[Cite as *State v. McComb*, 2015-Ohio-2556.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26481
	:	
v.	:	Trial Court Case No. TRD-1302171
	:	
ROBERT MCCOMB	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 26th day of June, 2015.

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Robert McComb, appeals pro se from a judgment overruling his petition to set aside, vacate, and dismiss a void judgment. McComb failed to submit specific assignments of error with his brief. However, we conclude that the trial court did not err in dismissing the petition, because McComb failed to meet the requirements for obtaining relief from judgment under Civ.R. 60(B). Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 2} On March 21, 2013, Deputy Brandon Harrison of the Montgomery County Sheriff's Office issued a citation to Defendant-Appellant, Robert McComb, based on McComb's operation of a vehicle without a front license plate and without a county sticker on the rear plate, in violation of R.C. 4503.21. McComb was ordered to appear in Vandalia Municipal Court on March 28, 2013, but he failed to appear. As a result, the court issued a warrant block in May 2013.

{¶ 3} On January 13, 2014, the trial court terminated the warrant block, and on January 15, 2014, the court issued a notice indicating that trial had been set for January 30, 2014. McComb apparently did not appear for trial on that date, or appeared late, causing the court to reset the trial for February 6, 2014. Subsequently, on February 3, 2014, the trial date was cancelled and a new date of February 5, 2014, was set. McComb was personally served with notice of the new trial date.

{¶ 4} On February 4, 2014, McComb filed several pro se motions, declaring himself a "sovereign operating under common law," and denying that the State had a right

to regulate his driving privileges. McComb also filed a motion claiming that the court lacked jurisdiction because he was not a "statutory citizen" of the United States. In addition, he filed a request for a bill of particulars.

{¶ 5} On February 5, 2014, the trial court filed an entry noting that the matter came on for trial on that date and that McComb failed to appear. The trial court also denied all the pending motions based on McComb's failure to appear. Another notice was filed on February 6, 2014, indicating that trial would be held on February 27, 2014.

{¶ 6} McComb then filed another series of pro se motions. On February 24, 2014, he filed a motion to dismiss, based on the court's failure to comply with his speedy trial rights. On February 27, 2014, he also filed a demand for "GSA SF24 Bid Bond," and a "Judicial Notice," alleging that legislative traffic statutes are unconstitutional.

{¶ 7} A trial was held on February 27, 2014, before a magistrate. At that time, McComb appeared and defended himself. During the trial, the magistrate indicated that McComb's motions were filed untimely and would not be considered. However, the magistrate did elect to consider the speedy trial motion because it involved a fundamental right. After considering the docket and the parties' statements, the magistrate overruled the speedy trial motion, based on the fact that any delays in bringing the case to trial had been McComb's fault. The State then presented evidence from Deputy Harrison. McComb chose not to present any evidence at trial.

{¶ 8} After hearing the evidence, the magistrate filed a written decision on March 4, 2014, concluding that McComb had violated R.C. 4503.21 by failing to display a license plate on the front of his car. The magistrate recommended a fine of $150, with $125 suspended, and also recommended that McComb be required to pay court costs.

McComb filed objections to the magistrate's decision, but failed to supplement his objections after the trial transcript was filed.

{¶ 9} Subsequently, on July 7, 2014, the trial court filed a Final Decision and Judgment Entry overruling the objections, and finding McComb guilty of having violated R.C. 4503.21. The court fined McComb $150, plus court costs, and suspended $125 of the fine, conditioned on McComb having no moving violations for one year.

{¶ 10} McComb failed to appeal from the final judgment of the trial court. Subsequently, on September 30, 2014, McComb filed a petition to set aside, vacate, and dismiss a void judgment. In this motion, McComb alleged that the trial court lacked jurisdiction over him. He also raised the speedy trial issue.

{¶ 11} On October 16, 2014, the trial court filed an order overruling the petition to set aside the judgment. In its decision, the court noted that it had previously issued a final appealable order in the case on July 7, 2014, and that McComb's remedy was to file a direct appeal from that order. On October 24, 2014, McComb filed a notice of appeal, stating that he was appealing from the trial court's order of October 16, 2014.

II. Alleged Trial Court Error

{¶ 12} In his initial brief, McComb failed to assert any specific assignments of error, and failed to otherwise comply with the requirements of App.R. 16 (A). As a result, the State argued in its reply brief that McComb's brief should be dismissed. Nonetheless, the State then construed what it thought McComb was arguing. The State outlined two potential assignments of error, which were both based on alleged lack of jurisdiction over the subject matter of the case and lack of personal jurisdiction over McComb.

{¶ 13} In a reply brief, McComb raised five assignments of error, based on matters such as a speedy trial violation, denial of due process rights, failure to prove jurisdiction, tampering with the court docket, and failure to properly serve McComb with a notice to appear.

{¶ 14} As an initial matter, we note that we may disregard assignments of error if a party fails to separately argue the assignment of error as required by App.R. 16(A). *See, e.g., Gomez v. Kiner*, 10th Dist. Franklin Nos. 11AP-767, 11AP-768, 2012-Ohio-1019, ¶ 6-7. Furthermore, we have held that "[a]n appellant may not use a reply brief to raise new issues or assignments of error." (Citations omitted.) *State v. Murnahan*, 117 Ohio App.3d 71, 82, 689 N.E.2d 1021 (2d Dist.1996).

{¶ 15} Although we need not consider any of McComb's assignments of error, we will consider what arguments we can glean from his initial appellate brief. We will not consider the matters raised in McComb's reply brief, to the extent those issues were not raised in his initial appellate brief, because the State did not have an opportunity to file a reply.

{¶ 16} More importantly, before addressing any arguments, we should outline the limited parameters of this appeal. As was noted, McComb did not appeal from the final judgment of conviction and sentence that was entered on July 7, 2014. Instead, he appealed only from the judgment entry filed on October 16, 2014, which overruled his petition to vacate the prior judgment Our discussion, therefore, will be limited to the matters raised in the petition and the judgment overruling it.

{¶ 17} In his brief, McComb contends that the trial court erred in failing to address the merits of his petition. After considering the record, we agree that the trial court failed

to consider the merits of the petition. However, for the reasons that follow, we also conclude that the petition was properly dismissed.

{¶ 18} Following a conviction, there are limited avenues for post-conviction relief. One avenue is outlined in R.C. 2953.21(A)(1)(a), which provides, in pertinent part, that:

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

{¶ 19} However, in *State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583, 805 N.E.2d 1085, the Supreme Court of Ohio held that "[a] municipal court is without jurisdiction to review a petition for post-conviction relief filed pursuant to R.C. 2953.21." *Id.* at syllabus. In particular, the court stressed that:

> Municipal courts are creatures of statute and have limited jurisdiction. R.C. 1901.18 and 1901.20 provide for their creation, with the former statute relating to civil matters and the latter relating to criminal and traffic matters. Neither R.C.1901.18 nor R.C.1901.20 provides for jurisdiction over post-conviction relief petitions in municipal court. Had the General Assembly envisioned such jurisdiction, it could have explicitly conferred it in R.C. Chapter 1901.

Id. at ¶ 11.

{¶ 20} The court also focused on its prior decision in *Dayton v. Hill*, 21 Ohio St.2d 125, 256 N.E.2d 194 (1970), which had held that "to allow municipal courts to review post-conviction petitions 'would create chaos and uncertainty at both county and municipal levels of government as to how to process postconviction petitions filed under circumstances obviously not envisioned by the General Assembly.' " *Cowan* at ¶ 18, quoting *Hill* at 128. The court went on to note that:

> In the years since this court's decision in *Hill,* the General Assembly has amended the post-conviction relief statute several times but still has never provided a procedure for handling any type of post-conviction petition in municipal court. *See, e.g.*, 146 Ohio Laws, Part IV, 7815, 7823 (eff. 9-21-95); 146 Ohio Laws, Part VI, 10539, 10549 (eff. 10-16-96); Sub.S.B. No. 11 (eff. 10-29-03). In order for this court to hold that R.C. 2953.21 allows for municipal court jurisdiction, we would have to devise a procedure under which this post-conviction review could be accomplished in municipal court, since it is not provided in the plain language of the statute. To create this procedure would be to rewrite the statute, a function that must be left to the discretion of the General Assembly if it disagrees with the interpretations taken by this court.

Id. at ¶ 19.

{¶ 21} After the decision in *Cowan*, the First District Court of Appeals concluded that criminal defendants in municipal court could bring motions for relief from judgment under Civ.R. 60(B)(5). *See Miller v. Walton*, 163 Ohio App.3d 703, 2005-Ohio-4855, 840

N.E.2d 222, ¶ 16-17 (1st Dist.). In *Miller*, the defendant filed a post-conviction petition under R.C. 2953.21 based on ineffective assistance of counsel in failing to demand a jury trial. *Id.* at ¶ 3. After the municipal court denied the petition, the defendant filed a petition for a writ of habeas corpus in common pleas court, which was also denied. *Id.* at ¶ 4. On further appeal to the First District Court of Appeals, the judgment of the common pleas court was affirmed. *Id.* at ¶ 19.

{¶ 22} The court of appeals first observed that the R.C. 2953.21 petition had been properly denied under *Cowan. Id. at ¶ 8.* The court then disagreed with the reason of the common pleas court for dismissing the habeas petition, i.e., that the defendant had an adequate legal remedy by virtue of a direct appeal from his conviction. *Id.* at ¶ 12. In this regard, the court stressed that the defendant could not have raised the issue on direct appeal because it involved matters outside the record. *Id.* Nonetheless, the court of appeals affirmed the dismissal of the habeas petition because the defendant had been given community control and, therefore, was not in the State's actual physical custody for habeas purposes. *Id.* at ¶ 14.

{¶ 23} Because this left an individual in the defendant's situation without a remedy, the First District Court of Appeals relied on Civ.R. 57 and Civ.R. 60(B)(5) to fashion a remedy. In addressing this point, the court stated that:

> We note that Crim.R. 57(B) provides that "[i]f no procedure is specifically prescribed by rule, [a] court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." The criminal rules thus contemplate resort to the civil

> rules for procedures not anticipated by the criminal rules. And Civ.R. 60(B)(5) permits relief from a judgment for "any * * * reason justifying [such] relief." It follows that Civ.R. 60(B) may afford a criminal defendant relief from a judgment of conviction.

Miller at ¶ 17.

{¶ 24} We have also held that, in criminal cases, municipal courts may entertain motions to vacate their own judgments pursuant to Civ.R. 60(B). *See State v. Minne*, 2d Dist. Montgomery No. 23390, 2010-Ohio-2269, ¶ 13, citing *State v. Mattachione*, 2d Dist. Greene No.2004 CA 80, 2005-Ohio-2769, ¶ 9 and 13. *Accord State v. Alexander*, 2d Dist. Darke No. 2014-CA-5, 2014-Ohio-4859, ¶ 12.

{¶ 25} In *GTE Automatic Elec., Inc. v. ARC Industries, Inc*., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), the Supreme Court of Ohio held that:

> To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

Id. at paragraph two of the syllabus.

{¶ 26} "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994), citing *GTE* at 151. Furthermore, we review the trial

court's decision for abuse of discretion. (Citation omitted.) *Id.* An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 27} After reviewing the trial court decision, we cannot find that the trial court abused its discretion. The sole reason the trial court gave for denying the petition was that the court had previously entered a final appealable order, and McComb's remedy was to file a direct appeal. While this may be generally correct, McComb's petition was styled as a petition to vacate the judgment. As a result, the court should have considered it as a motion to vacate the judgment pursuant to Civ.R. 60(B), which is permitted under our decisions in *Minne*, *Mattachione,* and *Alexander.*

{¶ 28} Despite the trial court's error in failing to consider the application of Civ.R. 60(B), the petition was properly dismissed, because McComb failed to comply with the requirements of the rule. In Civ.R. 60(B) situations, "[t]he movant has the burden of proving that he is entitled to the relief requested or to a hearing on the motion. Therefore, he must submit factual material which on its face demonstrates the timeliness of the motion, reasons why the motion should be granted and that he has a defense." *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974).

{¶ 29} As an initial matter, McComb failed to present facts indicating that he had a meritorious claim or defense to present. " 'A "meritorious defense" means a defense "going to the merits, substance, or essentials of the case." ' " *UBS Real Estate Securities, Inc. v. Teague*, 191 Ohio App.3d 189, 2010-Ohio-5634, 945 N.E.2d 573, ¶ 23 (2d Dist.), quoting *Wayne Mut. Ins. Co. v. Marlow*, 2d Dist. Montgomery No. 16882, 1998

WL 288912, *2 (June 5, 1998). (Other citation omitted.) "A party seeking relief from judgment is not required to prove that he or she will prevail on the meritorious defense; the movant is merely required to allege the existence of such a defense." *Id.*, citing *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, 889 N.E.2d 162, ¶ 10 (2d Dist.).

{¶ 30} The only defenses raised in McComb's petition pertain to the trial court's alleged lack of subject matter jurisdiction, a failure (presumably by the State) to prove jurisdiction, improper service, alleged back-dating of court dockets, and inadmissible evidence presented by the State. However, these matters would have been apparent on the record, and were thus cognizable on direct appeal. To the extent matters outside the record may have been involved, the allegations were not supported by any factual materials submitted by McComb. Furthermore, the allegations do not involve the merits or substance of the case, which concerned whether McComb operated a vehicle without displaying "in plain view on the front and rear of the motor vehicle the distinctive number and registration mark, including any county identification sticker * * *." R.C. 4503.21(A).

{¶ 31} As to the second prong of the test, "Civ.R. 60(B) permits trial courts to relieve parties from a final judgment for the following reasons: (1) 'mistake, inadvertence, surprise or excusable neglect,' (2) newly discovered evidence, (3) fraud, misrepresentation or other misconduct of an adverse party, (4) the judgment has been satisfied, released or discharged, or (5) any other reason justifying relief from the judgment." *Teague* at ¶ 27. In this regard, McComb failed to specifically raise any of the grounds in Civ.R. 60(B); in fact, he did not even refer to the rule.

{¶ 32} The only ground arguably raised in the petition is fraud. "The fraud or misconduct contemplated by Civ.R. 60(B)(3) is fraud or misconduct on the part of the

adverse party in obtaining the judgment by preventing the losing party from fully and fairly presenting his defense, not fraud or misconduct which in itself would have amounted to a claim or defense in the case." (Citations omitted.) *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12AP-256, 2012-Ohio-5383, ¶ 15. "Fraud on an adverse party may exist when, for example, a party presents material false testimony at trial, and the falsity is not discovered until after the trial." (Citation omitted.) *Id.*

{¶ 33} Although the petition generally mentions fraud, it is devoid of any specific facts indicating that the State engaged in misconduct preventing McComb from defending the case. The only comment about fraud in the petition is that the trial court and magistrate committed fraud by overruling McComb's timely-filed motions. Petition to Set Aside, Vacate and Dismiss Void Judgment, filed on September 30, 2014, p. 7. However, the fact that the court overruled McComb's motion does not arguably involve "fraud," and has nothing to do with the adverse party's conduct. In addition, this alleged "fraud" would have been apparent on the record, and would have been cognizable on direct appeal.

{¶ 34} The final requirement under Civ.R.60(B) is that the petition be filed within a reasonable time, and "where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment" was rendered. The petition was filed fairly promptly, within a few months of judgment, and McComb appears to have satisfied this requirement. However, McComb failed to meet two of the other necessary requirements for Civ.R. 60(B) relief. One such failure is fatal, and the trial court, therefore, did not err in denying the petition to vacate the judgment, even though the court's reasoning was incorrect.

{¶ 35} Based on the preceding discussion, McComb's assignments of error, to the

extent they can be deciphered, are without merit and are overruled.

III. Conclusion

{¶ 36} All of McComb's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FAIN, J., and DONOVAN, J., concur.

Copies mailed to:

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