

[Cite as *State v. Farraj*, 2015-Ohio-1298.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101592

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**SAMI FARRAJ**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-07-499710-A

**BEFORE:** Stewart, J., Keough, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** April 2, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant, Sami Farraj, appeals the denial of his petition to set aside, or vacate his judgment of conviction pursuant to R.C. 2953.21, the postconviction relief statute. Finding no merit to the appeal, we affirm the decision of the trial court.

{¶2} On August 10, 2007, the Cuyahoga County Grand Jury issued an indictment charging Farraj with numerous sex crimes and theft offenses. As a result of plea negotiations, on May 20, 2008, Farraj pleaded guilty to amended counts of sexual battery, abduction, gross sexual imposition, burglary, and theft. The plea agreement included the promise of a 10-year prison term; however, at sentencing, the judge also included an additional 19-year prison term, if Farraj was not deported from the United States upon his release. Farraj directly appealed his sentence, arguing that his plea was not knowing and voluntary because he was induced to plea by the promise of receiving only a 10-year prison term. Agreeing that the plea was not knowing and voluntary, this court reversed the conviction and remanded the case to the trial court. *See State v. Farraj*, 8th Dist. Cuyahoga No. 91771, 2009-Ohio-1896, ¶ 10.

{¶3} At the second plea hearing, the prosecutor outlined the terms of the plea agreement for the court. The prosecutor explained that Farraj would again plead guilty to sexual battery, abduction, gross sexual imposition, burglary, and theft, in exchange for a 10-year prison term. The prosecutor never stated that Farraj agreed to waive his right to appeal the conviction, however, inexplicably, during the plea colloquy, the court asked

Farraj if he understood that he was waiving his appellate rights. Farraj stated that he did understand this, and then proceeded to plead guilty to the charges. At sentencing, on December 10, 2009, the court imposed a 10-year prison term without the additional 19-year provisional prison time. Farraj did not file a direct appeal from the judgment.

{¶4} On March 25, 2013, Farraj filed a pro se petition to vacate, or set aside, the judgment of conviction pursuant to R.C. 2953.21, on the basis that his plea was not knowing and intelligent due to ineffective assistance of counsel. The state filed a motion for summary judgment on the petition, that the trial court granted. On August 13, 2013, Farraj filed a motion for leave to file a delayed appeal from the judgment. This court denied that motion. Then, on February 12, 2014, Farraj filed a second petition for postconviction relief under R.C. 2953.21, arguing that the trial court violated his due process rights by not informing him of his right to appeal at sentencing, and telling him that he had waived his right to appeal as part of his plea agreement. On May 28, 2014, the court granted the state's motion for summary judgment on the second petition. It is from this order that Farraj now appeals.

{¶5} Appellate courts review a trial court's decision on a petition for postconviction relief for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-667, 860 N.E.2d 77, ¶ 49. Thus, "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." *Id.* at ¶ 58. Further, appellate courts review a trial court's decision to deny a postconviction petition without a hearing under an abuse of discretion standard. *State v.*

*Campbell*, 10th Dist. Franklin No. 03AP-147, 2003-Ohio-6305, ¶ 14. “An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶6} When the claims raised in a petition for postconviction relief are barred by the doctrine of res judicata, a trial court does not abuse its discretion in denying the petition without a hearing. *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, 671 N.E.2d 233, syllabus, approving and following, *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. The doctrine of res judicata prevents a defendant from raising an issue in a motion for postconviction relief if he already raised the issue on direct appeal or could have raised the issue on direct appeal. *State v. Duling*, 21 Ohio St.2d 13, 254 N.E.2d 670 (1970).

{¶7} Here, the court did not abuse its discretion in denying the petition without a hearing because the issue contained in the petition was barred by the doctrine of res judicata and because the petition was untimely. Even assuming that Farraj did not in fact waive his appellate rights as a consequence of entering into the plea deal, Farraj was aware of the trial court’s error in stating that he had waived his appellate rights at the moment of sentencing and should have filed a direct appeal asserting the error.

{¶8} This was the second time Farraj pled guilty to the charges. After the first plea hearing and sentencing, Farraj directly appealed his convictions on the basis that he was given more prison time than he had originally agreed to in the plea deal. Presumably, Farraj knew, at the time of his second plea, what appellate rights are and how they

function. Thus, he should have said “no” when the judge asked him at the second plea if he was aware that he was waiving his rights as a result of the plea. But, Farraj did not say no to this question, or answer in the negative in any fashion; rather, he said that he understood he was waiving his rights. If Farraj had not agreed to the waiver of his appellate rights, he would have known this immediately and could have told the court as much, or he could have directly appealed the alleged error. Because the defendant did not raise the issue on direct appeal, he is barred from doing so now in a petition for postconviction relief.

{¶9} Furthermore, prior to filing the instant petition on February 12, 2014, Farraj had already filed one other petition for postconviction relief on March 25, 2013. The only issue raised in the first petition was ineffective assistance of counsel based on claims that trial counsel failed to investigate critical witnesses, failed to file a motion to suppress evidence, and failed to keep the defendant abreast of potentially exculpatory evidence. R.C. 2953.23 makes it clear that a trial court cannot review a second petition for post conviction relief unless the petitioner initially demonstrates either (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief at the time he filed his first petition, or (2) that after he filed his first petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation.<sup>1</sup> R.C. 2953.23(A)(1)(a). Farraj’s current petition does not

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<sup>1</sup> If the petitioner demonstrates either one of the requirements of R.C. 2953.23(A)(1)(a), then the petitioner must also demonstrate that, but for the constitutional error at trial, no reasonable finder of fact would have found him guilty. R.C.

adequately explain, in accordance with R.C. 2953.23(A)(1)(a), why he was unavoidably delayed from asserting this issue in his first petition for postconviction relief, or that a new federal or state right applies retroactively to him that would grant him relief. Therefore, we also find that this petition is untimely filed.

{¶10} For these reasons, we hold that the court did not abuse its discretion in denying Farraj's petition without a hearing.

{¶11} Judgment affirmed.

It is ordered that appellee recover of appellant 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 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.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and  
EILEEN A. GALLAGHER, J., CONCUR

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2953.23(A)(1)(b). Because Farraj cannot meet either of the requirements under R.C. 2953.23(A)(1)(a), we will not analyze whether he can meet the second step under (A)(1)(b).