

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case Nos. 14CA3649
		15CA3679
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
		<u>JUDGMENT ENTRY</u>
JERONE McDOUGALD,	:	
Defendant-Appellant.	:	RELEASED: 10/5/2015

APPEARANCES:

Jerone McDougald, Lucasville, Ohio, pro se appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay S. Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Jerone McDougald appeals the Scioto County Court of Common Pleas' judgment denying his third and fourth petitions for postconviction relief. McDougald contends that the court erred in denying his petitions, which raised claims challenging the jurisdiction of the trial court, the state's use of false testimony during the trial, the withholding of an arresting officer's report, and the failure of the trial court to enter a final judgment in his criminal case.

{¶2} We reject McDougald's claims. He failed to demonstrate the requirements necessary for the trial court to address the merits of his untimely claims. Moreover, res judicata barred the proceedings because he either raised or could have raised these claims on direct appeal or in one of his earlier postconviction petitions for relief.

{¶3} Therefore, we overrule his assignments of error and affirm the judgments of the trial court denying his petitions.

I. FACTS¹

{¶4} On December 18, 2006, authorities searched the premises at 1119 17th Street in Portsmouth and found crack cocaine, money, digital scales, and a pistol. They arrested the two occupants of the residence, McDougald and Kendra White, at the scene.

{¶5} Subsequently, the Scioto County Grand Jury returned an indictment charging McDougald with drug possession, drug trafficking, possession of criminal tools, and the possession of a firearm while under disability. McDougald pleaded not guilty to all charges.

{¶6} At the jury trial Kendra White testified that McDougald used her home to sell crack cocaine and that she also sold drugs on his behalf as well. She also testified that the digital scales belonged to McDougald and, although the pistol belonged to her ex-boyfriend, Benny Simpson (who was then incarcerated), McDougald asked her to bring it inside the home so that he would feel more secure. White explained that Simpson previously used the pistol to shoot at her, but threw it somewhere in the backyard when he left. Simpson then allegedly called White from jail and instructed her to retrieve the pistol. White complied and then hid it “under the tool shed” until McDougald instructed her to retrieve it and bring it inside the house. White confirmed that she saw McDougald at the premises with the gun on his person.

{¶7} Jesse Dixon and Melinda Elrod both testified that they purchased crack cocaine from McDougald at the residence. Shawna Lattimore testified that she served

¹ Except where otherwise noted, these facts are taken from our opinion in *State v. McDougald*, 4th Dist. Scioto No. 07CA3157, 2008-Ohio-1398.

as a “middleman” for McDougald's drug operation and also helped him transport drugs from Dayton. She testified that she also saw McDougald carry the pistol.

{¶8} The jury returned guilty verdicts on all counts. The trial court sentenced McDougald to serve five years on the possession count, nine years for trafficking, one year for the possession of criminal tools, and five years for the possession of a firearm while under disability. The court ordered the sentences to be served consecutively for a total of twenty years imprisonment. The sentences were included in a judgment entry filed April 30, 2007, as well as a nunc pro tunc judgment entry filed May 16, 2007.

(OP64, 68)

{¶9} In McDougald's direct appeal where he was represented by counsel, we affirmed his convictions and sentence. *McDougald*, 4th Dist. Scioto No. 07CA3157, 2008-Ohio-1398. We rejected McDougald's contention that because the only evidence to link him to the drugs, scales, and weapon found on the premises was “the testimony of admitted drug addicts and felons,” the verdicts were against the manifest weight of the evidence:

*** appellant's trial counsel skillfully cross-examined the prosecution's witnesses as to their statuses as drug addicts and convicted felons. Counsel also drew attention to the fact that some of the witnesses may actually benefit from the testimony that they gave. That evidence notwithstanding, the jury obviously chose to believe the prosecution's version of the events. Because the jury was in a better position to view those witnesses and determine witness credibility, we will not second-guess them on these issues.

Id. at ¶ 8, 10.

{¶10} In January 2009, McDougald filed his first petition for postconviction relief. He claimed that he was denied his Sixth Amendment right to confrontation when the trial court admitted a drug laboratory analysis report into evidence over his objection.

The trial court denied the petition, and we affirmed the trial court's judgment. *State v. McDougald*, 4th Dist. Scioto No. 09CA3278, 2009-Ohio-4417.

{¶11} In October 2009, McDougald filed his second petition for postconviction relief. He again claimed that he was denied his Sixth Amendment right of confrontation when the trial court admitted the drug laboratory analysis report. The trial court denied the petition, and McDougald did not appeal the judgment.

{¶12} In July 2014, McDougald filed his third petition for postconviction relief. He claimed that: (1) the trial court lacked jurisdiction to convict and sentence him because the original complaint filed in the Portsmouth Municipal Court was based on false statements sworn to by the officers; (2) the prosecuting attorney knowingly used and relied on false and perjured testimony in procuring the convictions against him; and (3) the state denied him his right to due process by withholding exculpatory evidence, i.e., a drug task force report. To his petition McDougald attached the report, the municipal court complaints, a portion of the trial transcript testimony of Kendra White, his request for discovery, and the state's answer to his request for discovery. The trial court denied the petition because it was untimely and did not fall within an exception justifying its late filing. McDougald appealed from the trial court's judgment denying his third petition for postconviction relief in Case No. 14CA3649.

{¶13} In December 2014, McDougald filed his fourth petition for postconviction relief. He claimed that his sentence is void because the trial court never properly entered a final order in his criminal case. The trial court denied the petition. McDougald appealed from the trial court's judgment denying his fourth petition for postconviction relief in Case No. 15CA3679.

{¶14} We consolidated McDougald’s appeals in Case Nos. 14CA3649 and 15CA3679.

II. ASSIGNMENTS OF ERROR

{¶15} In Case No. 14CA3649, McDougald assigns the following errors for our review:

1. The trial court was without competent jurisdiction.
2. The prosecution used false testimony and failed to correct it.
3. The prosecution withheld arresting officers['] police reports.

{¶16} In Case No. 15CA3679, McDougald assigns the following error for our review:

1. No proper or finalized judgment entry of sentence has been entered by the trial court rendering the sentence void.

III. STANDARD OF REVIEW

{¶17} The postconviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Postconviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Id.* It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, ¶ 18.

{¶18} “[A] trial court’s decision granting or denying a postconviction relief petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *State v.*

Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58. A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *In re H. V.*, 138 Ohio St.3d 408, 2014–Ohio–812, 7 N.E.3d 1173, ¶ 8.

IV. LAW AND ANALYSIS

A. Third Petition for Postconviction Relief

{¶19} In Case No. 14CA3649, McDougald asserts that the trial court abused its discretion in denying his third petition for postconviction relief.

{¶20} R.C. 2953(A)(2) provides that a petition for postconviction relief must be filed no later than 180 days after the date on which the trial transcript is filed with the court of appeals in the direct appeal. *State v. Burkes*, 4th Dist. Scioto No. 13CA3582, 2014-Ohio-3311, ¶ 16. McDougald’s third petition, which was filed over seven years after the trial court convicted and sentenced him in the underlying criminal case, was filed well after the 180-day period had expired.

{¶21} R.C. 2953.23(A) authorizes a trial court to address the merits of an untimely filed petition for postconviction relief if:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶22} In his first assignment of error McDougald claims that the trial court abused its discretion by denying his claim that the trial court lacked jurisdiction over his criminal case because the charging officers falsified the criminal complaints they filed in municipal court. He argues that based on a Southern Ohio Law Enforcement Drug Task Force Report that was not disclosed to him or his counsel in discovery provided by the state, those complaints, which stated that he possessed approximately 92 grams of cocaine and \$926 cash when he was arrested, were false. That report noted that 17 grams of crack cocaine was found inside White's pants and that 75 grams of crack cocaine was found inside a hat on a stuffed bear in a downstairs bedroom. The report further noted that \$440 in cash was found on White's person and that \$485 of cash was found in McDougald's pockets. In his third assignment of error McDougald contends that the trial court abused its discretion by denying the claim that the trial court violated his due process by failing to provide a copy of the drug task force report in discovery.

{¶23} It is questionable whether McDougald established that he met the requirement under R.C. 2953.23(A)(1)(a) that he was either unavoidably prevented from the discovery of the facts upon which he relied or that the United States Supreme Court recognized a right that applied retroactively to him. He cites no new right and we are aware of no new right that the Supreme Court recognized that applied retroactively to him. McDougald never specifically alleged how he was unavoidably prevented from discovering the report at the time he filed his first and second petitions for postconviction relief.

{¶24} Moreover, McDougald cannot establish by the requisite clear and convincing evidence that if he had had timely access to the drug task force report, "no

reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.” R.C. 2953.23(A)(1)(b). First, any defect in the complaints in municipal court would not have divested the common pleas court of jurisdiction over the criminal charges set forth in the subsequent indictment. See *Monroe v. Jackson*, 119 Ohio St.3d 344, 2008-Ohio-4480, 894 N.E.2d 43, ¶ 4 (holding that the manner by which an accused is charged with a crime is procedural rather than jurisdictional, and after a conviction for crimes charged in an indictment, the judgment binds the defendant for the crime for which he is incarcerated). Second, the drug task force report does not prove that the municipal court complaints were false. The report would merely have been cumulative to the other evidence admitted at trial. For example, Portsmouth Police Sgt. Steven Timberlake testified that on December 18, 2006, in executing the search warrant at 1119 17th Street in Portsmouth, they seized \$485 from McDougald, \$440 from White, 17 grams of cocaine from White, and cocaine from the hat on a teddy bear in the downstairs bedroom. White testified that McDougald sold drugs out of her home and that she sold drugs on his behalf. This did not constitute material, exculpatory evidence that the state improperly withheld from McDougald.

{¶25} For his remaining claim in his second assignment of error, McDougald contended that the state used false testimony to procure the convictions against him in the criminal case. He contended that White lied because she did not initially advise law enforcement officers that the drugs and money seized during the search of the residence belonged to McDougald. But at trial White explained why she did not initially advise the officers that the items seized were McDougald’s—“Because I wasn’t a snitch. But since he tried to put it on me, I told them it wasn’t mine, it was his.” Again, any

newly discovered evidence would have been merely cumulative to what was already in his counsel's possession and would not have resulted in different verdicts.

McDougald's claimed lack of access to the record specified in his petition—the drug task force report—did not impact the outcome of his criminal case or direct appeal. See *State v. Heid*, 4th Dist. Scioto No. 14CA3655, 2015-Ohio-1467, ¶ 18.

{¶26} Moreover, res judicata barred McDougald from raising these claims, which he either raised or could have raised in his appeal or previous petitions for postconviction relief. See *State v. Pemberton*, 4th Dist. Gallia No. 13CA8, 2014-Ohio-1204, ¶ 13, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 93, 671 N.E.2d 233 (1996). His claim attacking the credibility of the state's witnesses is similar to his manifest-weight argument raised in his direct appeal. *McDougald*, 4th Dist. Scioto No. 07CA3157, ¶ 8, 10. And his remaining claims could have been raised at trial, on direct appeal, or in prior petitions for postconviction relief based on evidence comparable to that contained in the drug task force report he relied on to support his third petition.

{¶27} Therefore, the trial court did not abuse its considerable discretion by denying McDougald's third petition for postconviction relief. We overrule his first, second, and third assignments of error.

B. Fourth Petition for Postconviction Relief

{¶28} In Case No. 15CA3679, McDougald contends that the trial court abused its discretion in denying his fourth petition for postconviction relief. In that petition he claimed that the trial court never entered a final order in his criminal case. The trial court issued a sentencing entry in April 2007 and a nunc pro tunc sentencing entry in May 2007.

{¶29} McDougald's petition, which was filed over seven years after his sentencing entries, was untimely. Furthermore, he did not establish that he was unavoidably prevented from discovering the alleged defect in the sentencing entries so as to prevent him from raising his claim in his direct appeal. If McDougald believed there was error in our acceptance and review of the judgment he now claims was not final, "his remedy was by way of further review in the Ohio Supreme Court, and not in a postconviction attempt at the trial court level to have the sentence declared void." *State v. Fowler*, 5th Dist. Mahoning No. 14 MA 124, 2015-Ohio-1053, ¶ 16.

{¶30} In addition, he did not establish any error in the sentencing entries. A judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 14; *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 38. Each of the trial court's sentencing entries satisfied the foregoing requirements, thus making them final and appealable and conferring jurisdiction on this court to decide his direct appeal in *McDougald*, 4th Dist. Scioto No. 07CA3157, 2008-Ohio-1398.

{¶31} Therefore, the trial court did not abuse its broad discretion in denying McDougald's fourth petition for postconviction relief.

V. CONCLUSION

{¶32} The trial court did not act in an unreasonable, arbitrary, or unconscionable manner by denying McDougald's third and fourth petitions for postconviction relief. Having overruled his assignments of error, we affirm the judgments of the trial court.

JUDGMENTS AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS ARE AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for these appeals.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.