Christine Spencer, a witness in appellant's trial, to answer and show cause why she should not be held in contempt of court. Appellant asserted that Spencer committed perjury during his trial, alleging that the "prosecution's own expert witnesses contradict[ed] the testimony of Christine Spencer, not once but several times [during trial] with other expert witnesses as well." (Show cause motion, 2.) Appellant also alleged in the motion that "Christine Spencer has made statements concerning this case to the Court's," in violation of the court's order "barring all witnesses and potential witnesses from making extrajudicial statements." (Show cause motion, 2, 1.)

{¶ 6} Under case No. 07CR-06-4568, appellant also filed an "Affidavit for Arrest (or) Prosecution Pursuant to R.C. 2935.09" detailing the allegedly false testimony Spencer provided during the trial. Appellant subsequently filed a document asking the court to strike the affidavit for arrest or prosecution due to clerical errors. Appellant submitted a corrected affidavit for arrest or prosecution, alleging the same facts as the previous affidavit, but clarifying that Spencer's perjured testimony occurred in case No. 07CR-06-4563.

{¶ 7} On May 17, 2012, the trial court issued a decision and entry denying the show cause motion ("Decision"). The court held that appellant's claims regarding

extrajudicial statements and perjury fell "within that class of claims that either were, or could have been, raised at the time of his appeal, OR within the time limits for post-conviction relief set forth by statute." (Decision, 3.) Accordingly, the court concluded that res judicata acted as a jurisdictional bar which precluded the court from considering the merits of the show cause motion. The court noted that the res judicata finding related to the convictions in case No. 07CR-06-4563. Regarding case No. 07CR-06-4568, the court held that "[b]ecause of the dismissal, there is nothing to appeal. That case is over. There were no convictions." (Decision, 3.)

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellant appeals, assigning the following errors:

[I.] MS. CHRISTINE SPENCER'S, PERJURY IS CONTEMPT COMMITTED IN THE PRESENCE OF THE COURT, IN AN OFFICIAL PROCEEDING, BEFORE THE FRANKLIN COUNTY, COMMON PLEAS COURT OF OHIO, AND THE JURY. THEREFORE, THERE SHOULD HAVE BEEN A REVIEW PURSUANT TO PLAIN ERROR ANALYSIS, BECAUSE, MS. SPENCER, DID KNOWINGLY MAKE A FALSE STATEMENT, UNDER OATH AND MATERIAL TO SAID PROCEEDING IN VIOLATION OF SECTION 2921.11 OF THE REVISED CODE. (PERJURY.)

[II.] APPELLANT WAS PREJUDICED BY THE STATE OF OHIO AND ITS AGENTS FOR CONTEMPT OF THE TRIAL COURT'S STATE WITNESS THAT CRIMINALLY INJURED APPELLANT DURING TRIAL WITH PERJURY, THE TRIAL COURT ERRED IN VIOLATION OF THE UNITED STATE'S AND THE STATE OF OHIO'S CONSTITUTION BY NOT RECOGNIZING THE PERJURY AND THE CONTEMPT COMMITTED IN THE PRESENCE OF THE COURT AND NOT CORRECTING THE INJURY TO THE APPELLANT. (2) THE TRIAL COURT ABUSED [ITS] DISCRETION WHEN THE TRIAL COURT CREATED AN UNJUST, AND UNNECESSARY DELAY OF OVER 515 DAYS BEFORE RULING ON SAID MOTION, WHICH CAUSED APPELLANT PREJUDICE.

III. NO RIGHT OF APPEAL AND MOTION PROPERLY DENIED

{¶ 9} Under his first assignment of error, appellant cites to several pages of transcript from the underlying case to support his allegation that Spencer's perjury amounted to direct contempt. Appellant has not filed a transcript from the trial in the underlying case, *see* App.R. 9(B)(3), and the record before this court concerns only case

No. 07CR-06-4568. Appellant's claims regarding contempt and perjury under case No. 07CR-06-4568 are moot, as appellant was never convicted and the case was dismissed. However, because the trial court considered appellant's show cause motion relative to case No. 07CR-06-4563 as well, in the interest of justice, we will similarly analyze appellant's appeal as it relates to case No. 07CR-06-4563.

{¶ 10} Contempt is generally " 'conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.' " *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 15 (1988), quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1971), paragraph one of the syllabus. Contempt may be characterized as either direct or indirect. *Sansom v. Sansom*, 10th Dist. No. 05AP-645, 2006-Ohio-3909, ¶ 23. Direct contempt occurs in the presence of the court and obstructs the administration of justice. *Id.* See R.C. 2705.01. Indirect contempt involves behavior which occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders. *Id.* at ¶ 23. See R.C. 2705.02. Courts may further classify contempt as civil or criminal, depending on the character and purpose of the contempt sanctions. *Id.* at ¶ 24. When reviewing a finding of contempt, an appellate court applies an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶ 12.

{¶ 11} However, "[t]here is no right of appeal from the dismissal of a contempt motion when the party making the motion is not prejudiced by the dismissal." *Denovchek* at syllabus. Absent prejudice, there is no right of appeal because "contempt is essentially a matter between the court and the person who disobeys a court order or interferes with court processes." *Id.* at 17. See *McCarthy v. Lippitt*, 6th Dist. No. 04-MO-1, 2004-Ohio-5367, ¶ 43 (because the McCarthys suffered no prejudice from the denial of their contempt motion, they had "no right of appeal on this matter"); *Natl. Equity Title Agency, Inc. v. Rivera*, 147 Ohio App.3d 246, 255 (1st Dist.2001) (noting that when the "trial court [does] not believe that its authority require[s] vindication, [the contempt movant cannot] force the court to assert its own authority"). Compare *State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10 (1981) (cited in *Denovchek* as an example of prejudice, the residents of Summit County eligible to receive poor-relief payments were prejudiced by the court's denial of their motion seeking contempt charges against Summit

County officials for failing to establish proper standards of poor-relief payments, as required by previous court orders).

{¶ 12} Appellant asserted in his show cause motion that Spencer's extrajudicial statements and perjury deprived him of a fair trial. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if any reasonable likelihood exists that the false testimony could have affected the jury's judgment. *State v. Ojile*, 1st Dist. No. C-110677, 2012-Ohio-6015, ¶ 80, citing *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). On the scant record before this court, it is unclear whether the jury relied on Spencer's allegedly false testimony to reach its verdict. *See* R.C. 2921.11. Appellant does not indicate what extrajudicial statements Spencer made or how such statements affected the outcome of his trial. Appellant has thus failed to demonstrate prejudice resulting from the trial court's denial of his show cause motion and, pursuant to *Denovchek*, appellant does not have a right to appeal the court's denial of his show cause motion.

{¶ 13} Even if appellant could establish prejudice, the trial court did not err in finding appellant's show cause motion was barred by the doctrine of 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 any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996). In the show cause motion, appellant alleged that Spencer must have provided false testimony, because Spencer's testimony conflicted with the trial testimony of other expert witnesses. Accordingly, appellant's claim regarding Spencer's perjury could have been raised at trial or in appellant's direct appeal, and res judicata now prevents appellant from attempting to raise the claim through a show cause motion. *See State v. Bozsik*, 9th Dist. No. 03CA0141-M, 2004-Ohio-4947, ¶ 14 (finding the defendant's motion asking the court to find the state prosecutors, agents, and witnesses in contempt of court was barred by res judicata because the defendant "could have, should have and did raise on direct appeal the very issues he is now raising in his contempt proceeding").

{¶ 14} Appellant's attempt to collaterally attack his convictions through the show cause motion amounts to an untimely attempt at post-conviction relief. *See* R.C.

2953.21(A)(1)(a). Post-conviction petitions must be timely 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." R.C. 2953.21(A)(2). When a post-conviction petition is untimely, the trial court lacks jurisdiction to consider it, unless the petitioner demonstrates that he can meet one of the exceptions set forth in R.C. 2953.23(A). *See State v. Satterwhite*, 10th Dist. No. 10AP-78, 2010-Ohio-3486, ¶ 8. Appellant has not asserted that any of the exceptions to the jurisdictional bar could apply in the instant case.

{¶ 15} Based on the foregoing, appellant's first assignment of error is overruled. Appellant's second assignment of error asserts that the trial court's nearly two-year delay in ruling on the show cause motion caused appellant prejudice. Our disposition of appellant's first assignment of error renders appellant's second assignment of error moot.

IV. CONCLUSION

{¶ 16} Having overruled appellant's first assignment of error, rendering appellant's second assignment of error moot, we affirm the judgment of the Franklin County Court of Common Pleas denying appellant's show cause motion.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
