

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

STATE OF OHIO,	:	Case No. 17CA3823
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
MICHEL L. ROSS, #684665	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 09/25/2018

APPEARANCES:

G. Michael Goins, Cleveland, Ohio, for appellant.

Shane Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Michel L. Ross appeals from a judgment entered by the Scioto County Court of Common Pleas dismissing his petition for postconviction relief which he filed while his direct appeal was pending. Ross asserts that the trial court abused its discretion by denying his petition for postconviction relief for lack of jurisdiction. We agree.

{¶2} Under R.C. 2953.21(D), the pendency of a direct appeal does not deprive the trial court of jurisdiction to consider a timely postconviction-relief petition. Moreover, the trial court's dismissal of the petition is not justified by the alternative basis that Ross's petition was a second or successive petition. Although Ross did file an earlier petition, he voluntarily withdrew it before the trial court ruled on it, so his subsequently filed petition constituted an initial or first petition. Finally, the trial court did not address the other merit issues argued by the state, e.g. *res judicata*, so we refrain from usurping

the trial court's duty to determine the merits of Ross's postconviction petition in the first instance.

{¶3} We sustain Ross's assignment of error, reverse the judgment dismissing his petition based on a lack of jurisdiction, and remand the cause to the trial court for consideration of the merits of the petition.

I. FACTS

{¶4} In 2012, a Scioto County Grand Jury indicted Ross on 21 counts, which included Ohio RICO violations, multiple drug related charges, and other felonies.¹

{¶5} As part of a negotiated plea agreement Ross pleaded guilty to the two Ohio RICO violations and one drug offense: Count I—engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), Count II—conspiracy to engage in a pattern of corrupt activity in violation of R.C. 2923.01, and Count III—aggravated funding of drug activity in violation of R.C. 2925.05(A)/(C)(1). In return the state agreed to dismiss the remaining counts. At the plea hearing the trial court placed the agreement on the record in open court, stating that if Ross abided by the conditions of bond, Ross would receive a 10-year prison term, but if he failed to comply he would get a 30-year term. The sentencing hearing was set for July 9, 2013, however, Ross breached the conditions of bond and failed to appear. Ross remained at large for three years but was eventually apprehended in Cuyahoga County using a false name.

{¶6} After his return to Scioto County in March 2016, Ross filed a motion to withdraw his guilty plea, which the trial court denied. The trial court sentenced Ross to an 11-year prison term on count I, 8-year term on count II, and 11-year term on count

¹ The preliminary facts concerning Ross's charges and convictions are taken from our decision in *State v. Ross*, 2017-Ohio-9400, 103 N.E.3d 81, ¶ 8-10 (4th Dist.).

III. The trial court ordered the sentence to run consecutively for a total aggregate prison term of 30 years as part of “a jointly recommended and agreed to sentence.” Ross filed his direct appeal from his convictions and sentence in September 2016.

{¶17} While that appeal was pending, counsel for Ross filed a “motion” for postconviction relief in December 2016. After the state filed a memorandum in opposition, Ross filed a notice withdrawing the motion in July 2017.

{¶18} A few months later, in October 2017, through new counsel, Ross filed a petition to vacate or set aside his convictions and sentence under R.C. 2953.21, the postconviction-relief statute. The state filed a memorandum in opposition. In November 2017, without conducting an evidentiary hearing, the trial court dismissed Ross’s petition by finding that “there is an appeal pending in this matter” and “[t]herefore, this court lacks jurisdiction over this matter at this time.” Shortly thereafter, we decided Ross’s direct appeal by overruling his assignments of error, affirming his convictions, and finding his sentence not reviewable. *Ross*, 2017-Ohio-9400, 103 N.E.3d 81.

II. ASSIGNMENT OF ERROR

{¶19} Ross presents the following assignment of error for our review:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN THE TRIAL COURT DENIED PETITIONER-APPELLANT’S TIMELY FILED PETITION FOR POSTCONVICTION RELIEF PURSUANT TO O.R.C. § 2953.21 WITHOUT ISSUING FINDINGS OF FACTS AND CONCLUSION OF LAW. [SIC.]

III. STANDARD OF REVIEW

{¶10} 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.

{¶11} Notwithstanding our decision in *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, “[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. This standard applies to both a merit review and a dismissal occurring without a hearing. *Id.* at 952. 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

{¶12} In his sole assignment of error Ross asserts that the trial court abused its discretion when it denied his timely filed petition for postconviction relief without issuing findings of fact and conclusions of law. We first make two observations about Ross’s assigned error: (1) the trial court dismissed his petition rather than denying it; and (2) the court did issue sufficient findings of fact and conclusions of law to support its decision—it made the factual finding that Ross’s direct appeal from his convictions and sentence was still pending, so it concluded that it lacked jurisdiction to address the merits of the petition.

{¶13} Nevertheless, Ross’s assigned error has sufficient breadth to include his argument that the trial court abused its discretion by dismissing his petition for lack of jurisdiction because of his pending direct appeal. The state does not suggest otherwise.

{¶14} It is true that as a general rule, “once an appeal has been perfected to a court of appeals, a trial court lacks jurisdiction over matters inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment.” *State v. Gannon*, 4th Dist. Lawrence No. 15CA16, 2016-Ohio-1007, fn. 1, citing *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13.

{¶15} But in postconviction-relief cases, R.C. 2953.21(D) provides a statutory exception requiring a trial court to consider a timely petition for postconviction relief notwithstanding a pending appeal of the judgment of conviction and sentence:

The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending.

{¶16} Therefore, “the pendency of a direct appeal does not deprive the trial court of jurisdiction to consider a timely postconviction petition.” *See State v. Mayle*, 11th Dist. Ashtabula No. 2017-A-0065, 2018-Ohio-2576, ¶ 8, citing *State v. Lauharn*, 2d Dist. Miami No. 2011 CA 10, 2012-Ohio-1572, ¶ 12. That is, “ ‘R.C. 2953.21[D] specifically confers jurisdiction in the trial court to consider a postconviction petition that is timely filed even if a direct appeal is pending.’ ” *State v. Shaffer*, 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, ¶ 13, quoting *State v. Vasquez*, 6th Dist. Lucas No. L-13-1051, ¶ 9.

{¶17} R.C. 2953.21(D) provides that a petition for postconviction relief is timely filed if it is “filed no later than [365] 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 or adjudication * * *.” Ross filed his petition for postconviction relief well within this time period. Thus, the trial court abused its discretion when it dismissed the petition on this jurisdictional basis.

{¶18} “However, we will not reverse a correct judgment merely because it is based on an erroneous rationale.” *Shaffer* at ¶ 14, citing *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 239, ¶ 51 (“a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons”).

{¶19} Thus the state argues that the trial court’s dismissal of Ross’s October 2017 petition for postconviction relief was proper because his petition was a second or successive petition, which would have the same effect as an untimely petition and could be dismissed without findings of fact and conclusions of law. *See State ex rel. Reynolds v. Basinger*, 90 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459, ¶ 7 (“trial courts have no duty to issue findings of fact and conclusions of law on second and successive petitions for postconviction relief”).

{¶20} However, Ross voluntarily withdrew his earlier, December 2016 petition, before the trial court tried it or ruled on it, so his October 2017 petition was not a “second” or “successive” petition; it was instead properly treated as his first petition. *See State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 16, quoting *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 8 (“ ‘a

postconviction proceeding is not an appeal of a criminal conviction but rather, is a collateral, civil attack on a criminal judgment’ ”); *State v. Qualls*, 4th Dist. Meigs No. 06CA7, 2007-Ohio-3938, fn. 1 (“Because proceedings in postconviction relief are civil in nature, they are governed by the Ohio Rules of Civil Procedure”); *State v. Bays*, 2d Dist. Greene No. 2014-CA-24, 2015-Ohio-1935, ¶ 25 (Civ.R. 41(A)(1)(a) notice of voluntary dismissal applied to a dismissed petition for postconviction relief, leaving the defendant “in the same position as if nothing had been filed”).

{¶21} Next the state argues that the petition was properly dismissed on the merits based on, e.g., res judicata, the non-reviewability of an agreed sentence on appeal, and Ross’s guilty plea. To be sure, there are circumstances where we have exercised our discretion to affirm a trial court’s dismissal of a petition for postconviction relief even though the court relied on an erroneous basis. See *Shaffer*, 2014-Ohio-4976. But in that case, it was readily apparent that the petition was meritless because res judicata barred the defendant from raising his postconviction claims when he could have raised them on direct appeal, he waived his claims by pleading guilty, and did not contend that his plea was not knowingly, intelligently, and voluntarily made. *Id.* Conversely, it is less clear here that the petition is meritless, where Ross raised some ineffective-assistance claims that were different from the claims raised in his direct appeal, relied in part on evidence outside the record, and contended that his plea was not knowingly, intelligently, and voluntarily made. See *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, ¶ 37 (petition for postconviction relief, rather than direct appeal, is the proper vehicle to raise a claim of ineffective assistance of counsel that relies upon evidence outside the record).

{¶22} Under these circumstances we will not usurp the trial court's duty to determine the merits of Ross's petition for postconviction relief in the first instance because of its erroneous view that it lacked jurisdiction. We sustain Ross's assignment of error.

V. CONCLUSION

{¶23} The trial court abused its discretion by dismissing Ross's petition for postconviction relief based on lack of jurisdiction. Having sustained his assignment of error, we reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee 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 Scioto 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.

Hoover, P.J. & Abele, 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.