

[Cite as *State v. Lenard*, 2011-Ohio-1571.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95317

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD LENARD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-463837 and CR-508101

BEFORE: Kilbane, A.J., Stewart, J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: March 31, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Richard Lenard, appeals from the denial of his petitions for postconviction relief and the denial of his motion to vacate his guilty plea in connection with his conviction for tampering with records and other charges. For the reasons set forth below, we affirm.

{¶ 2} On April 5, 2005, the state of Ohio filed a 38-count indictment against the defendant and three codefendants in CR-463837. Lenard was charged with one count of receiving stolen property, nine counts of forgery, eleven counts of tampering with records, five counts of telecommunications fraud, two counts of uttering, two counts of theft, two counts of money laundering, three counts of falsification, two counts of insurance fraud, and one count of grand theft of a motor vehicle, all in connection with an alleged scheme to defraud the estate of Regina Thomas.

{¶ 3} The record further indicates that on July 25, 2005, Lenard was indicted for several offenses in an unrelated matter in CR-468589.

{¶ 4} On August 23, 2005, Lenard's trial counsel demanded discovery from the State, including "[a]ny * * * papers, documents, * * * available to or within the possession, custody or control of the State and which are material to the preparation of the defense * * *."

{¶ 5} On November 29, 2005, Lenard's trial counsel filed a motion for return and inspection of property, to which he attached the search warrant inventory list.

{¶ 6} On December 7, 2005, in CR-463837, Lenard entered into a plea agreement with the State whereby he would plead guilty to receiving stolen property, two counts of tampering with records, one count of telecommunications fraud, one count of forgery, one count of theft, and one count of grand theft of a motor vehicle, and the remaining charges would be dismissed. Lenard also agreed to forfeit various guns and ammunition. On the same day, in CR-468589, he entered guilty pleas to one count of attempted aggravated theft and tampering with records.

{¶ 7} On March 16, 2006, Lenard appeared before the trial court for sentencing. In CR-463837, he was sentenced to an aggregate term of four years in prison. In CR-468589, he was sentenced to a total of 11 months. Lenard's sentences in each case were ordered to run consecutive to one another, for a total of 4 years and 11 months of imprisonment. See *State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-81 ("*Lenard I*").

{¶ 8} On February 9, 2007, Lenard filed a motion for judicial release. The trial court granted his motion following a hearing on March 20, 2007, and placed him on community control sanctions.

{¶ 9} The record states that on March 21, 2008, Lenard was charged in CR-508101 with kidnapping, violation of a temporary protection order, domestic violence, and disruption

of public service in connection with an alleged attack on his wife. On July 1, 2008, he pled guilty to violating the temporary protection order and to a misdemeanor charge of domestic violence. He was sentenced to six months of incarceration, which was to run consecutively to the terms imposed in CR-463837 and CR-468589, plus one year of community control sanctions.

{¶ 10} The record further states that on January 14, 2009, Lenard was arrested and indicted for theft in CR-520755. Thereafter, on May 19, 2009, the trial court conducted a hearing and found Lenard in violation of his community control sanctions in CR-463837 and CR-468589, and sentenced him to serve the time remaining. *Lenard I.* Lenard filed a timely appeal, but on January 25, 2010, this court affirmed the trial court's judgment that terminated Lenard's community control sanction and returned him to prison in order to serve the balance of his sentence of incarceration. *Lenard I.*

{¶ 11} On December 11, 2009, Lenard filed a motion for relief from judgment in CR-463837, in which he claimed that his January 2009 arrest and confinement were illegal, lacked due process, were the result of racial profiling, and violated his rights under the Fourth Amendment to the Constitution. On January 5, 2010, the trial court converted this motion into a petition for postconviction relief and denied the motion.

{¶ 12} On March 8, 2010, Lenard filed an action in mandamus, in which he complained that he was not provided pretrial discovery in CR-463837, including the affidavit

in support of the search warrant. He requested an order compelling the trial judge to provide him with all of the pretrial discovery, including the search warrant and affidavit. See *State v. Lenard*, Cuyahoga App. No. 94782, 2010-Ohio-2488 (“*Lenard II*”).

{¶ 13} On March 22, 2010, while the mandamus action was pending, Lenard filed a motion for relief from judgment in which he complained that the search warrant executed in this matter was not given to him at the time of the search or left at his residence in violation of Crim.R. 41, he was not provided with a copy of the warrant during discovery, and his trial counsel failed to obtain the warrant or investigate its sufficiency or issues of staleness of the warrant. He also insisted that the affidavit was defective and did not establish probable cause to search and, therefore, the search was not justified by the good faith exception. Specifically, he complained that the affidavit was signed on January 6, 2004, but the warrant was signed by the magistrate on January 6, 2005. Thereafter, on April 13, 2010, while the first petition was pending, Lenard filed a second petition for postconviction relief, which reiterated his previous claims. In addition, he averred in relevant part as follows:

“12. I was unavoidably prevented from discovering the facts of the search warrant and affidavit until after my conviction [due to the state’s repeated failures to provide the search warrant.]

13. The search warrant in this case is stale because (a) it was filed more than 365 days after the crime it was based on; (b) it did not state ‘[an] ongoing investigation of 135 Chestnut Lane Apt. J 326; (c) the affiant did not have personal knowledge that the item to be sought in the search warrant would be in the apartment and there was no confidential informant to give detailed information * * *; (d) the search warrant

affidavit to obtain the search warrant was signed in 2004 and the search warrant to do the search was signed in 2005.”

{¶ 14} Also on March 22, 2010, Lenard filed an application to reopen his direct appeal from the termination of judicial release. In two of his proposed assignments of error, he argued that his trial counsel was ineffective for failing to challenge the validity of a search warrant and the search of his home.

{¶ 15} On May 14, 2010, this court denied the application for reopening. See *State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-2220 (“*Lenard III*”). This court stated in relevant part:

“Any challenge to the search warrant or the search of Lenard’s home, however, could not be addressed through the appeal that was prosecuted in *State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-81 [*Lenard I*]. The trial court judgment, which formed the basis of the appeal in *State v. Lenard*, supra, involved the termination of Lenard’s community control sanction and the resulting sentence of incarceration. Lenard is attempting to raise proposed assignments of error that are directly related to his plea of guilty of December 7, 2005, and the resulting sentences of March 16, 2006. No timely appeal was filed by Lenard, from his plea of guilty and sentences, and he cannot now ‘bootstrap’ arguments to seek review of errors from which a timely appeal has not been taken.” *Lenard III*.

{¶ 16} On May 27, 2010, the trial court denied Lenard’s motion for relief from judgment in an entry that provided:

“Defendant’s motion for relief from judgment pursuant to Crim.R. 57(B) and Civ.R. 60(B) shall be treated as a ‘petition for post-conviction’ and defendant’s petition is barred by res judicata and his direct appeal has been denied and the trial court affirmed.”

{¶ 17} Thereafter, on June 2, 2010, this court ruled that Lenard failed to demonstrate that he has a clear legal right to relief in mandamus. This court stated:

“Lenard did not appeal his original plea and conviction. We acknowledge that Lenard pled guilty. ‘When a defendant enters a plea of guilty as part of a plea bargain, the defendant waives all appealable errors which may have occurred at trial, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658; *State v. Bobo* (Nov. 1, 2001), Cuyahoga App. No. 77793, at 3. Nevertheless, Lenard did have the right to appeal and challenge the propriety of his plea. Of course, if Lenard had not elected to plead guilty, he could have challenged the discovery ruling directly on appeal.” *Lenard II*.

{¶ 18} The record further states that on June 8, 2010, Lenard filed a motion to withdraw his guilty plea and asserted that his plea was not knowingly and voluntarily made. In support of this motion, Lenard asserted that he did not understand the nature of the charges against him, did not understand the effect of his guilty plea, and was “not advised of the defects in the search warrant affidavit.” Appended to this motion were letters from his trial attorneys, which indicated that they did not have copies of the affidavit in support of the search warrant executed in this matter, and this court’s opinion denying the motion to reopen the direct appeal. The trial court denied this motion on June 16, 2010.

{¶ 19} Lenard filed a notice of appeal from the denial of his petition for postconviction relief, and following his amendment to his notice of appeal, he also challenges the trial court’s denial of the motion to withdraw his guilty plea. He assigns four interrelated errors for our review.

{¶ 20} Lenard's assignments of error state:

- “1. The appellant suffered ineffective assistance of trial counsel when attorney David L. Grant failed to obtain, review, and investigate the search warrant affidavit and arrest warrant for sufficiency of law. This is plain and reversible error by defense counsel.**
- 2. The state violated prosecutorial duties and committed prosecutorial misconduct when it failed to provide evidence favorable to appellant (the search warrant affidavit) to induce his plea of guilty. This is a violation of the prosecution of Criminal Rule 16(F). Through this manifest injustice the appellant did not make his plea of guilty knowingly and voluntarily.**
- 3. There are elements to the search warrant affidavit that make the search and seizure of the appellant's home unconstitutional according to R.C. 2933.23 and United States Constitution Amendment 4. The \$99,000 seized must be returned as unconstitutionally obtained evidence.**
- 4. Due to the many violations suffered by the appellant from his trial attorney and the prosecution, he has completed 20 months of a 4 year sentence in case no. CR-463837. Case no. [CR-]508101 was ran consecutive to 463837 for 6 months. The appellant's incarceration time served should be credited towards the 6 month sentence in 508101.”**

1. Motion to Vacate Guilty Pleas

{¶ 21} Crim.R. 32.1 provides that “to correct manifest injustice[,] the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 22} “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in

support of the motion are matters to be resolved by that court.” *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. Thus, one who seeks to withdraw a plea after sentencing must establish the existence of manifest injustice. See *Smith* at paragraph one of the syllabus.

{¶ 23} This court has consistently recognized that the doctrine of res judicata bars all claims raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding, including a direct appeal. *State v. Fountain*, Cuyahoga App. Nos. 92772 and 92874, 2010-Ohio-1202; *State v. McGee*, Cuyahoga App. No. 91638, 2009-Ohio-3374; *State v. Pickens*, Cuyahoga App. No. 91924, 2009-Ohio-1791; *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825.

{¶ 24} Although Lenard insists that he was unavoidably prevented from challenging the claimed defects in the search warrant because he did not obtain a copy of the warrant until March 2, 2010, we note that an “undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, quoting *Smith* at paragraph three of the syllabus.

{¶ 25} Lenard complains that the affidavit is so defective as to preclude a probable cause determination and prevent the officers’ good faith reliance upon it, because the affidavit

was signed on “January 6, 2004,” but the warrant was signed by the magistrate on January 6, 2005. Clearly, however, the 2004 date is in error because the affidavit sets forth matters that occurred in 2005.

{¶ 26} The record clearly indicates that counsel demanded discovery in this matter and that he was in possession of the inventory for the search warrant in December 2005. Although counsel later told Lenard that he did not have the warrant, this does not establish that counsel failed to review the warrant at any time or that he failed to examine its sufficiency. There is no evidence of a reasonable probability that, but for trial counsel’s errors, Lenard would not have pled guilty. Moreover, upon our review, we find nothing in the record that demonstrates a manifest injustice occurred in this matter. Accord *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045 (where defendant’s trial attorney did not file a motion to suppress, and defendant waited four years to file motion to vacate guilty plea, but claimed that he only discovered the basis for the motion a few months earlier, the trial court could reasonably conclude that appellant did not demonstrate a reasonable likelihood that withdrawal of the plea was necessary to correct a manifest injustice).

{¶ 27} In accordance with the foregoing, the trial court did not err in denying the motion to vacate the guilty plea. The first, second, and third assignments of error are without merit.

2. Postconviction Relief

{¶ 28} R.C. 2953.21(A)(2) mandates that petitions for postconviction relief must be filed within 180 days after the transcript is “filed in the court of appeals in the direct appeal of the judgment.” On its face, therefore, Lenard’s petition was not timely filed with the trial court.

{¶ 29} As to whether the delay is excused, we must next consider whether he has met the criteria set forth in R.C. 2953.23(A), which states:

“[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 division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either 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, or, 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.

(b) 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} Unless the above exceptions apply, the trial court has no jurisdiction to consider an untimely petition for postconviction relief. *State v. Wheatt* (Oct. 26, 2000), Cuyahoga App. No. 77292.

{¶ 31} These criteria are not met herein. Although Lenard complains that it was not until March 2, 2010, that he was able to obtain the search warrant in this matter, there is no evidence that Lenard attempted to obtain this information until late in 2009, and he provides no evidence that the delay was unavoidable.

{¶ 32} Further, the Ohio Supreme Court has repeatedly held that the doctrine of res judicata bars the filing of successive petitions if the claim could have been raised in the earlier petition. See, e.g., *State ex rel. Johnson v. Ohio Dept. of Rehab. & Corr.*, 95 Ohio St.3d 70, 2002-Ohio-1629, 765 N.E.2d 356. In this matter, the record indicates that Lenard filed a petition for postconviction relief in CR-463837 and CR-508101 on December 11, 2009. The March 22, 2010 petition is therefore a successive petition. Although the claims of the first petition raise different issues than the March 22, 2010 petition, again we note that there has been no showing that Lenard was unavoidably prevented from raising the additional claims, only that he did not do so until November 2009.

{¶ 33} Similarly, 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. Szeftcyk* (1996), 77 Ohio St.3d 93, 671 N.E.2d 233, syllabus, approving and following *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Herein, Lenard's claims regarding the search warrant affidavit, the search, his trial counsel's performance, and discovery issues could have been raised in the direct appeal. These claims are therefore barred by res judicata.

{¶ 34} The trial court properly denied the petition for postconviction relief.

{¶ 35} The assignments of error are without merit and are overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
EILEEN A. GALLAGHER, J., CONCUR