

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-09-187
- vs -	:	<u>OPINION</u>
	:	6/8/2015
JAMES C. FRANCIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-09-1533

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Repper, Pagan, Cook, Ltd., Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, James C. Francis, appeals the denial of his petition for postconviction relief. For the reasons outlined below, we affirm the decision of the trial court.

{¶ 2} On March 7, 2012, Francis pled guilty to four counts of rape in violation of R.C. 2907.02(A)(1)(b). During this time, Francis retained Attorney Matthew Minor (trial counsel) to represent him. In exchange for his plea, the state agreed to dismiss specifications that the

victims were under ten years of age. A sentencing hearing was held on April 18, 2012, where the trial court sentenced Francis to two consecutive life terms with the possibility of parole after 20 years. On April 23, 2012, the trial court entered a judgment entry of sentence.

{¶ 3} Francis, pro se, filed a notice of appeal from his conviction on May 24, 2012. This Court dismissed the appeal finding it was without jurisdiction since the notice of appeal was not timely filed. *State v. Francis*, 12th Dist. Butler No. CA2012-05-111 (June 19, 2012) (Judgment Entry of Dismissal). Francis also filed a motion for a delayed appeal, which this Court also denied. *State v. Francis*, 12th Dist. Butler No. CA2012-12-251 (Jan. 31, 2013) (Entry Denying Motion to File Delayed Appeal).

{¶ 4} On November 19, 2012, Francis filed a petition for postconviction relief arguing his trial counsel was ineffective because he provided inaccurate sentencing information and failed to file a timely notice of appeal. Attached to the petition was Francis' affidavit averring that trial counsel would not represent Francis beyond the sentencing hearing and refused to preserve Francis' right to appeal. The trial court summarily dismissed Francis' postconviction relief petition pursuant R.C. 2953.21(C). In regards to the timely notice of appeal issue, the trial court reasoned, "it lacks jurisdiction to counter or overturn a decision by an appellate court as to whether or not Francis timely filed a Notice of Appeal." *State v. Francis*, Butler C.P. No. CR2011-09-1533 (Apr. 16, 2013) (*Francis I*).

{¶ 5} Francis appealed the trial court's denial of his postconviction relief petition to this Court in *State v. Francis*, 12th Dist. Butler No. CA2013-05-078, 2014-Ohio-443 (*Francis II*). This Court partially sustained Francis' assignment of error finding:

[W]e conclude that the trial court did not abuse its discretion in denying Francis' ineffective assistance claim regarding erroneous sentencing information but did err in denying, on the basis that it lacked jurisdiction to rule on it, his ineffective assistance claim regarding the failure to file a timely notice of appeal. Therefore, we remand this matter to the trial court, with instructions that it rule on Francis' ineffective assistance

claim regarding his trial counsel's failure to file a timely notice of appeal.

Id. at ¶ 1.

{¶ 6} On remand, the trial court denied Francis' postconviction relief petition finding trial counsel was not ineffective in failing to file a notice of appeal. The court reasoned trial counsel informed Francis that his representation concluded after sentencing, Francis had ample opportunity to obtain new counsel or file a pro se notice of appeal, and Francis' trial counsel was retained and not appointed. The trial court also reasoned Francis was not prejudiced.

{¶ 7} Francis now appeals, asserting a sole assignment of error:

{¶ 8} THE TRIAL COURT ERRED IN OVERRULING FRANCIS' CLAIM FOR INEFFECTIVE ASSISTANCE FOR FAILING TO FILE AN APPEAL UPON AN EXPLICIT REQUEST.

{¶ 9} Francis challenges the trial court's denial of his petition for postconviction relief and asserts this Court should conduct a de novo review of the trial court's decision. Francis maintains trial counsel was deficient when he failed to file the appeal after Francis specifically requested trial counsel to do so and Francis was prejudiced by this failure because but for trial counsel's failure, he would have appealed.

Standard of Review for a Petition for Postconviction Relief

{¶ 10} A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on a criminal judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999); *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8. An initial petition for postconviction relief is governed under R.C. 2953.21, which provides three methods for adjudicating the petition. When a criminal defendant challenges his conviction through postconviction relief, the trial court may (1)

summarily dismiss the petition without holding an evidentiary hearing pursuant to R.C. 2953.21(C), (2) grant summary judgment on the petition to either party who moved for summary judgment pursuant to R.C. 2953.21(D), or (3) hold an evidentiary hearing on the issues raised by the petition pursuant to R.C. 2953.21(E). *Francis I* at ¶ 11-13; R.C. 2953.21(C)-(E).

{¶ 11} Under R.C. 2953.21(C) "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun* at paragraph two of the syllabus. When a trial court reviews a postconviction relief petition filed pursuant to R.C. 2953.21, the court "should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Id.* at paragraph one of the syllabus.

{¶ 12} In *Francis II*, this Court characterized the trial court's decision on the postconviction relief petition in *Francis I* as "one that summarily dismissed Francis' petition under R.C. 2953.21(C) rather than as one that granted summary judgment to the state under R.C. 2953.21(D)" because the court considered evidence outside the record and reiterated the language in R.C. 2925.21(C) in its decision. *Francis II* at ¶ 15. We then concluded the appropriate standard of review for a trial court's decision to summarily deny a postconviction petition without holding an evidentiary hearing pursuant to R.C. 2953.21(C) is abuse of discretion rather than a de novo standard. *Id.* at ¶ 22, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58. In coming to this conclusion, we expressly disagreed with the Fourth District's decision in *State v. Harrington*, 172 Ohio App.3d 595, 2007-Ohio-3796 (4th Dist.), which reviewed issues of law under a de novo standard and reviewed factual findings

for whether there was sufficient evidence. *Francis I* at ¶ 18.

{¶ 13} On appeal, Francis again argues an appellate court should conduct a de novo review because Francis moved for summary judgment on his postconviction relief petition and because this appeal involves issues of law. However, the trial court's decision regarding Francis petition for postconviction relief was summarily dismissed under R.C. 2953.21(C) as the court explicitly referenced R.C. 2953.21(C) and relied on evidence outside the record. Therefore, as stated in *Francis II*, we will review the trial court's decision to summarily deny a postconviction relief petition without holding an evidentiary hearing under an abuse of discretion standard.

Ineffective Assistance of Counsel

{¶ 14} To establish a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's actions were outside the wide range of professionally competent assistance and prejudice resulted by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Sheldon*, 12th Dist. Brown No. CA2013-12-018, 2014-Ohio-5488, ¶ 40. Accordingly, counsel's performance will not be deemed ineffective unless (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by that deficient performance in that there is a reasonable probability but for counsel's deficient performance, the outcome of trial would have been different. *Strickland* at 687-688.

{¶ 15} The United States Supreme Court has applied the *Strickland* test to a case involving an attorney's failure to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000). In *Flores-Ortega*, the Supreme Court recognized the long established principle that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477. This constitutes deficient performance because "a defendant who instructs counsel to initiate an appeal

reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." (Emphasis added.) *Id.*

{¶ 16} In regards to demonstrating prejudice under *Strickland*, the Supreme Court held "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Flores-Ortega* at 484. In reaching its conclusion, the Supreme Court rejected the proposition that a defendant must always establish prejudice by showing possible success on the merits. Instead, deficient performance in this context is prejudicial because it causes the "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right." *Id.* at 483. Thus, the defendant need only "demonstrate that, but for counsel's deficient conduct, he would have appealed." *Id.* at 486.

{¶ 17} In the case at bar, attached to Francis' postconviction relief petition was his affidavit and the affidavit of trial counsel. In Francis' affidavit, he averred that his retained trial counsel did not preserve his right to appeal. Francis stated that trial counsel told Francis his obligation to Francis ended at the conclusion of the sentencing hearing and Francis asked trial counsel to preserve his right to appeal but trial counsel refused. Francis also averred:

8. That I received an appeal packet in the mail at DRC [Department of Rehabilitation and Corrections] about a week or two before the thirty (30) day appeal period expired;

9. That I met an attorney from the Ohio Public Defender's Office to perfect an appeal at the DRC;

10. That the Ohio Public Defender attorney told me I could not file an appeal without a copy of the Judgment Entry;

11. That it took two or three days to obtain a copy of the Judgment Entry;

12. That once I had a copy of the Judgment Entry I asked the Ohio Public Defender attorney to fax my Notice of Appeal to the Clerk but the attorney told me he didn't have a fax and could not file it that way;

13. That I mailed my Notice of Appeal from DRC prior to the expiration of the thirty (30) day appeal period;

{¶ 18} In trial counsel's affidavit, he averred he did not file a notice of appeal for Francis and after sentencing he advised Francis and his family members that Francis could appeal the court's decision but that he would not represent Francis in the appeal. He stated his representation concluded because his law office "did not have an appellate practice and I did not have the appropriate experience to handle such an appeal and that they should seek other representation."

{¶ 19} After a thorough review of the record, we find Francis has not set forth substantive grounds for relief based on an ineffective assistance of counsel claim. Francis has not established trial counsel acted in a manner that was professionally unreasonable because Francis did not rely upon trial counsel to file the appeal. Unlike the factual circumstances contemplated in *Flores-Ortega*, in this case, trial counsel was retained and his representation of Francis concluded at the sentencing hearing. Francis acknowledged trial counsel informed him the representation concluded at sentencing in his affidavit. See *State v. Stewart*, 7th Dist. Mahoning No. 11 MA 195, 2013-Ohio-753, ¶ 29; *State v. Wente*, 8th Dist. Cuyahoga No. 81721, 2003-Ohio-3659, ¶ 4-5. Further, Francis sought an appeal packet on his own, met with another attorney about the appeal, and began the process of filing an appeal. Consequently, Francis did not rely on trial counsel to file an appeal because Francis knew trial counsel was only retained through sentencing and Francis undertook the appeal process on his own. Therefore, trial counsel was not professionally unreasonable in

failing to file the appeal.

{¶ 20} Having concluded that trial counsel was not deficient, we need not address whether Francis suffered any prejudice. See *State v. Dovala*, 9th Dist. Lorain No. 10CA009896, 2011-Ohio-3110, ¶ 22. Therefore, the trial court did not abuse its discretion in denying Francis' petition for postconviction relief.

{¶ 21} Francis' sole assignment of error is overruled.

{¶ 22} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.