

[Cite as *State v. Parker*, 2011-Ohio-1102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95544

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL PARKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521078

BEFORE: Stewart, P.J., Celebrezze, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} This cause came on to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1,¹ the records from the Cuyahoga County Court of Common Pleas, and the briefs submitted by counsel.

{¶ 2} Appellant-defendant-petitioner Michael Parker (hereinafter “appellant”) appeals the denial of his motion for relief from judgment that sought to vacate the trial

¹App.R. 11.1(E) states: “Determination and judgment on appeal. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form.” See, also, Form 3, Appendix of Forms to the Rules of Appellate Procedure.

court's ruling that dismissed, without a hearing, his petition for postconviction relief. Finding no error, we affirm.

{¶ 3} On August 10, 2009, following a jury trial, appellant was convicted of drug possession with a firearm specification and possession of criminal tools, and sentenced to ten years incarceration. He timely filed a direct appeal of this conviction in *State v. Parker*, 8th Dist. No. 93835, 2011-Ohio-____. In that appeal, Parker raised 17 errors for review challenging the grand jury proceedings, the indictment, the trial procedure, the state's evidence, the jury's verdict, and the effectiveness of his trial lawyer's representation. One of Parker's claims was that his trial lawyer was ineffective for withholding exculpatory information; namely, the lease agreement for the warehouse where the drugs were found and cancelled checks showing that Parker had not made a rent payment on the warehouse since April 2008. This claim, along with all of the others, was overruled and Parker's conviction was affirmed.

{¶ 4} While his appeal was pending, Parker filed a petition for postconviction relief (PCR), pursuant to R.C. 2953.21, seeking to set aside the judgment of conviction claiming that he was innocent, and requesting an evidentiary hearing. Parker asserted ten claims for relief in his petition alleging racial and ethnic discrimination in the grand jury selection, the presentation of false testimony to the grand jury, a lack of probable cause to search or arrest him, errors in admitting evidence and in instructing the jury, inconsistencies in the jury's verdicts, judicial bias, prosecutorial misconduct, and the ineffectiveness of his trial counsel's representation. He attached the following evidence

in support of his claims: his own affidavit; a copy of his indictment; a copy of his “Supplemental Response to The State of Ohio’s Discovery Demand”; the verdict forms from his trial; and a petition containing hundreds of signatures of people protesting his conviction as a “travesty of injustice.” Parker made reference to an affidavit from co-defendant Robert Moore, a copy of a lease agreement, and copies of cancelled checks showing warehouse payments; however, these documents were not attached to his petition.

{¶ 5} The state filed its response in opposition to the petition on May 20, 2010 by filing a “Brief In Opposition To Petition For Post-Conviction Relief” and a “Brief In Opposition To Evidentiary Hearing/Motion For Summary Judgment.” The trial court denied appellant’s petition without a hearing on May 28, 2010, finding that appellant failed to establish substantive grounds for relief and that his claims were barred by res judicata. Parker did not appeal the trial court’s decision. Instead, he filed a Civ.R. 60(B) motion for relief from that decision in which he claimed that the trial court erred by ruling on his petition before he had an opportunity to respond to the state’s motion for summary judgment.

{¶ 6} On August 3, 2010, the trial court denied Parker’s motion finding that he had failed to show that he has a meritorious defense or claim to present if relief was granted. The court also found that Parker failed to demonstrate that he was prejudiced by his inability to file a response to the state’s motion.

{¶ 7} Parker timely appeals the trial court's August 3, 2010 judgment, raising as a single error that the trial court erred when it granted the state's motion for summary judgment without giving him an opportunity to file a response and then denied his Civ.R. 60(B) motion to vacate the judgment. He argues that if the trial court had not denied him an opportunity to respond, he would have submitted two affidavits in response to the state's motion that would have demonstrated a need for an evidentiary hearing on his claim of ineffective assistance of counsel.

{¶ 8} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, 453 N.E.2d 648. The question of whether relief should be granted is addressed to the sound discretion of the trial court. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.

{¶ 9} A review of the record discloses that Parker failed to demonstrate either a meritorious claim or an entitlement to relief. Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant's PCR petition without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that the petitioner set forth sufficient operative facts to establish

substantive grounds for relief. A trial court may also dismiss a PCR petition without an evidentiary hearing when the claims raised in the petition are barred by the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraphs six and seven of the syllabus. R.C. 2953.21, does not specify that the petitioner be given an opportunity to reply to any motion filed on behalf of the respondent. The statute does, however, indicate that a petitioner must state all grounds for relief in the petition and that any ground for relief not so stated is waived. *State v. Caldero*, 8th Dist. No. 83729, 2004-Ohio-2337; R.C. 2953.21(A)(4).

{¶ 10} In the instant case, Parker failed to submit with his petition evidentiary material that set forth sufficient operative facts to demonstrate substantive grounds for relief. His postconviction claims are ones that were raised or could have been raised on direct appeal and, therefore, are barred by res judicata. Additionally, Parker failed to amend his petition as provided under R.C. 2953.21 to add any additional claims or affidavits, therefore, those claims not stated in the petition when filed were waived.

{¶ 11} Parker also fails to demonstrate an entitlement to relief under one of the grounds stated in the rule. In his motion for relief from judgment, Parker claims entitlement under Civ.R. 60(B)(1) which requires a showing of “mistake, inadvertence, surprise or excusable neglect.” He argues that the trial court erred in its application of the provisions of R.C. 2953.21 and Civ.R. 56. However, an error by the trial court in the application of the law is not the sort of “mistake” that entitles one to relief under Civ.R. 60(B)(1). See, e.g., *Dahl v. Kelling* (1986), 34 Ohio App.3d 258, 518 N.E.2d 582.

The rule is intended to address the mistake or inadvertence of parties or their agents. *Blatt v. Meridia Health Sys.*, 8th Dist. No. 89074, 2008-Ohio-1818, ¶10, citing *Hankinson v. Hankinson*, 7th Dist. No. 03MA7, 2004-Ohio-2480. Parker's remedy for the trial court's alleged error was to appeal the trial court's May 28, 2009 final order denying his petition for postconviction relief. App.R. 4(A). A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal, even when the Civ.R. 60(B) motion is filed within the period for a timely appeal. *Blatt v. Meridia Health Sys.* at ¶11.

However, even if Parker had timely appealed the claimed error, he cannot demonstrate the requisite prejudice for reversal.

{¶ 12} Parker argues that, given time, he would have responded to the state's motion with two affidavits — one from Peter Wairegi, an agent of the property manager for the warehouse, and one from co-defendant Robert Moore III — both attesting to the fact that the trucking company co-owned and operated by Parker and Moore out of the subject warehouse went out of business in April 2008, after which all rent payments for the warehouse were made solely by Moore. Parker maintains that this is evidence, outside of the record, that supports his contention that he was not involved in illegal activity at the warehouse and that his defense counsel was ineffective for not providing this evidence at trial. As noted earlier in this opinion, this same argument was raised and rejected in Parker's direct appeal. Because Parker is precluded from raising this claim in his postconviction petition, he cannot demonstrate prejudice from being denied an opportunity to provide additional evidence in support of it.

{¶ 13} For the reasons stated above, we find that the trial court did not err by denying Parker's Civ.R. 60(B) motion for relief from judgment. The single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
SEAN C. GALLAGHER, J., CONCUR