[Cite as *State v. Moon*, 2015-Ohio-1550.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101972

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL E. MOON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-09-522061-A

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

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ATTORNEYS FOR APPELLANT

Sarah H. Schregardus
Barry W. Wilford
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Avenue
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Michael Moon appeals the trial court's denial of his postconviction petition to vacate and set aside his sentences and his motion to withdraw his guilty pleas to more than 50 counts of pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance and possession of criminal tools based on his claim that he was denied effective assistance of trial counsel. Moon contends that he was denied effective assistance of counsel due to his trial counsel's failure to obtain, review and challenge the validity of a search warrant that gave rise to a number of the offenses with which he was charged, prior to the entry of his guilty pleas. We find that the trial court lacked jurisdiction to consider, and, therefore, properly denied, Moon's motion to withdraw his guilty pleas. However, for the reasons that follow — in particular the absence of any evidence in the record demonstrating that the search warrant was, in fact, issued — we conclude that the trial court abused its discretion in denying Moon's postconviction petition without a hearing. We remand the case for the trial court to conduct a hearing to investigate the circumstances surrounding the alleged search warrant and to determine whether Moon is entitled to the relief he seeks on his postconviction petition.

Factual and Procedural Background

{¶2} On July 29, 2008, Moon was at Cleveland Hopkins International Airport traveling for a business trip. When his checked bags were sent through security

screening, baggage scanners discovered 50 images of child pornography concealed in several envelopes in his luggage. Because the luggage scanner could not penetrate the envelopes, a hand search was conducted, revealing the images. Moon was identified as the owner of the luggage and arrested.

{¶3} On August 6, 2008, Cleveland police obtained a warrant to search the remainder of Moon's luggage and a laptop that were seized at the airport. The search revealed nothing other than those images. On August 8, 2008, a warrant was purportedly obtained from the Medina County Court of Common Pleas to search Moon's home in Medina, Ohio for further evidence that Moon had engaged in criminal activity related to child pornography (the "August 8, 2008 search warrant"). As a result of that search, police officers recovered seven computer disks that were later discovered to contain images of child pornography. A third search warrant, to search the property that had been seized from the house during the August 8, 2008 search, including various electronic devices, computer peripherals, cell phones, floppy discs, CDs and DVDs, was issued on August 15, 2008.

{¶4} On March 18, 2009, the Cuyahoga County Grand Jury indicted Moon on 101 counts — four counts of pandering sexually-oriented matter involving a minor, 42 counts of illegal use of a minor in nudity-oriented material or performance, 53 counts of pandering sexually oriented matter involving a minor and two counts of possession of criminal tools. The offenses arose from Moon's possession of over 500 images of child pornography. *State v. Moon,* 8th Dist. Cuyahoga No. 93673, 2010-Ohio-4483, ¶ 3.

Forty-seven of the counts (Counts 1-46 and 100)[1] related to the images and other evidence discovered during the search of Moon's checked baggage at the airport; the remaining counts (Counts 47-101) related to images discovered and materials seized as a result of the August 8, 2008 search of Moon's home.

{¶5} On June 8, 2009, Moon pled guilty to four counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.22(A)(2) (Counts 1-4), 46 counts of illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(1) (Counts 5-40 and 47-56) and two counts of possession of criminal tools in violation of R.C. 2923.24 (Counts 100-101). Forty-one of the counts to which Moon pled guilty (Counts 1-40 and 100) related to the images and other evidence discovered during the search of Moon's checked baggage at the airport; the remaining counts (Counts 47-56 and 100-101) related to the images discovered and materials seized during the search of Moon's home. In exchange for his guilty pleas, the remaining counts were nolled.

{¶6} Although Moon and his counsel were aware that search warrants had allegedly been obtained for the search of Moon's luggage, laptop and home, Moon's trial counsel did not request or obtain copies of the search warrants or otherwise review the search warrants before Moon entered his guilty pleas. The prosecutor purportedly stated

[1]Count 100 related both to evidence seized during the search of Moon's luggage and evidence seized during the search of Moon's home.

at the plea hearing that he "did not provide a copy of the search warrant * * * because it was filed under seal" and "no request was ever made to unseal that warrant."

{¶7} On July 8, 2009, the trial court sentenced Moon to a prison term of (1) six years each on Counts 1-4, to run concurrently with each other, (2) six years each on Counts 5-40, to run concurrently with each other, (3) six years each on Counts 47-56, to run concurrently with each other and (4) one year each on Counts 100 and 101. The sentences on Count 1 (six years), Count 5 (six years), Count 47 (six years), Count 100 (one year) and Count 101 (one year) were to run consecutively, for an aggregate prison sentence of 20 years. The trial court also imposed a five-year mandatory period of postrelease control on counts 1, 5 and 47, a three-year period of discretionary postrelease control on counts 100 and 101[2] and classified Moon as a Tier II sex offender/child victim offender subject to the requirements of that classification for 25 years.

{¶8} Moon appealed his convictions and sentences, retaining new counsel to represent him in his appeal. Among the issues Moon raised in his appeal was that trial counsel was ineffective for failing to request that the search warrant relating to the search of Moon's home be unsealed prior to advising Moon to enter his guilty pleas. *Moon*, 2010-Ohio-4483 at ¶ 6. Moon argued that by not requesting and reviewing the sealed search warrant, trial counsel was deprived of the possibility of arguing that the search warrant was defective and that, if the search warrant had been found to be defective, the

[2]The three-year discretionary postrelease control on counts 100 and 101 was imposed in May 2011 after remand from Moon's direct appeal of his convictions and sentences.

offenses linked to the images found on the computer disks seized during the search of Moon's home would have been eliminated. *Id.* at ¶ 8. This court rejected Moon's argument as "pure speculation," reasoning that the search warrant could have just as likely been valid and that "because we obviously do not know what is contained in the search warrant," there was no evidence that the unsealing of the warrant would have changed the result of the proceedings. *Id.* at ¶ 9. On September 23, 2010, this court affirmed Moon's convictions but remanded the case to the trial court for a hearing pursuant to R.C. 2929.191 on the criminal possession counts (Counts 100 and 101). *Id.* at ¶ 34. Moon's other sentences were affirmed. *Id*. The Ohio Supreme Court declined jurisdiction. *State v. Moon,* 128 Ohio St.3d 1142, 2011-Ohio-848, 942 N.E.2d 384.

{¶9} After his direct appeal was unsuccessful, Moon hired new counsel to represent him. On October 13, 2011, Moon's counsel filed a motion to unseal the search warrants "for the limited purpose of providing a copy to [new] counsel." The state did not oppose the motion, and the trial court granted the unopposed motion on December 5, 2011.

{¶10} Nearly six months later, on May 18, 2012, Moon filed a motion with the trial court to have "the search warrant[s] issued in Mr. Moon's case be made a part of the official court record" under App.R. 9(E). The "search warrant[s]" Moon sought to have added to the record, which Moon attached to his motion, consisted of (1) the August 6, 2008 search warrant, (2) the August 8, 2008 affidavit for search warrant, (3) the August 15, 2008 search warrant and (4) the inventory lists itemizing the items recovered in

connection with the searches conducted on August 6 and 8, 2008. The August 8, 2008 search warrant itself was not among the documents Moon sought to have added to the record. The state opposed the motion, arguing that the issue was moot because there was no pending appeal and that this court had already ruled on the issues Moon had raised regarding the August 8, 2008 search warrant and whether trial counsel's failure to obtain, review and/or challenge that warrant constituted ineffective assistance of trial counsel. On May 29, 2012, the trial court denied the motion. Moon did not appeal that ruling.

{¶11} On May 31, 2012, Moon filed a petition for a writ of habeas corpus with the United States District Court for the Northern District of Ohio, asserting that he had been denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel advised him to plead guilty to various charges without examining the search warrant authorizing the search of his home or filing a motion to unseal the search warrant.[3] *Moon v. Robinson*, N.D.Ohio No. 1:12cv1396, 2013 U.S. Dist. LEXIS 108799, *7 (Aug. 2, 2013). The district court found that the performance of both trial and appellate counsel was deficient for their respective failures to (1) file a motion to unseal the search warrant, (2) investigate the existence of probable cause to support it and (3) provide the appellate court with an

[3]Moon also asserted that he was denied due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution because the trial court had failed to make "the findings required by law [under R.C. 2929.14] when it imposed consecutive sentences." *Moon v. Robinson,* N.D.Ohio No. 1:12cv1396, 2013 U.S. Dist. LEXIS 108798, *10 (Feb. 20, 2013). The district court held that this claim involved an issue of state law and therefore was not cognizable on federal habeas review. *Id.* at *23-25; *Moon*, 2013 U.S. Dist. LEXIS 108799 at *8.

opportunity to review the merits of Moon's claim of ineffective assistance of trial counsel. The district court held, however, that because the search warrant and warrant application were not part of the state court record, it could not consider the search warrant and, therefore, could not make a determination of whether Moon was prejudiced by the deficient performance of counsel. *Id.* at *14-19. The district court denied Moon's habeas petition without prejudice and held that "in the interests of equity," Moon would be permitted to return to state court to attempt to litigate his challenge to the validity of the search warrant "whether by an appeal of the trial court's denial of his motion to correct the record under Ohio App. R. 9(E), a motion to re-open his direct appeal under Ohio App. R. 26(B), or other appropriate post-conviction review proceedings," *id.* at *21, and could thereafter, if necessary, return to the district court within 30 days of exhausting his state remedies. *Id.* at *22.

{¶12} On August 30, 2013, Moon filed an application to reopen his appeal pursuant to App.R. 26(B). Moon argued that his prior appellate counsel was ineffective for (1) failing to obtain a copy of the sealed search warrant and moving to add it to the record in his direct appeal and (2) failing to argue that trial counsel was ineffective for failing to file a motion to suppress based on the allegedly invalid search warrant. *State v. Moon,* 8th Dist. Cuyahoga No. 93673, 2014-Ohio-108, ¶ 7. This court denied Moon's application to reopen the appeal, concluding that, assuming Moon had established good cause for the delayed filing of an App.R. 26(B) application, he had failed to demonstrate a genuine issue as to whether he was deprived of the effective assistance of appellate

counsel on appeal under App.R. 26(B). The court held that Moon could not establish a claim of ineffective assistance of appellate counsel by adding new materials to the appellate record that were not part of the trial court record and then arguing that counsel should have raised additional issues in Moon's direct appeal revealed by the newly added materials. *Id.* at ¶ 9-12. The court further noted that a postconviction proceeding, rather than a direct appeal, is the proper mechanism for asserting an ineffective assistance of trial counsel claim that is based on evidence dehors the record. *Id.* at ¶ 13. Once again, the Ohio Supreme Court declined jurisdiction. *State v. Moon*, 138 Ohio St.3d 1497, 2014-Ohio-2021, 8 N.E.3d 965. Moon's litigation of this issue continued.

{¶13} On February 20, 2014, Moon filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1 and a petition to vacate and set aside his sentences. He asserted the same grounds for both motions, arguing that he should be permitted to withdraw his pleas and that his sentences should be vacated because trial counsel rendered ineffective assistance by (1) failing to request and review the August 8, 2008 search warrant and (2) failing to move to suppress the evidence seized as a result of the search warrant prior to advising Moon to enter his guilty pleas. In support of each motion, Moon attached the prior decisions that had been issued by this court and the federal district court in the case, the August 6, 2008 search warrant, the August 8, 2008 affidavit for search warrant,[4] the

[4]Thus, as he did with his motion to add the search warrant to the record, Moon submitted only the affidavit in support of the August 8, 2008 search warrant (and not the warrant itself) in support of his petition to vacate and set aside his sentences and motion to withdraw his guilty pleas. The alleged August 8, 2008 search warrant is not in the record.

August 15, 2008 search warrant and the inventory lists itemizing the items recovered in connection with the searches conducted on August 6 and 8. The state opposed the motions, asserting that no manifest injustice existed that would warrant Moon's guilty pleas being vacated and that Moon's petition for postconviction relief was untimely. On September 8, 2014, the trial court summarily denied both motions.

{¶14} This appeal followed. In his appeal, Moon raises the following two assignments of error for review:

> Assignment of Error 1:
> The trial court abused its discretion when it denied Mr. Moon's postconviction petition in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.
>
> Assignment of Error 2:
> The trial court abused its discretion when it denied Mr. Moon's Motion to Withdraw his Guilty Plea in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Law and Analysis

The Missing Search Warrant

{¶15} As an initial matter, we note that only the "affidavit for search warrant" upon which the finding of probable cause for the issuance of the alleged August 8, 2008 search warrant was purportedly based (the "August 8, 2008 affidavit") is part of the record on appeal, not the warrant itself. Search warrants are issued pursuant to the authority in R.C. 2933.21 through 2933.25 and Crim.R. 41, and R.C. 2933.25 dictates the form to be used for a search warrant. Although both parties assert in their briefs that a Medina County Common Pleas Court judge found probable cause existed to search

Moon's home based on the August 8, 2008 affidavit included in the record and that a search warrant was issued by a Medina County Common Pleas Court judge authorizing the search of Moon's home on August 8, 2008 there is nothing in the record to support the claim that a warrant was, in fact, issued. As detailed above, each copy in the record of what purports to be the "search warrants" in this case consists only of (1) the August 6, 2008 search warrant, (2) the August 8, 2008 affidavit for search warrant, (3) the August 15, 2008 search warrant and (4) the inventory lists itemizing the items recovered in connection with the searches conducted on August 6 and 8, 2008. At no time, either in opposing Moon's motions below or in its appellate brief, has the state ever contended that what Moon has represented to be the "search warrants" in this case omitted the August 8, 2008 search warrant or was otherwise incomplete.[5] Accordingly, it is unclear, based on the record before us, whether the August 8, 2008 search warrant is absent from the record because (1) Moon's counsel failed to copy the August 8, 2008 search warrant along with the other documents related to the search warrants when he filed his motions with the trial court and never noticed the error; (2) the August 8, 2008 search warrant was not included in the materials received when the search warrants were unsealed and provided to Moon's counsel and no one ever noticed the error or (3) the August 8, 2008 search warrant was

[5]In its combined brief in opposition to Moon's motion to vacate his plea and opposition to petition for post conviction relief, the state asserts that the "warrant to search Moon's home * * * was attached to Moon's motion to vacate" and cites to the August 8, 2008 affidavit as the warrant. The August 8, 2008 affidavit is not, however, the search warrant.

never issued.[6] Without the alleged August 8, 2008 search warrant, we do not know what specific finding of probable cause, if any, was made by the Medina Common Pleas Court judge based on the affidavit and cannot state whether the search that was conducted conformed to the search purportedly authorized in the alleged warrant. Because Moon's assignments of error are premised on the prejudice he allegedly sustained as a result of his trial counsel's failure to obtain, review and litigate the validity of the alleged August 8, 2008 search warrant prior to the entry of his guilty pleas and there is nothing in the record that indicates that that search warrant was, in fact, issued, this omission is troubling.

Postconviction Petition

{¶16} In first assignment of error, Moon argues that the trial court abused its discretion in denying his postconviction petition to vacate and set aside his sentences without conducting a hearing. Moon argued in his postconviction petition that his convictions and sentence were void or voidable because he was denied his constitutional right to effective assistance of counsel. He asserted that, due to the ineffective assistance of counsel, his guilty pleas were not knowing, intelligent and voluntary and that were it not for his trial counsel's failure to obtain and review the alleged August 8, 2008 search warrant and to then file a motion to suppress the evidence seized pursuant to that search

[6]The copies of the search warrants submitted with Moon's application to reopen his appeal likewise did not include a copy of the August 8, 2008 search warrant. In an affidavit submitted in support of the application, Moon's counsel testified that the copies of the search warrants submitted with Moon's application to reopen his appeal were copies of what was provided to her by the Cuyahoga County Prosecutor's Office in response to her motion to unseal the search warrants.

warrant, he would not have entered his guilty pleas, i.e., that he "would not have entered guilty pleas to charges that were unsupported by admissible evidence."

{¶17} Moon contends that his petition, albeit untimely, satisfied an exception for untimely filing under R.C. 2953.23(A) and that he "pled sufficient operative facts," supported by the evidence dehors the record submitted with his petition (i.e., the affidavit in support of the August 8, 2008 search warrant) to require a hearing on whether trial counsel's failure to obtain, review and/or challenge the August 8, 2008 search warrant prior to the entry of Moon's guilty pleas supported the relief he requested.

{¶18} R.C. 2953.21 and 2953.23 govern petitions for postconviction relief. Under R.C. 2953.21(A), a person convicted of a criminal offense who claims that "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States" may file a petition in the court that imposed the sentence for the offense, "stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief." A postconviction proceeding is not an appeal of a criminal conviction; it is a collateral civil attack on the judgment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 48, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994); R.C. 2953.21(J). As such, a defendant's petition for postconviction relief is not a constitutional right; the only rights afforded to a defendant in a postconviction proceeding are those specifically granted by the legislature. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999).

{¶19} There are strict time limits for seeking postconviction relief under R.C. 2953.21. Under R.C. 2953.21(A)(2), a petition for postconviction relief must be filed no later than 180 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the conviction or, if no appeal is taken, no later than 180 days after the expiration of time for filing the appeal. Here, the trial transcript was filed in the court of appeals in Moon's direct appeal on September 2, 2009. He filed his postconviction petition in February 2014, more than four-and-a-half years later. Accordingly, there is no question that Moon's petition was untimely.

{¶20} If a defendant's petition is untimely under R.C. 2953.21(A)(2), then it must comport with R.C. 2953.23(A). Under R.C. 2953.23(A)(1), the trial court may not consider a delayed petition for postconviction relief unless the petitioner satisfies two requirements. First, the petitioner must demonstrate either that (1) he was unavoidably prevented from discovering the facts upon which he relies in the petition or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner. R.C. 2953.23(A)(1)(a). Second, the petitioner must establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. R.C. 2953.23(A)(1)(b); *State v. Thomas*, 8th Dist. Cuyahoga No. 99972, 2014-Ohio-1512, ¶ 6-7. R.C. 2953.23 provides in relevant part:

> (A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section * * * 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 * * *.

{¶21} The time limit for filing a motion for postconviction relief is jurisdictional. *State v. Johns*, 8th Dist. Cuyahoga No. 93226, 2010-Ohio-162, ¶ 8. Unless a defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider an untimely petition for postconviction relief. *Thomas*, 2014-Ohio-1512 at ¶ 8, citing *State v. Carter*, 2d Dist. Clark No. 03CA-11, 2003-Ohio-4838, ¶ 13, citing *State v. Beuke*, 130 Ohio App.3d 633, 720 N.E.2d 962 (1st Dist.1998).

{¶22} A petitioner is not automatically entitled to a hearing on a petition for postconviction relief. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). In addressing a petition for postconviction relief, a trial court assumes a "gatekeeping role" as to whether a defendant will receive a hearing. *Gondor*, 2006-Ohio-6679 at ¶ 51. A trial court is required to hold an evidentiary hearing only if the petitioner alleges sufficient operative facts that show substantive grounds for relief. *State v. Calhoun*, 86 Ohio St.3d 279, 282-83, 714 N.E.2d 905 (1999). A trial court may dismiss a petition for

postconviction relief without a hearing "'where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.'" *Gondor* at ¶ 51, quoting *Calhoun* at paragraph two of the syllabus; R.C. 2953.21(C) ("Before granting a hearing on a petition filed under [R.C. 2395.21(A)], the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript."); *see also State v. Pheils*, 6th Dist. Wood No. WD-13-050, 2014-Ohio-1454, ¶ 18 ("Before a hearing is granted on a petition claiming ineffective assistance of trial counsel, the petitioner bears the initial burden to submit evidentiary material which contains sufficient operative facts to demonstrate a substantial violation of defense counsel's essential duties to his client and that this ineffectiveness operated to the client's prejudice."), citing *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus; *see also State v. Shepherd*, 8th Dist. Cuyahoga No. 100660, 2014-Ohio-1736, ¶ 8 ("a trial court is not required to hold a hearing on a petition for postconviction relief if the record and the petition fail to show that the defendant is entitled to relief"), citing *Calhoun* at paragraph two of the syllabus.

{¶23} A trial court need not conduct an evidentiary hearing when it dismisses an untimely postconviction relief petition.[7] *See, e.g., State v. Piasecki*, 8th Dist. Cuyahoga No. 98952, 2013-Ohio-1191, ¶ 21 (where the trial court lacked jurisdiction to hear petition under R.C. 2953.23(A)(1), trial court did not err in failing to conduct a hearing).

{¶24} A trial court's decision to deny a postconviction petition without a hearing is reviewed for abuse of discretion. *State v. Broom*, 8th Dist. Cuyahoga No. 96747, 2012-Ohio-587, ¶ 13, citing *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15. An "abuse of discretion" requires more than an error of law or of judgment; it "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶25} Moon does not claim that a new federal or state right has been recognized that applies retroactively to his situation. Rather, he contends that he was "unavoidably prevented" from discovering that the August 8, 2008 search warrant was defective because he received ineffective assistance of counsel, first from his trial counsel and then from his first appellate counsel, both of whom failed to obtain or review the August 8, 2008 search warrant. "Unavoidably prevented" means that the defendant "'was unaware

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[7] Likewise, a trial court need not issue findings of fact and conclusions of law when it dismisses an untimely postconviction relief petition. *See, e.g., State v. Dilley*, 8th Dist. Cuyahoga No. 99680, 2013-Ohio-4480, ¶ 9. This rule applies even where, as here, the defendant claims, under R.C. 2953.23, that he was unavoidably prevented from discovery of the facts necessary to present his claim for postconviction relief. *State v. Chapman*, 8th Dist. Cuyahoga No. 99960, 2014-Ohio-1059, ¶ 19. No findings of fact or conclusions of law were issued in this case.

of those facts and was unable to learn of them through reasonable diligence.'" *State v. Stone*, 2d Dist. Clark No. 2011 CA 96, 2012-Ohio-4755, ¶ 17, quoting *State v. Rainey*, 2d Dist. Montgomery No. 23851, 2010-Ohio-5162, ¶ 13. Moon contends that it was not until he engaged new counsel, i.e., his third counsel in October 2011, that he was able to "discover the facts of the unsealed search warrant," i.e., that the search warrant was "defective." R.C. 2953.23(A)(1)(a). He further contends that the "defective search warrant" coupled with the fact that it was never reviewed by trial counsel prior to advising Moon to enter his guilty pleas[8] establishes by clear and convincing evidence that, but for the ineffective assistance provided by his trial counsel, Moon would not have entered his guilty pleas and would not have been convicted of the offenses at issue. R.C. 2953.23(A)(1)(b).

Ineffective Assistance of Counsel

{¶26} In a petition for postconviction relief based on a claim of ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate: (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) that counsel's deficient performance prejudiced him, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v. Moore*, 2d Dist. Clark No. 2014-CA-66,

[8] There is nothing in the record regarding what advice trial counsel allegedly gave Moon with respect to Moon's entry of his guilty pleas.

2015-Ohio-550, ¶ 13, citing *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983); *see also Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶27} A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Where a defendant has entered a guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *Williams* at ¶ 11, citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The prejudice inquiry in the context of a guilty plea requires a "nuanced analysis of all of the factors surrounding the plea decision," including the benefits associated with a plea, the possible punishments involved, the weight of the evidence against the defendant and any other special circumstances that might support or rebut a defendant's claim that he would have taken his chances at trial. *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-600, ¶ 16.

{¶28} Where counsel's failure to litigate a Fourth Amendment claim is the basis for a claim of ineffective assistance of counsel, the defendant must prove that his Fourth Amendment claim is meritorious and there is a reasonable probability the outcome would have been different absent the excludable evidence. Failure to file a motion to suppress does not constitute per se ineffective assistance of counsel. *See, e.g., State v. Suarez*, 12th Dist. Warren CA2014-02-035, 2015-Ohio-64, ¶ 13, Rather, the failure to file a motion to suppress constitutes ineffective assistance of counsel only when the record demonstrates that the motion would have been successful if made. *See, e.g., id.*; *State v. Finch*, 5th Dist. Licking No. 11-CA-114, 2012-Ohio-4727, ¶ 28 ("Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted."); *State v. Griffin*, 10th Dist. Franklin No. 12AP-798, 2013-Ohio-5389, ¶ 18 ("In order to establish ineffective assistance of counsel based upon failure to file a motion to suppress, a defendant 'must prove that there was a basis to suppress the evidence in question.'"), quoting *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35; *State v. Gibson*, 69 Ohio App.2d 91, 95, 430 N.E.2d 954 (8th Dist.1980) ("Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion"). "Even if some evidence in the record supports a motion to suppress, counsel is still considered effective

if counsel could reasonably have decided that filing a motion to suppress would have been a futile act." *Suarez* at ¶ 13.

{¶29} Moon contends that had his trial counsel obtained and reviewed the August 8, 2008 search warrant, he would have discovered that the alleged warrant was issued without probable cause, or, at the very least, that there was "a Fourth Amendment issue that needed to be litigated" relating to the alleged search warrant. Moon further contends that if he had been aware that the evidence that formed the basis for Counts 47-101 of the indictment was "tainted by the improper search and therefore excludable," he would not have entered his guilty pleas.

{¶30} The documents submitted by Moon and that have been represented by the parties to constitute the "search warrants" in this case on their face show a deficiency with the August 8, 2008 search warrant that is not explained anywhere in the record: there is no August 8, 2008 search warrant. It is undisputed that Moon's trial counsel did not request or review the search warrants in the case prior to Moon's entry of his guilty pleas, that Moon's first appellate counsel did not request or review the search warrants at any time and that it was not until Moon engaged new counsel in October 2011 and his motion to unseal the search warrants was granted in December 2011 — long after the 180-day deadline set forth in R.C. 2953.21(A)(2) had expired — that Moon first had an opportunity to discover the facts upon which he now relies for his claim for relief. The state has not claimed that Moon had a means of accessing the search warrants (or identifying any deficiencies with the August 8, 2008 search warrant) other than by

Moon's counsel filing a motion to unseal them. Further, it does not appear that any of Moon's counsel (or anyone else) has ever questioned why the "search warrants" purportedly issued in this case include only the August 6, 2008 search warrant, the August 15, 2008 search warrant, and the August 8, 2008 affidavit and not the search warrant allegedly issued based on the August 8, 2008 affidavit.

{¶31} Trial counsel has a duty to conduct a reasonable investigation to determine possible defenses or to make a reasonable decision that a particular investigation is unnecessary. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674. There is no evidence in the record that trial counsel conducted such an investigation as it relates to the warrant to search Moon's home or otherwise made a reasonable decision that an investigation into the validity of the search warrant was unnecessary. No explanation has been offered as to why trial counsel failed to move to unseal the search warrants and to examine the warrants and the supporting affidavits prior to the entry of Moon's guilty pleas. Thus, Moon has alleged sufficient facts that, if proven true, could support a finding that his trial counsel's failure to file a motion to unseal the search warrants and to examine the search warrants for potential defects prior to Moon's entry of his guilty pleas constituted deficient performance of trial counsel.

{¶32} With respect to whether Moon was prejudiced as a result of his trial counsel's deficient performance, Moon has likewise alleged facts that, if proven true, could establish a basis to suppress the evidence at issue. Eleven of the counts to which Moon entered guilty pleas were based exclusively on evidence seized during the August

8, 2008 search of Moon's home. If, in fact, no warrant was issued for the search of Moon's home, a motion to suppress the evidence seized from the home and/or a motion to dismiss the counts of the indictment based on that evidence, may very well have been successful. *See, e.g., State v. Carpenter*, 12th Dist. Butler No. CA2005-11-494, 2007-Ohio-5790 (where search warrant was not signed by judge prior to search, it was void ab initio and any evidence seized pursuant to the warrant had to be suppressed; defense counsel provided ineffective assistance by failing to challenge a warrant on that basis and defendant was prejudiced as to those offenses that relied on the evidence seized), citing *State v. Williams*, 57 Ohio St.3d 24, 26, 565 N.E.2d 563 (1991) ("[A] search warrant is void ab initio if not signed by a judge prior to the search. Evidence seized pursuant to such an invalid warrant must be suppressed.").

Under such circumstances, it could be reasonably expected that Moon would not have pled guilty to those counts. Thus, the operative facts set forth in Moon's petition and related evidentiary materials, if proven true, could establish that (1) Moon, as a result of the sealing of the warrants and the failures of his trial and appellate counsel, was "unavoidably presented from discovery of the facts" upon which he relies for his claim for relief under R.C. 2953.23(A)(1)(a), (2) trial counsel's failures constituted a substantial violation of defense counsel's essential duties to his client and (3) this deficient performance prejudiced Moon, i.e., that had this deficient performance not occurred, the result would have been different; Moon would not have entered guilty pleas to the

offenses at issue and no reasonable factfinder would have found him guilty of those offenses at trial. R.C. 2953.23(A)(1)(b).

{¶33} In reaching this conclusion, we are aware that this court and others have previously held that where a defendant enters a guilty plea, R.C. 2953.23(A)(1)(b) — requiring a defendant to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial — does not apply. *See, e.g., State v. Moore*, 8th Dist. Cuyahoga No. 82734, 2003-Ohio-4819, ¶ 16 ("Appellant pled guilty to drug possession and no trial occurred; therefore, [R.C. 2953.23(A)] does not apply."); *State v. Halliwell*, 134 Ohio App.3d 730, 735, 732 N.E.2d 405 (8th Dist.1999) (defendant could not satisfy the requirement that "but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted" where he was convicted "pursuant to his plea of guilty, not by reason of trial"); *State v. Hairston*, 10th Dist. Franklin No. 13AP-225, 2013-Ohio-3834, ¶ 8 (where appellant was convicted pursuant to his guilty plea, not a trial, "the exception found in R.C. 2953.23(A)(1) does not allow the trial court to consider appellant's * * * petition"); *State v. Demyan*, 9th Dist. Lorain No. 11CA0100096, 2012-Ohio-3634, ¶ 4 (because defendant pleaded guilty instead of going to trial, he could not demonstrate that, "but for constitutional error at trial, no reasonable factfinder would have found [him] guilty"); *State v. Clark*, 5th Dist. Stark No. 2007 CA 00206, 2008-Ohio-194, ¶ 18 (appellant cannot satisfy the requirement that but for constitutional error no reasonable factfinder would have found the petitioner guilty of the

offense at trial because appellant was convicted based on his entry of a guilty plea to the charges in the indictment); *State v. Pough*, 11th Dist. Trumbull No. 2003-T-0129, 2004-Ohio-3933, ¶ 17 ("Where a petitioner's conviction results from a guilty plea rather than trial, R.C. 2953.23(A)(1)(b) does not apply"); *see also State v. Pepper*, 5th Dist. Ashland No. 13 COA 019, 2014-Ohio-364, ¶ 26 ("While we note appellant's post-hearing memorandum references the post-conviction relief statutes, it is questionable that the 'constitutional error at trial' criterion of R.C. 2953.23(A)(1)(b) can be met where the defendant seeking PCR relief [sic] was convicted pursuant to a guilty plea, not as a result of a trial.").

> **{¶34}** As one court has explained,
>
> > "[t]he plea of guilty is a complete admission of the defendant's guilt." *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 73, quoting Crim.R. 11(B)(1). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (1991), quoting *United States v. Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). Therefore, [the defendant] has no basis to claim that a reasonable factfinder would not have found him guilty but for constitutional error at trial.

State v. Cool, 9th Dist. Summit No. 24518, 2009-Ohio-4333, ¶ 14; *see also State v. Estridge*, 2d Dist. Greene No. 2005 CA 136, 2006-Ohio-5310, ¶ 8 (Appellant did not meet burden under R.C. 2953.23(A)(1)(b) "because his guilty pleas operate as a waiver. * * * '[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. * * * A guilty plea, therefore, simply renders irrelevant those constitutional violations not

logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established,'") quoting *State v. Pennington*, 2d Dist. Clark No. 2001 CA 1, 2002-Ohio-2375. Other courts have focused on the fact that, in the absence of a trial and a record of the evidence the state had against a defendant, it would be impossible for a court to determine that a reasonable factfinder would have not found the defendant guilty at trial of the charges at issue. *See, e.g., State v. Lewis*, 4th Dist. Lawrence No. 11CA29, 2013-Ohio-1327, ¶ 8 (Appellant could not satisfy the requirement that "no reasonable fact-finder would have found him guilty of the offense for which he was convicted" because (1) he pled guilty and (2) there was no trial and, therefore, no trial transcript. "In the absence of a transcript and a record of the evidence the State had against him, it is not possible for a court to determine that a reasonable fact-finder would have not found him guilty."); *see also State v. Warner*, 2d Dist. Greene No. 2005-CA-84, 2006-Ohio-3188, ¶ 11 (untimely postconviction petition based on sentencing issues was improper under R.C. 2953.23(A) because defendant could not show "but for the constitutional error at *trial*, no reasonable *factfinder* would have found the petitioner *guilty* of the offense") (emphasis sic); *State v. Carson*, 2d Dist. Greene No. 2003-CA-76, 2004-Ohio-2741, ¶ 20 ("[C]onsideration of an untimely filed petition for post-conviction relief requires the rather extraordinary showing, by clear and convincing evidence, that, but for the constitutional error, 'no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was

convicted.' This is an especially difficult showing to make in the context of a no-contest plea, since there is no trial testimony to frame the facts.").

{¶35} However, we believe that this case is distinguishable from the cases cited above. First, in this case, Moon contends that, as a result of the ineffective assistance he received from counsel, his guilty pleas were not knowingly, intelligently or voluntarily made. Accordingly, the fact that a guilty plea is generally regarded as "a complete admission of the defendant's guilt" should not, in and of itself, preclude relief. Second, in the usual case involving a conviction based on a guilty plea, because there is no trial, it is impossible to know what evidence would have been presented and thus virtually impossible for a defendant to establish by clear and convincing evidence that a reasonable factfinder would not have found him guilty "but for constitutional error at trial." This case is different. In this case, assuming the truth of the facts asserted by Moon (and as it appears from the absence of the search warrant in the record), if the evidence giving rise to Counts 47-56 and 101 of the indictment was seized without a valid search warrant, that evidence could have been excluded had defendant's trial counsel filed a motion to suppress that evidence and thus there would have been no evidence upon which the jury could have reasonably convicted Moon of those counts at trial. Therefore, we believe the facts alleged by Moon, if proven true, could establish that no reasonable factfinder would have found him guilty of these counts but for the alleged ineffective assistance of his trial counsel. The fact that Moon pled guilty to those counts thus does not, in and of itself, preclude him from satisfying the requirements of R.C. 2953.23(A)(1)(b).

{¶36} Accordingly, under the unique circumstances of this case, including the fact that what the parties have represented as constituting the search warrants in this case does not include a search warrant for the August 8, 2008 search of Moon's home and the fact that certain of the counts to which Moon pled guilty related exclusively to evidence seized during that search, we find that the trial court abused its discretion in summarily denying Moon's petition for postconviction relief without a hearing. Based on our review of the record, we find that Moon has set forth evidence of sufficient operative facts to warrant a hearing (1) to investigate the circumstances surrounding the alleged August 8, 2008 search warrant and (2) to determine whether Moon has met the requirements for filing an untimely petition for postconviction relief under R.C. 2953.23(A)(1) and, if so, whether he has established grounds for the relief requested.[9] Moon's first assignment of error is well-taken.

Motion to Withdraw Guilty Pleas

{¶37} In his second assignment of error, Moon contends that the trial court abused its discretion in summarily denying his motion to withdraw his guilty pleas without an evidentiary hearing. Moon's second assignment of error is based on the same facts, arguments and evidence as his first assignment of error, i.e., that he was denied the

[9] Our decision is limited to the counts that arose out of the evidence seized during the August 8, 2008 search of Moon's home. We do not believe Moon has alleged sufficient facts that, if proven true, would establish he was prejudiced by the alleged deficient performance of his trial counsel with respect to the counts related to the images and other evidence discovered during the search of Moon's checked baggage at the airport.

effective assistance of counsel based on trial counsel's failure to obtain, review and/or challenge the August 8, 2008 search warrant prior to the entry of his guilty pleas.

{¶38} The withdrawal of a guilty plea is governed by Crim.R. 32.1, that states:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but 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.

{¶39} We review a trial court's decision to deny a defendant's postsentence motion to withdraw a guilty plea under an abuse of discretion standard. *State v. Britton*, 8th Dist. Cuyahoga No. 98158, 2013-Ohio-99, ¶ 17, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus, and *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist.1980).

{¶40} We find no abuse of discretion here because a trial court lacks jurisdiction to consider a defendant's motion to vacate his guilty pleas under Crim.R. 32.1 after a court of appeals has reviewed and affirmed the defendant's convictions. *State ex rel. Special Prosecutors v. Judges, Belmont Cty. Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978) (a trial court loses jurisdiction over a case "after an appeal has been taken and decided" and that, absent a remand, does not regain jurisdiction subsequent to the decision of the appellate court); *see also State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 61-62; *State v. Nicholson*, 8th Dist. Cuyahoga No. 97567, 2012-Ohio-1550, ¶ 9-10; *State v. Vild*, 8th Dist. Cuyahoga Nos.

87742, and 87965, 2007-Ohio-987, ¶ 12 ("A trial court has no jurisdiction to grant a motion to withdraw a plea after the plea and judgment have been affirmed on appeal.") Crim.R. 32.1 does not "vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and affirmance by the appellate court." *Special Prosecutors* at 97; *compare State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516 (distinguishing *Special Prosecutors* holding that a trial court retains jurisdiction to decide a motion for a new trial based on newly discovered evidence when the specific issue has not been decided upon direct appeal and explaining that "the holding in *Special Prosecutors* does not bar the trial court's jurisdiction over posttrial motions permitted by the Ohio Rules of Criminal Procedure. These motions provide a safety net for defendants who have reasonable grounds to challenge their convictions and sentences. The trial court acts as the gatekeeper for these motions and, using its discretion, can limit the litigation to viable claims only.").

{¶41} In this case, Moon appealed the trial court's judgment to this court, and this court affirmed his convictions, which were based on his guilty pleas. *Moon*, 2010-Ohio-4483. The trial court, therefore, did not have jurisdiction to consider Moon's motion to withdraw his plea under Crim.R. 32.1.

{¶42} Accordingly, the trial court did not abuse its discretion in denying Moon's motion to withdraw his guilty pleas without a hearing. Moon's second assignment of error is overruled.

{¶43} Judgment affirmed in part; reversed in part and remanded for the trial court to conduct a hearing on Moon's petition for postconviction relief. 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.

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EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MELODY J. STEWART, J., CONCUR