

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 15CA3
GUY A. LONG, JR.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Richland County  
Court of Common Pleas, Case No. 2011-  
CR-0147R

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 29, 2015

APPEARANCES:

For Plaintiff-Appellee

BAMBI COUCH PAGE  
BY: JOHN C. NIEFT  
Richland County Prosecutor  
38 South Park Street  
Mansfield, OH 44902

For Defendant-Appellant

GUY A. LONG, SR.  
Inmate #604-650  
Richland Correctional Institution  
Box 8107  
Mansfield, OH 44901

*Gwin, P.J.*

{¶1} Appellant, Guy Alexander Long [“Long”] appeals the January 6, 2015 Judgment Entry of the Richland County Court of Common Pleas overruling his motion to vacate his plea due to a breach of contract.

*Facts and Procedural History*

{¶2} On March 11, 2011, the Richland County Grand Jury indicted Long, on two counts of possession of drugs in violation of R.C. 2925.11, one count of having a weapon under disability in violation of R.C. 2923.13, two counts of receiving stolen property in violation of R.C. 2913.51, and one count of safecracking in violation of R.C. 2911.13. Said charges arose from a search of Long’s residence pursuant to a no-knock search warrant. Subsequently, Long was charged with one count of aiding and abetting tampering with evidence in violation of R.C. 2921.12. *See, State v. Long*, 5th Dist. Richland No. 11CA95, 2012-Ohio-3091. [Hereinafter “*Long I*”].

{¶3} On May 18, 2011, Long filed a motion to suppress, challenging the search warrant. A hearing was held on June 17, 2011. The trial court denied the motion. *Long I*, ¶2.

{¶4} On September 13, 2011, Long pled no contest to all the counts except for one of the receiving stolen property counts, which was dismissed. By sentencing entry filed same date, the trial court sentenced Long to an aggregate term of seven years in prison. *Long I*, ¶3.

{¶5} In *Long I*, Long argued that his trial counsel was ineffective in failing to attack the sufficiency of the affidavit for the search warrant. Long argued that the affidavit was based on unsubstantiated anonymous tips that were not corroborated by

any other evidence. Pursuant to an Opinion filed on June 27, 2012 *Long I*, this Court affirmed the judgment of the trial court.

{¶6} On September 25, 2012, Long, with counsel, timely filed an application to reopen his appeal under App.R. 26(B). Long, pro se, filed a second application to reopen his appeal shortly after his attorney. In the Long's pro se application, he argued that the plea bargain was not honored and that the gun was not operable. This Court denied those motions.

{¶7} As relevant to the present appeal, Long filed on October 17, 2011, a pro se Motion to Withdraw Plea Pursuant to Ohio Crim R. 32.1. (Docket Entry at 265). In this motion Long averred,

Deal that Defendants attorney made with the Judge and Prosecutor was not honored. Prosecutors deal in writing and he backs out [sic.] the deal day of plea. Defendants [sic.] attorney never informed him of the change.

{¶8} In a handwritten document titled "Defendants Responde [sic.] To State's Response to Defendants Motion to Withdraw Plea" filed by Long on November 1, 2011, Long states,

Defendant attached an plea agreement, made by defendant s [sic.] attorney showing the plea agreement Defendant was offered. To Have (6) six charges dismissed for his plea to (1) one count of possession of cocaine a first degree [sic.], to be given (7) years. Deal was not honored. Defendant plea [sic.] no contest, and was still charged with all seven

counts. Not the deal that's in writing. Wherefore Defendants [sic.] argument is with merit.

Docket Entry at 270. The trial court overruled Long's motion to withdraw his plea by Judgment Entry filed October 19, 2011. (Docket Entry 268). No appeal was taken from this entry and Long did not raise the issue in *Long I*.

{¶9} While his appeal was pending, Long, on February 28, 2012, had filed a Motion to Sustain Due Process Rights. Long, in his motion, requested that the trial court "grant a hearing suppressing all evidence from the unreasonable search and seizure of his home and property." By Judgment Entry filed February 4, 2013, the trial court overruled Long's motion. (Docket Entry 295).

{¶10} On March 6, 2012, Long filed a Motion to Withdraw his Plea. (Docket Entry 279). Long, in a motion filed on March 22, 2012, asked that a hearing be set on his Motion to Suppress. The trial court, pursuant to a Judgment Entry filed on April 24, 2012, denied Long's request for a hearing, noting that it had ruled on Long's Motion to Suppress on March 21, 2012 and that, therefore, Long was not entitled to a hearing on such motion. See *State v. Long*, 5th Dist. Richland No. 13CA74, 2014-Ohio-2032, ¶7 [Hereinafter "*Long II*"]. The trial court also overruled Long's March 6, 2012 motion to withdraw his guilty plea. (Docket Entry 282).

{¶11} On May 23, 2012, Long filed a Motion to Withdraw his Plea. (Docket Entry 283). The trial court overruled Long's motion by Judgment Entry filed June 12, 2012. (Docket Entry 286).

{¶12} On November 6, 2012, Long filed a “Motion for Judgment Ruling Withdrawal of Plea Pursuant to R (32).” (Docket Entry 287). The trial court overruled Long’s motion by Judgment Entry filed December 5, 2012. (Docket Entry 289).

{¶13} On January 28, 2013, Long filed a Motion to Sustain Due Process Rights. (Docket Entry 293). The trial court overruled Long’s motion by Judgment Entry filed February 4, 2013. (Docket Entry 295).

{¶14} On February 8, 2013, Long filed a Motion to Sustain Due Process Rights. (Docket Entry 296). The trial court overruled Long’s motion by Judgment Entry filed March 5, 2013. (Docket Entry 300).

{¶15} On March 18, 2013, Long filed a “Motion for Habeas Corpus.” (Docket Entry 306). On April 5, 2013 Long filed a Motion to Withdraw his Plea. (Docket Entry 308). The trial court overruled Long’s motions by Judgment Entry filed May 9, 2013. (Docket Entry 313).

{¶16} On July 17, 2013 Long filed a “Motion to Grant the February 28, 2012 Motion to Sustain Due Process Right Evidentiary Hearing Requested.” (Docket Entry 318). The trial court overruled Long’s motion by Judgment Entry filed July 24, 2013 because Long’s February 28, 2012 motion had already been overruled by the trial court by Judgment Entry filed March 5, 2013. (Docket Entry 321).

{¶17} On September 8, 2014, Long filed a “Motion for Breach of Contract.” (Docket Entry 336). On January 2, 2015, Long filed a second “Motion for Breach of Contract.” (Docket Entry 340). The trial court overruled Long’s motions by Judgment Entry filed January 6, 2015. (Docket Entry 341).

{¶18} It is from the trial court's January 6, 2015 Judgment Entry overruling Long's Motion for Breach of the plea agreement that Long has filed the present appeal.

*Assignments of Error*

{¶19} Long raises three assignments of error,

{¶20} "I. WRITTEN CONTRACT NOT HONORED. (PLEA AGREEMENT).

{¶21} "II. APPELLANT [SIC.] CONSTITUTIONAL RIGHTS WAS [SIC.] VIOLATED BY TRIAL COURT FOR CONVICTING APPELLANT OF WEAPON UNDER DISABILITY FOR A GUN PROSECUTOR ADMITS WAS NOT OPERABLE. PART OF THE SAME WRITTEN AGREEMENT.

{¶22} 'III. TRIAL COURT ERRED IN DENYING APPELLANTS [SIC.] MOTION STATING APPELLANT BROUGHT THE ISSUE UP ON APPEAL WITHOUT ANY PROOF OF THIS UNTRUE CLAIM."

I, II & III

{¶23} Long's first, second and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶24} We understand that Long has filed this appeal pro se. Nevertheless, "like members of the bar, pro se litigants are required to comply with rules of practice and procedure." *Hardy v. Belmont Correctional Inst.*, 10th Dist. Franklin No. 06AP-116, 2006-Ohio-3316, ¶9. See, also, *State v. Hall*, 11th Dist. Trumbull No. 2007-T-0022, 2008-Ohio-2128, ¶11. We also understand that "an appellate court will ordinarily indulge a pro se litigant where there is some semblance of compliance with the appellate rules." *State v. Richard*, 8th Dist. Cuyahoga No. 86154, 2005-Ohio-6494, ¶4 (internal quotation omitted).

{¶25} Also, in *State v. Hooks*, 92 Ohio St.3d 83, 2001-Ohio-150, 748 N.E.2d 528(2001), the Supreme Court noted, “a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. See, *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500(1978).” It is also a longstanding rule “that the record cannot be enlarged by factual assertions in the brief.” *Dissolution of Doty v. Doty*, 4th Dist. Pickaway No. 411, 1980 WL 350992 (Feb. 28, 1980), citing *Scioto Bank v. Columbus Union Stock Yards*, 120 Ohio App. 55, 59, 201 N.E.2d 227(1963). New material and factual assertions contained in any brief in this court may not be considered. See, *North v. Beightler*, 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶7, quoting *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶16. Therefore, we have disregarded facts in both parties’ brief that are outside of the record.

{¶26} In the interests of justice, we shall attempt to consider Long’s assignments of error.

{¶27} With respect to the Long’s September 8, 2014 and January 2, 2015 motions concerning the breach of the plea agreement, we note the caption of a pro se pleading does not definitively define the nature of the pleading. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131. In *Reynolds*, the Ohio Supreme Court found, despite its caption, the appellant’s pleading met “the definition of a motion for post-conviction relief set forth in R.C. 2953.21(A)(1), because it is a motion that was (1) filed subsequent to Reynolds’s direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the

judgment and sentence.” Pursuant to *Reynolds*, we find Long’s motions for breach of the plea agreement is a petition for post conviction relief as defined in R.C. 2953.21.

{¶28} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief, shall be filed no later than one hundred eighty 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal. In the case at bar, Long filed his original appeal in *Long I* on October 11, 2011.

{¶29} Because Long’s petition was untimely filed, the trial court was required to entertain the petition only if Long could meet the requirements of R.C. 2953.23(A). This statute provides, in pertinent part:

\* \* \* [A] court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:

(1) Either of the following applies:

(a) 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.

(b) 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.

(2) 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.

{¶30} In the case at bar, Long became aware of the difference in the plea agreement during his change of plea hearing. (T. Sept. 12, 2011 at 18-22). During that hearing which took place on the day the jury trial was to commence, the trial judge explained to Long that the prosecutor had withdrawn his previous plea offer because Long was pleading on the day of trial. (T. Sept. 12, 2011 at 19).

{¶31} The inoperability of the firearm was also addressed at Long's change of plea hearing. Two firearms were recovered from Long's residence. A .22 caliber, which was inoperable, and a .25 caliber, which was operable. Accordingly, Long was convicted of weapons while under a disability for the operable firearm. (T. Sept. 12, 2011 at 32- 3).

{¶32} Long next raised the issue in his motion to withdraw his plea filed in the trial court on October 17, 2011 and in his response filed November 1, 2011. Long did not appeal the trial court's October 19, 2011 Judgment Entry overruling his motion. In *Long I*, Long's sole assignment of error was " INEFFECTIVE ASSISTANCE OF COUNSEL." *Long I*, ¶5. Long argued "his trial counsel was ineffective for failing to

attack the sufficiency of the affidavit for the search warrant. Appellant argues the affidavit was based on unsubstantiated anonymous tips that were not corroborated by any other evidence.” *Long I*, ¶10.

{¶33} Long again attempted to raise a breach of the plea agreement in *Long II*. In that case, Long’s assignments of error were,

1. TRIAL COURT ERRED WHEN IT ISSUED THIS 2013 JULY 24TH JUDGMENT ENTRY STATING APPELLANTS (SIC) 2012 FEB. 28TH PETITION WAS OVERRULED ON 2013 MAR 5TH WHEN THE 2013 MARCH 5TH ENTRY OVERRULED A 2013 FEB 8TH “CLEARLY STATED” 2013 FEB 8TH PETITION.

2. TRIAL COURT DENIAL OF FEDERAL CONSTITUTIONAL RIGHTS.

3. TRIAL COURT VIOLATED APPELLANTS (SIC) RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 & 14 OF THE OHIO CONSTITUTION WHEN IT ALLOWED THE USE OF EVIDENCE WHICH WAS OBTAINED AS A RESULT OF AN INVALID SEARCH WARRANT.

4. PLEA AGREEMENT BETWEEN PROSECUTOR, APPELLANT & COUNSEL (WAS) NOT HONORED.

5. TRIAL COURT CONVICTED APPELLANT OF WEAPONS UNDER DISABILITY FOR A GUN THAT WAS NOT OPERABLE.

*Long II*, ¶¶ 12-16.

{¶34} In the case at bar, Long raised the issues he now attempts to argue. He therefore cannot demonstrate that he was “unavoidable prevented” from discovery of the facts upon which the petitioner must rely to present the claim for relief. As such, Long has failed to meet his burden under R.C. 2953.23(A)(1) to file an untimely petition for post-conviction relief and the trial court therefore lacked jurisdiction to entertain the petition. See *State v. Downey*, 5th Dist. Stark No. 2013CA00157, 2013-Ohio-4693, ¶25; *State v. Kelly*, 6th Dist. Lucas No. L-05-1237, 2006-Ohio-1399, ¶12; *State v. Smith*, 9th Dist. Lorain No. 05CA008772, 2006-Ohio-2045, ¶9; *State v. Luther*, 9th Dist. Lorain No. 05CA008770, 2006-Ohio-2280, ¶13.

{¶35} We find that the trial court’s denial is proper because the court was not statutorily authorized to entertain the petition because of its untimeliness.

{¶36} Another proper basis upon which to deny a petition for post-conviction relief without holding an evidentiary hearing is res judicata. *State v. Lentz*, 70 Ohio St.3d 527, 530, 639 N.E.2d 784(1994); *State v. Phillips*, 9th Dist. Summit No. 20692, 2002-Ohio-823

{¶37} 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. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233(1996), syllabus, approving and following *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104(1967), paragraph nine of the syllabus. It is well settled that, “pursuant to res judicata, a defendant cannot raise an

issue in a [petition] for post conviction relief if he or she could have raised the issue on direct appeal.” *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131(1997). Accordingly, “[t]o survive preclusion by res judicata, a petitioner must produce new evidence that would render the judgment void or voidable and must also show that he could not have appealed the claim based upon information contained in the original record.” *State v. Nemchik*, 9th Dist. Lorain No. 98CA007279, 2000 WL 254908 (Mar. 8, 2000); *see, also, State v. Ferko*, 9th Dist. Summit No. 20608, 2001 WL 1162835(Oct. 3, 2001); *State v. Phillips*, *supra*.

{¶38} In *Long II* we noted,

Finally, while appellant raises a number of other claims in his appeal, we find that such claims are barred by the doctrine of res judicata. Appellant had a prior opportunity to litigate the claims he now sets forth in the instant appeal in his direct appeal. Such claims, therefore, are barred under the doctrine of res judicata. *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967).

*Long II*, ¶20.

{¶39} As we observed in *Long II*, Long could have, but did not, raise the claims concerning the plea agreement and the operability of the firearm in his original appeal.

{¶40} In the case at bar, the facts and information upon which Long bases his petition are contained in the trial court record. Accordingly, Long had the opportunity to raise this issues on direct appeal, but he failed to do so. The doctrine of res judicata bars Long from raising this issue anew via a motion for breach of the plea agreement. *See State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, 1996–Ohio–337; *State v.*

*Perry* (1967), 10 Ohio St .2d 175, 226 N.E.2d 10; *State v. Foy*, 5th Dist. Stark No. 2009–CA–00239, 2010–Ohio–2445, ¶ 8; *State v. Miller*, 5th Dist. Stark No. 2011–CA–00074, 2011–Ohio–3039.

{¶41} Long’s three assignments of error are overruled.

{¶42} The judgment of the Richland County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur