

[Cite as *State v. Orr*, 2010-Ohio-366.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93796

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WYLEE ORR

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506072-B

BEFORE: Kilbane, P.J., McMonagle, J., and Boyle, J.

RELEASED: February 4, 2010

JOURNALIZED:

APPELLANT

Wylee Orr
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ATTORNEYS FOR APPELLEES

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Wylee Orr (“Orr”), pro se, appeals the trial court’s denial of his petition for postconviction relief. Orr argues that the trial court’s judgment in denying his postconviction petition was contrary to law. After reviewing the pertinent facts and law, we reverse and remand.

{¶ 2} On January 29, 2008, Orr was indicted by a Cuyahoga County Grand Jury for breaking and entering, a fifth degree felony, in violation of R.C. 2911.13(A), and failure to comply with the order or signal of a police officer, a third degree felony, in violation of R.C. 2921.331(B).

{¶ 3} On April 1, 2008, Orr pled guilty to failure to comply with the order or signal of a police officer, as indicted, and the State nolleed the breaking and entering charge.

{¶ 4} On April 29, 2008, the trial court sentenced Orr to a two-year prison term.

{¶ 5} On August 26, 2008, Orr filed a motion for delayed appeal, which was granted on September 10, 2008.

{¶ 6} On December 15, 2008, Orr filed an instanter brief asserting five assignments of error. *State v. Orr*, Cuyahoga App. No. 92005, 2009-Ohio-4038 (*Orr I*). In *Orr I*, he challenged the validity of his sentence, the denial of his request for a continuance, and the effectiveness of his trial counsel. Orr further asserted that his convictions violated the prohibition

against double jeopardy.

{¶ 7} On April 13, 2009, while *Orr I* was pending before this court, Orr filed a petition to vacate or set aside judgment of conviction or sentence with the trial court, also known as a petition for postconviction relief.

{¶ 8} On June 17, 2009, the trial court struck Orr's petition for lack of jurisdiction, stating:

“Defendant's petition, filed, 4/13/09, to vacate or set aside judgment of conviction or sentence is denied as case is on appeal, this court has no jurisdiction, petition is stricken.”

{¶ 9} On August 18, 2009, Orr appealed the striking of his petition for postconviction relief asserting the following assignment of error.

“The trial court erred and issued a judgment contrary to law when the court claimed it did not have jurisdiction to entertain the post conviction petition when a pending appeal is being reviewed with the court of appeals.”

{¶ 10} On August 28, 2009, this court affirmed Orr's conviction and sentence in *Orr I*.

Standard of Review

{¶ 11} A postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. In

postconviction cases, a trial court acts as a gatekeeper, determining whether a defendant will even receive a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. In *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, the Ohio Supreme Court held that the trial court's gatekeeping function in the postconviction relief process is entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. Accordingly, we review appellant's postconviction claims brought pursuant to R.C. 2953.21 under an abuse of discretion standard. *Id.* An abuse of discretion is more than a mere error in judgment, it implies that a court's ruling is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. See, also, *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927, at ¶8.

Analysis

{¶ 12} In this case, the trial court struck Orr's petition without considering it because his appeal was pending in this court. However, R.C. 2953.21(C) explicitly states that trial courts shall consider timely filed petitions even if a direct appeal of the judgment is pending:

“R.C. 2953.21(C) 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. * * *.”

{¶ 13} “This part of the statute became effective in September 1995 and allows concurrent processing of direct appeals and post-conviction petition proceedings. As a result, trial courts do have jurisdiction to hear timely filed petitions for post-conviction relief, even while direct appeals are pending.” *State v. Myers* (Feb. 28, 2003), Clark App. No. 2002-CA-73, 2003-Ohio-915, at ¶8, citing *State v. Traish* (1999), 133 Ohio App.3d 648, 650-651, 729 N.E.2d 766 and *State v. Walker* (Dec. 11, 1998), Montgomery App. No. 16959.

{¶ 14} Orr’s sole assignment of error is well taken.

{¶ 15} The trial court is instructed to consider Orr’s petition as required by R.C. 2953.21(C).

Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR

