

[Cite as *State v. Johnson*, 2015-Ohio-1649.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101993

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ERIC JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-567736-A

BEFORE: Jones, P.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 30, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant Eric Johnson appeals the trial court's decision denying his petition for postconviction relief without a hearing. We affirm.

{¶2} In February 2013, Johnson was convicted, after a jury trial, on numerous charges, including kidnaping, aggravated robbery, felonious assault, and attempted murder. Johnson was also convicted of firearm specifications. The trial court sentenced him to a 21-year prison term.

{¶3} In April 2013, Johnson, through appointed appellate counsel, filed a notice of appeal. On May 31, 2013, appointed appellate counsel withdrew because Johnson had retained another attorney to represent him. The record was filed on June 3, 2013. In February 2014, this court affirmed his conviction and sentence. *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-482.

{¶4} On December 3, 2013, Johnson's new appellate counsel filed his petition for postconviction relief. In his petition, Johnson claimed that he received ineffective assistance of counsel due to trial counsel's failure to (1) investigate an alibi witness and (2) communicate a plea deal. In support of his petition, Johnson submitted the affidavit of his trial counsel, dated December 2, 2013. In the affidavit, trial counsel averred to the following:

(1) That sometime prior to the trial * * * Johnson advised counsel of a potential alibi defense. Counsel spoke with Mr. Johnson regarding this possible defense but took no further steps to investigate this claim.

(2) During the middle of trial in this case, and before the state rested, counsel was approached by one or both of the assistant county prosecutors regarding

the possibility of a mid-trial plea bargain to resolve the case. While it was clear that no specific resolution had been authorized by the prosecutor's office, I generally discussed potential resolution by way of guilty plea to a reduced charge which was rejected by Mr. Johnson. I made no further efforts to determine from the prosecutor exactly what plea might be available or to further discuss the subject with Mr. Johnson.

{¶5} The state opposed Johnson's motion on the grounds that (1) it was untimely, (2) Johnson failed to present sufficient operative facts to support his claim, and (3) counsel had discussed the plea with Johnson, but he rejected it.

{¶6} In January 2014, the trial court denied Johnson's petition. In February 2014, Johnson filed a supplemental petition for postconviction relief, which the state moved to dismiss. The trial court granted the state's motion and dismissed the supplemental petition.

{¶7} In May 2014, Johnson sought findings of fact and conclusions of law, which the trial court entered in September 2014. In its findings, the trial court stated that: (1) Johnson failed to demonstrate that his trial counsel's performance was deficient and that he was prejudiced; (2) Johnson's claim was refuted by his trial counsel's affidavit and the transcripts of the trial court proceedings; (3) Johnson failed to sustain his burden of demonstrating that there had been a denial or infringement of his rights so as to render the judgment void or voidable, and (4) Johnson was not entitled to a hearing because he failed to demonstrate that there were substantive grounds for relief.

{¶8} Johnson now appeals, raising the following two assignments of error:

I. Defendant was denied due process of law and effective assistance of counsel when counsel failed to file a timely post-conviction petition.

II. Defendant was denied due process of law when the court dismissed his petition for post-conviction relief without an evidentiary hearing.

{¶9} “[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; 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.” *State v. Sidibeh*, 10th Dist. Franklin No. 12AP-498, 2013-Ohio-2309, ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Further, a trial court’s decision to deny a postconviction petition without a hearing is reviewed under an abuse of discretion standard. *State v. Boddie*, 10th Dist. Franklin No. 12AP-811, 2013-Ohio-3925, ¶ 11. 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).

{¶10} In his first assignment of error, Johnson contends that his appellate counsel was ineffective for failing to timely file his petition. In his second assignment of error, he contends that the trial court improperly dismissed his petition without a hearing. We disagree with both contentions.

{¶11} After a defendant is convicted and sentenced and files a timely notice of appeal, the transcript of the trial court proceeding is filed in the court of appeals. R.C. 2953.21(A)(2). From that point in time, the defendant has 180 days to file a petition for postconviction relief in the trial court to raise issues concerning the original conviction and sentence. *Id.*

{¶12} Under R.C. 2953.23(A), a trial court cannot entertain an untimely petition for postconviction relief unless (1) the petitioner shows either that he was unavoidably prevented from discovering the facts upon which he relies in his petition, or that the United States Supreme Court has, since the expiration of the period for timely filing, recognized a new federal or state right that applies retroactively to the petitioner; and (2) the petitioner shows by clear and convincing evidence that a reasonable factfinder would not have found him guilty but for constitutional error at trial.

{¶13} The transcripts of the trial court proceedings were filed on June 3, 2013. 180 days from that date was November 30, 2013. Johnson did not file his petition until December 3, 2013. The petition, therefore, indeed was untimely. Counsel failed to advance any explanation whatsoever in an attempt to satisfy the two above-mentioned criteria for consideration of an untimely petition. The trial court, therefore, lacked jurisdiction to consider his petition. *State v. Lenard*, 8th Dist. Cuyahoga No. 95317, 2011-Ohio-1571, ¶ 30, citing *State v. Wheatt*, 8th Dist. Cuyahoga No. 77292, 2000 Ohio App. LEXIS 4953 (Oct. 26, 2000).

{¶14} Because his petition was untimely, Johnson now claims that his retained appellate counsel was ineffective. To establish ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "In order to show deficient performance, the defendant must prove that counsel's

performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.” *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. “Failure to establish either element is fatal to the claim.” *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶15} Before we focus on the prejudice requirement, we note a misstatement by Johnson in regard to the timing in this case. Johnson contends that appellate counsel was in “possession of [the] affidavit of trial counsel dated September 2, 2013,” therefore it could have been timely filed. But the affidavit is dated December 2, 2013, the day before the petition was filed, not September 2, 2013.

{¶16} That aside, Johnson has not demonstrated that he was prejudiced by the untimeliness of the petition. That is, he has failed to show that there was a reasonable probability that the result of the proceeding would have been different.

{¶17} Notwithstanding the untimeliness of the petition, the trial court addressed the merits of it and found all of Johnson's claims unwarranted. We agree with the trial court.

In his petition, Johnson claimed that his trial counsel was ineffective for not investigating an alleged alibi witness and for not communicating to Johnson a plea offer made by the state prior to the jury verdict. In support of his claim, Johnson submitted an affidavit of his trial counsel.

{¶18} In the affidavit, counsel averred that he spoke to Johnson about a possible alibi defense, but took no further steps to investigate it. Johnson, however, did not

provide the court with any other further details in his petition. Relying on the trial testimony, the court rejected Johnson's claim.

{¶19} Specifically, at trial, the victim testified that he knew Johnson, and that during the course of the incident, Johnson put a gun to his head, robbed him, and shot him in his leg, causing him to fall to the ground. While the victim was on the ground, Johnson shot him multiple times at close range. The victim testified that he was looking at Johnson the entire time.

{¶20} On this record, we agree with the trial court that Johnson failed to demonstrate that his trial counsel substantially violated any essential duty owed to him and that he was materially prejudiced by counsel's performance in regard to Johnson's alleged alibi defense.

{¶21} In regard to Johnson's claim that his trial counsel failed to communicate the mid-trial plea offer, we also agree with the trial court that counsel's affidavit belies the contention. Specifically, counsel averred that he "discussed potential resolution by way of guilty plea to a reduced charge which was rejected by Mr. Johnson." The record also demonstrates that Johnson had rejected a plea offer made by the state prior to the hearing on his motion to suppress.

{¶22} On this record, the trial court properly found that Johnson failed to demonstrate that his trial counsel substantially violated any essential duty owed to him and that he was materially prejudiced by counsel's performance in regard to communicating the plea offer to Johnson.

{¶23} It is well established that a petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *State v. Jackson*, 64 Ohio St.2d 107, 110-113, 413 N.E.2d 819 (1980). To warrant an evidentiary hearing, the petitioner bears the initial burden of providing evidence demonstrating a cognizable claim of constitutional error. *Id.*, citing R.C. 2953.21(C). The trial court may deny the petitioner's postconviction petition without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus.

{¶24} Because Johnson failed to set forth sufficient operative facts to establish substantive grounds for relief, he was not entitled to a hearing on his petition.

{¶25} In light of the above, Johnson's two assignments of error are without merit.

{¶26} 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 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.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR