

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

STATE OF OHIO,	:	Case No. 18CA710
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
MARK BETTS,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 06/28/2018

APPEARANCES:

Mark Betts, Nelsonville, Ohio, pro se.

Mike DeWine, Ohio Attorney General, and Micah R. Ault, Ohio Assistant Attorney General, Cleveland, Ohio, for appellee.

Harsha, J.

{¶1} After Mark Betts pleaded guilty to a felony, the Vinton County Court of Common Pleas sentenced him. Betts appealed, contending that he did not knowingly, intelligently, and voluntarily enter his guilty plea because the trial court failed to advise him of the maximum potential sentence involved. We disagreed and affirmed his conviction. *State v. Betts*, 4th Dist. Vinton No. 17CA706, 2017-Ohio-8595.

{¶2} Then Betts filed a postconviction relief petition contending a violation of his Sixth Amendment right to counsel due to ineffective assistance of trial counsel, and a violation of his Fourteenth Amendment right to due process. Betts argued that his trial counsel failed to raise defects in the indictment and failed to assert a statute of limitations defense. The trial court reviewed the petition and supporting documents, found no substantive grounds for relief, and denied the petition without a hearing.

{¶3} On appeal Betts fails to attribute error to the trial court but rather re-argues the issues raised in his petition and raises several new legal challenges. Betts broadly

argues a violation of his Sixth Amendment right to effective assistance of counsel. He contends that defects in the indictment involved fraud, misrepresentation, and abuse of legal proceedings. He asserts that the state did not comply with the applicable criminal rule when it filed the indictment because the clerk left blank the certification section. Betts misunderstands the function of the certification. The record shows that the indictment was signed and filed in accordance with the requirements of Crim. R. 6. The trial court did not abuse its discretion in determining that Betts provided no evidence of substantive grounds for relief on his challenge to the indictment or the ineffective assistance of counsel claim associated with this challenge. We overrule his first assignment of error.

{¶4} In his next two assignments of error, Betts contends that witness statements obtained by investigators do not provide clear and convincing evidence that Betts committed theft or attempted theft. However, Betts waived his right to challenge the state's evidence or issues concerning factual guilt when he entered his guilty plea. Moreover, he did not raise these contentions in his postconviction relief petition and cannot raise them now for the first time. We overrule his second and third assignments of error.

{¶5} Next Betts contends that the state failed to indict him before the six-year statute of limitations expired. However, the indictment alleged a continuing course of conduct from April 2007 through September 17, 2010. The indictment was filed on April 8, 2016, within the six-year period. We find no abuse of discretion in the trial court's determination that the indictment was filed within the statutory limitations period. We overrule his fourth assignment of error.

{¶6} Last Betts contends he received ineffective assistance of counsel because his trial counsel did not “catch” and address the alleged defects in the indictment, raise a statute of limitations defense, or do more to investigate the state’s case against him. However, his contentions concerning the indictment and the statute of limitation are meritless. His counsel has no duty to raise meritless defenses. Additionally, to the extent he relies upon evidence in the record, his ineffective assistance of counsel claim could have been raised in his direct appeal and is barred by res judicata. The trial court did not abuse its discretion when it found no substantive grounds for his claim of ineffective assistance of trial counsel. We overrule his fifth assignment of error and affirm the judgment of the trial court.

I. FACTS

{¶7} The Vinton County Grand Jury indicted Betts on one count of theft from an elderly person. Because the value of the property exceeded \$150,000, it was a first-degree felony. The court’s presentence investigation revealed that from 2007 through mid-September 2010, Betts timbered roughly 700 acres of the victim’s property. The victim, an elderly man living in Grove City, Ohio, had not authorized the harvest and had died by the time of sentencing. A forestry expert valued the stolen timber at \$2,025,088. The investigators traced \$575,685 of the timber payments from sawmills into bank accounts of Betts, his son, and his wife; none of the proceeds went to the victim. Betts waived his right to a jury trial and pleaded guilty to a reduced second degree felony charge of attempted theft. The trial court sentenced Betts to a prison term, Betts appealed, but we affirmed the trial court’s judgment. More extensive facts are set forth *State v. Betts*, 4th Dist. Vinton No. 17CA706, 2017-Ohio-8595, ¶ 8 – 14.

{¶18} After we affirmed his conviction, Betts filed a “Petition to Vacate or Set Aside Judgment of Conviction or Sentence” raising two claims: (1) his trial counsel was ineffective for failing to raise alleged defects in the indictment, depriving him of his constitutional right to counsel and (2) the state did not file its indictment prior to the time the six-year statute of limitation expired, depriving him of his due process rights. Betts argued that witnesses’ statements given to investigators supported his statute of limitations argument and that he was not given the opportunity to confront these witnesses.

{¶19} The trial court rejected the first claim because there were no defects in the indictment and thus “no information in the record or raised by Defendant’s petition that supports a claim for ineffective assistance of counsel.” The trial court rejected the second claim because the indictment charged a continuing course of conduct ending September 17, 2010 and the indictment was filed April 8, 2016, less than six years after the end of the continuing course of conduct. Thus, the statute of limitations had not expired. The trial court also found that Betts pleaded guilty, was convicted and sentenced to prison, and his conviction and sentence was affirmed on appeal. Therefore, res judicata barred Betts from raising and litigating issues that could have been raised at trial. The trial court dismissed Betts’s petition without a hearing.

II. ASSIGNMENT OF ERROR

{¶10} Betts assigns the following errors for our review:

INCORRECT, IMPROPER AND ERRONEOUS INDICTMENT
INVOLVING FRAUD, MISREPRESENTATION AND ABUSE OF LEGAL
PROCEEDINGS/PROCEDURES: ASSIGNMENT OF ERROR –
PROPOSITION OF LAW NO. 1.

IMPROPER, DECEPTIVE AND PURSUASIVE [SIC] USE OF COUNTERDICTORY [SIC] AND INACCURATE WITNESS REPORTS THAT DO NOT PROVIDE CONCLUSIVE SUPPORT FOR EITHER THEFT OF [SIC] ATTEMPTED THEFT. ASSIGNMENT OF ERROR – PROPOSITION OF LAW NO. 2.

DEFENDANT/APPELLANT IMPROPERLY CHARGED WITH THEFT AND IMPROPERLY CONVICTED OF ATTEMPTED THEFT AND ORDERED TO PAY RESTITUTION WHICH VIOLATES STATUTES, REGULATIONS AND CASE LAW. ASSIGNMENT OF ERROR – PROPOSITION OF LAW NO. 3.

PROCEDURAL VIOLATIONS, INSUFFICIENCY OF EVIDENCE PRESENTED BY THE STATE AND FAILURE TO INDICT APPELLANT WITHIN THE (6) SIX YEAR STATUTE OF LIMITATIONS. ASSIGNMENT OF ERROR – PROPOSITION OF LAW NO. 4.

INEFFECTIVE ASSISTANCE OF COUNSEL ASSIGNMENT OF ERROR – PROPOSITION OF LAW NO. 5.

III. STANDARD OF REVIEW

{¶11} 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. McDougald*, 4th Dist. Scioto No. 16CA3736, 2016-Ohio-5080, ¶ 19-20, citing *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 18.

{¶12} “[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.

{¶13} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Black*, 4th Dist. Ross No. 15CA3509, 2016-Ohio-3104, ¶ 9, citing *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999); *State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012–Ohio–1936, ¶ 13. Rather, before granting a hearing on a petition, the trial court must first determine that substantive grounds for relief exist. R.C. 2953.21(C). “Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a violation of the petitioner's constitutional rights.” *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008–Ohio–5771, ¶ 11. Furthermore, in order to merit a hearing, the petitioner must show that the claimed “errors resulted in prejudice.” *Id.*, quoting *Calhoun* at 283.

{¶14} Additionally, res judicata applies to proceedings involving postconviction relief. *Black* at ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). “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 the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. “Therefore, ‘any issue that could have been raised on direct appeal and was not is res

judicata and not subject to review in subsequent proceedings.” *Black* at ¶ 10, citing *State v. Segines*, 8th Dist. Cuyahoga No. 99789, 2013–Ohio–5259, ¶ 8, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006–Ohio–1245, 846 N.E.2d 824, ¶ 16.

IV. LAW AND ANALYSIS

{¶15} Betts does not phrase his assignments of error in terms of errors in the trial court’s judgment. Nonetheless under the applicable standard of review, we uphold a trial court’s decision granting or denying a postconviction relief petition absent an abuse of discretion, so we construe Betts’s assignments of error as challenging the trial court’s considerable discretion in dismissing his petition.

A. Purported Defects in the Indictment

{¶16} In his petition, Betts argued that his trial counsel was ineffective for failing to raise objections to purported defects in the indictment. Here the original indictment contained a blank preprinted “certification” section, which is completed by the clerk when a person requests a certified copy of the indictment. See Evid.R. 902(4) (“Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: * * * (4) Certified copies of public records.”). The certification section assists the clerk to certify that the copy of the indictment “is a full, true and correct copy of the original indictment” and it has a blank space for the month, day, and clerk’s signature. Based upon the documents Betts highlighted and attached to his petition, he appears to incorrectly believe that the clerk must fill out the certification section at the time the original indictment is filed. Betts argues that Crim.R. 6(F) requires the clerk to complete the certification section when the indictment is filed but that here the clerk did not complete the certification section until he requested a certified

copy of the indictment and the docket in June 2017. Betts received a certified copy of the indictment and docket that were certified by the clerk on June 27, 2017.¹

{¶17} Crim.R. 6(F) states, “The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial docket.” The record shows that the grand jury foreperson signed the indictment, the clerk endorsed the front page of the indictment with the time and date “2016 APR 8 PM 12:58” and the docket shows that the clerk opened the case on the docket on April 8, 2016. Thus the indictment was returned in accordance with Crim.R. 6(F). Betts’s argument that there were defects in the indictment is meritless. The trial court did not abuse its discretion in finding that Betts failed to submit sufficient credible evidence demonstrating a claim for ineffective assistance of counsel based on a failure to raise defects in the indictment. We overrule Betts’s first assignment of error.

B. Clear and Convincing Evidence of Theft and Attempted Theft

{¶18} Betts’s next two assignments of error contend that witness reports do not provide clear and convincing evidence that he committed theft or attempted theft as those offenses are statutorily defined and construed in case law.

{¶19} We reject Betts’s arguments for two reasons. First, Betts did not make these arguments in his petition at the trial court level. A party may not raise any new issues or legal theories for the first time on appeal. *Wheatley v. Marietta College*, 2016-

¹ In response to Betts’s June 2017 request for a certified copy of the docket and indictment, the clerk prepared a certified copy of the docket and indictment on June 27, 2017. However because the indictment had the preprinted certification form with the month and day blank but the year “2016” already typed on the form, the indictment incorrectly bore the date “June 27, 2016” while the certification of the docket sheet bore the correct handwritten date “June 27, 2017.” It appears that when certifying the indictment, the clerk failed to cross out “2016” and write “2017.” However, this scrivener’s error in the certification does not constitute a defect in the original indictment.

Ohio-949, 48 N.E.3d 587, ¶ 94 (4th Dist.). A party who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. *Id.*

{¶20} Second, Betts waived his right to a jury trial and entered a guilty plea. Therefore he waived the right to contest the state's evidence or his guilt. "Such a plea is a complete admission of appellant's guilt" and "removed all issues of factual guilt from his case." *State v. Spangler*, 4th Dist. Lawrence No. 16CA1, 2016-Ohio-8583, ¶ 16-18; *State v. Brunner*, 4th Dist. Ross No. 1654, 1991 WL 99669, *2 (June 4, 1991). We overrule his second and third assignments of error.

C. Statute of Limitations Defense

{¶21} Betts contends that the indictment alleged that he was illegally harvesting timber between 2007 through September 17, 2010, but that an inventory and valuation report referred to a time period ending in 2009, which was purportedly based on the victim's statement. Betts claims that the victim gave conflicting dates as to when the illegally harvesting ended, ranging from 2009 to as late as January 2012. Betts argues that the state failed to indict him within the applicable six-year statute of limitations.

{¶22} The trial court reviewed the indictment and found that it alleged a continuing course of conduct that concluded on September 17, 2010 and that the state filed its indictment on April 8, 2016, before the statute of limitations expired. It rejected Betts's statute of limitation defense.

{¶23} We find competent credible evidence in the record to support the trial court's finding that the indictment was filed within the applicable six-year statute of limitations. The trial court did not abuse its discretion when it rejected Betts's statute of limitation defense. We overrule Betts's fourth assignment of error.

D. Ineffective Assistance of Counsel²

{¶24} Betts contends that he was prejudiced when his trial counsel's performance fell below the objective standard of reasonable representation because his counsel did not "catch" and address the alleged defects in the indictment, did not assert a statute of limitations defense, and did not do more in the discovery phase to investigate the state's case against him.

{¶25} We have already determined that the trial court did not abuse its discretion in rejecting Betts's contentions concerning the indictment and the statute of limitations defense. Counsel has no duty to raise meritless claims. *State v. McGlone*, 83 Ohio App.3d 899, 903, 615 N.E.2d 1139, 1142 (4th Dist. 1992). Furthermore Betts failed to provide any credible evidence outside the record to support his contention that his trial counsel did not adequately undertake discovery efforts. And, to the extent he believes this contention is supported in the record, it is barred by res judicata because he could have raised his claims of ineffective assistance of trial counsel on direct appeal, when he was represented by different counsel. *State v. McDougald*, 4th Dist. Scioto No. 16CA3736, 2016-Ohio-5080, ¶ 26; *State v. Griffin*, 9th Dist. Lorain No. 14CA010680, 2016-Ohio-2988, ¶ 12, citing *State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus ("When the issue of competent trial counsel could have been determined on direct appeal without resort to evidence outside the record, res judicata is a proper basis to dismiss a petition for postconviction relief"). This is not a case where the exception to the general

² In his postconviction relief petition, Betts claimed that his trial counsel was ineffective. In his appellate brief he states that both his trial and appellate counsel were ineffective. However, Betts did not raise ineffective assistance of appellate counsel in his assignments of error or supporting arguments. Moreover, the claim would not have been cognizable had he had asserted it. See *State v. Ulmer*, 4th Dist. Scioto No. 15CA3708, 2016 -Ohio- 2873, ¶ 16 ("claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings pursuant to R.C. 2953.21").

rule of res judicata applies, i.e., this is not a case where the defendant was represented by the same counsel at both the trial and on direct appeal. See *State v. Ulmer*, 4th Dist. Scioto No. 15CA3708, 2016–Ohio–2873, ¶ 15.

{¶26} Additionally “[a] claim of ineffective assistance of counsel is * * * waived by a guilty plea, unless the ineffective assistance of counsel precluded the defendant from knowingly, intelligently, and voluntarily entering a guilty plea.” *State v. Grove*, 8th Dist. Cuyahoga No. 103042, 2016–Ohio–2721, ¶ 26; *State v. Guerra*, 2nd Dist. Miami No.2015–CA–28, 2016–Ohio–5647, ¶ 18. See generally Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwin's Ohio Criminal Law*, Section 43:20 (3d Ed.2014). In his direct appeal Betts did not raise ineffective assistance of counsel as a ground for setting aside his guilty plea so he is barred by res judicata from raising it now.

{¶27} Betts did not submit sufficient credible evidence demonstrating a violation of his Sixth Amendment right to counsel. The trial court did not abuse its discretion in denying Betts’s petition on that basis. We overrule his fifth assignment of error.

V. CONCLUSION

{¶28} The trial court did not abuse its considerable discretion in denying Betts’s postconviction relief petition without conducting a hearing. Betts failed to submit sufficient credible evidence of any defects in the indictment or meritorious statute of limitations defense. Thus he failed to demonstrate a violation of his constitutional rights to effective assistance of counsel or due process on these grounds. Betts provided no competent or credible evidence in or outside the record to support his contention that his trial counsel’s discovery efforts were ineffective or resulted in prejudice to him. And

he waived challenges to the state's evidence when he waived his right to trial and knowingly, intelligently, and voluntarily entered his guilty plea.

{¶29} Having overruled Betts's assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & McFarland, 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.