

[Cite as *State v. Cody*, 2015-Ohio-2764.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 102213

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOHN DONALD CODY  
A.K.A. BOBBY THOMPSON**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
AFFIRMED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-12-565050-A

**BEFORE:** Jones, P.J., Kilbane, J., and McCormack, J.

**RELEASED AND JOURNALIZED:** July 9, 2015

**FOR APPELLANT**

John Donald Cody, pro se  
Inmate No. 651-040  
P.O. Box 8170  
Richland Correctional Institution  
Mansfield, Ohio 44901

**ATTORNEYS FOR APPELLEE**

Mike DeWine  
Ohio Public Defender

BY: Brad L. Tammaro  
Assistant Attorney General  
Special Prosecuting Attorney  
P.O. Box 968  
Grove City, Ohio 43123

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

{¶1} Defendant-appellant, John Donald Cody, a.k.a. Bobby Thompson,<sup>1</sup> appeals the trial court’s decision to deny his postconviction petition. For the reasons that follow, we affirm.

### **Procedural History and Facts**

{¶2} The following facts are taken from Cody’s direct appeal, *State v. Thompson*, 8th Dist. Cuyahoga No. 100797, 2015-Ohio-2261.

{¶3} The case arose from an investigation regarding the United States Naval Veteran’s Association (“USNVA”), a charity organized and created by a person holding himself out to be Bobby Thompson. Through the investigation, it was discovered that the USNVA was a sham, fabricated by a person named John Donald Cody, who manipulated unsuspecting individuals across the United States to donate to this charity, unlawfully procuring millions of dollars.

{¶4} In mid-2010, the state of Ohio began its investigation into the USNVA after a story was published in the St. Petersburg Times that the charity was fictitious. Through its investigation, the state revealed that Ohio residents had been solicited by various professional fundraisers contracted by USNVA to donate money to the USNVA. It was discovered that approximately \$2 million was solicited on behalf of the USNVA from

---

<sup>1</sup>After sentencing and the filing of his direct appeal but before the filing of the instant appeal, the caption in the lower case was changed to reflect that the defendant’s real name is John Donald Cody a.k.a. Bobby Thompson. In this opinion, the defendant is referred to as John Donald Cody.

resident-donors in the state of Ohio.

{¶5} As a result of the investigation, on October 13, 2010, “Bobby Thompson” was indicted in Cuyahoga C.P. No. CR-10-543025 on charges of engaging in a pattern of corrupt activity involving the USNVA, money laundering, and aggravated theft. In December 2010, another indictment was issued against “Bobby Thompson” in Cuyahoga C.P. No. CR-10-545577 on 22 additional charges, including engaging in a pattern of corrupt activity, aggravated theft, money laundering, tampering with records, and identity fraud.

{¶6} A warrant was subsequently issued for Cody’s arrest. In April 2012, he was finally apprehended in the state of Oregon. After Cody was in custody in Ohio, a new indictment was issued against him in July 2012 in Cuyahoga C.P. No. CR-12-565050. Cody was charged with one count each of engaging in a pattern of corrupt activity pertaining to the criminal enterprise of the USNVA, complicity to commit theft, tampering with records, complicity to tamper with records, identity fraud (a felony of the second degree), and possessing criminal tools; seven counts of complicity to commit money laundering, and 11 counts of identity fraud (felonies of the fifth degree). The previous indictments issued in Case Nos. CR-10-543025 and CR-10-545577 were dismissed and the surviving indictment in Case No. CR-12-565050 ultimately was tried before a jury that heard testimony from 47 witnesses and viewed over 200 exhibits.

{¶7} At the close of evidence, the court granted Cody’s renewed Crim.R. 29 motion for judgment of acquittal as it pertained to Count 24, possessing criminal tools.

The court stated that the state of Ohio lacked jurisdiction to pursue this charge because the criminal tools were found in Cody's possession when he was arrested in Oregon.

{¶8} The jury returned a guilty verdict on the 23 remaining counts. After considering merger, the trial court imposed a total sentence of 28 years in prison and ordered that Cody spend every Veterans Day in solitary confinement.

{¶9} Cody filed a direct appeal, challenging the trial court's jurisdiction, the admission of certain evidence, and the court's decision to sentence him to solitary confinement. This court sua sponte ordered the parties to address an additional issue with regard to the jury instructions on Counts 13 through 23.

{¶10} While his direct appeal was pending, Cody filed a postconviction petition in the trial court. As evidentiary support, Cody attached his own two affidavits to the petition. In his petition, Cody raised five claims: (1) ineffective assistance of counsel; (2) lack of jurisdiction related to money laundering and identity theft charges; (3) the state's failure to provide full discovery; (4) issues with regard to his detention prior to and during trial; and (5) prosecutorial misconduct before and during trial.

{¶11} The state filed a memorandum contra and motion for summary judgment. The state also filed proposed findings of fact and conclusions of law. On October 15, 2014, the trial court granted the state's motion for summary judgment and denied Cody's postconviction petition. The court subsequently adopted the state's findings of fact and conclusions of law.

{¶12} In *Thompson*, 8th Dist. Cuyahoga No. 100797, 2015-Ohio-2261, this court

found, pursuant to R.C. 2901.11, that the state of Ohio did not have jurisdiction over the 11 counts of identity fraud contained in Counts 13 through 23 and vacated his convictions on those counts. This court then found that the sua sponte issue raised regarding the jury instructions given on Counts 13 through 23 was moot. This court determined that the trial court's decision to sentence him to solitary confinement each Veterans Day was contrary to law but overruled his assignment of error that challenged the admission of certain evidence. *Id.* at ¶ 29-30.

### **Assignments of Error**

{¶13} Cody appealed the denial of his postconviction petition and raises the following nine assignments of error for our review, which will be combined when possible:

- I. The trial court abused its discretion when it ruled as to Claim No. 1, that petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant post-conviction relief, and to state a constitutional claim.
- II. The trial court abused its discretion in denying petition Claim No. 2 for dismissal of counts 13-23 and 3-9 of the indictment on grounds of lack of jurisdiction.
- III. The trial court abused its discretion in dismissing petition Claim No. 3, holding petitioner presented insufficient cognizable evidence and insufficient applicability of the evidence to warrant a hearing on postconviction relief, and failed to state a constitutional claim.
- IV. The trial court abused its discretion in not holding a hearing on petitioner's claims of discrimination, disproportionality and excessivity [sic] of sentence.

V. The trial court abused its discretion in not holding a hearing on petitioner's claims of a vindictive and politically selective prosecution.

VI. The trial court abused its discretion in granting the state's motion for summary judgment.

VII. The trial court abused its discretion in applying the state's lack of credibility standards to the case.

VIII. The trial court abused its discretion in making numerous fundamental erroneous conclusions of law, which whether considered separately claim-by-claim and issue-by-issue, or as a whole as cumulative error, permeative [sic] the entire judgment of dismissal [and] require remand for correction and re-decision.

IX. The trial court abused its discretion in providing appellant no meaningful appeal given its adoption of the structuring of the [findings of fact and conclusions of law].

### **Postconviction Relief**

{¶14} “[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. 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).

{¶15} Unlike a direct appeal, a petition for postconviction relief is a collateral civil attack on a criminal judgment. *State v. Easley*, 10th Dist. Franklin No. 09AP-10, 2009-Ohio-3879, ¶ 9, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67

(1994). The petition is intended to reach constitutional issues that would otherwise be impossible to consider because the evidence supporting those issues was not contained in the trial court record. *Easley at id.* The petitioner bears the burden in a postconviction proceeding to submit evidentiary documents containing sufficient operative facts to demonstrate the substantive grounds of his or her petition. *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980). Broad assertions without any demonstration of proof are insufficient. *Id.* at 110-111. A postconviction petition is not intended to provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002-Ohio-3321, ¶ 23.

### **Res Judicata**

{¶16} Under the doctrine of res judicata, “a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *State v. Patrick*, 8th Dist. Cuyahoga No. 99418, 2013-Ohio-5020, ¶ 7, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). When a petitioner seeks postconviction relief on an issue that was raised or could have been raised on direct appeal, the petition is properly denied by the application of the doctrine of res judicata. *State v. Tucker*, 8th Dist. Cuyahoga No. 84595, 2005-Ohio-109, ¶ 11, citing *State v. Edwards*, 8th Dist. Cuyahoga No. 73915, 1999 Ohio App. LEXIS 894 (Mar. 11, 1999). In order to overcome the res judicata bar, the petitioner must show, through the use of extrinsic evidence, that he or she could not have appealed the original constitutional claim based



on the information in the original trial record. *State v. Combs*, 100 Ohio App.3d 90, 97-98, 652 N.E.2d 205 (1st Dist.1994). Said another way, issues properly raised in a petition for postconviction relief are only those that could not have been raised on direct appeal because the evidence supporting such issues is outside the record. *State v. Milanovich*, 42 Ohio St.2d 46, 50, 325 N.E.2d 540 (1975). Thus, a trial court may dismiss a petition on the basis of res judicata if an issue was or should have been raised on direct appeal. *State v. Dowell*, 8th Dist. Cuyahoga No. 86232, 2006-Ohio-110, ¶ 10, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶17} In his first assignment of error, Cody argues that his trial counsel was ineffective because counsel (1) refused to pursue certain witnesses that would have established that Cody was working for the CIA; and (2) did not pursue a line of defense that Cody was medically incompetent to stand trial or assist in his defense due to beatings he received in jail.

{¶18} In its findings of fact and conclusions of law, the trial court found that the sole support for Cody's claims was contained in his own self-serving affidavits and he was unable to demonstrate that any facts existed from outside the record.

{¶19} Cody's claims that he received ineffective assistance of counsel because his trial attorney failed to pursue specific witnesses and present a certain line of defense are both claims that could have been brought on direct appeal. Although Cody argues that both of these claims would be proved by evidence outside the record, he does not show what the evidence would be. Because Cody did not raise these issues on direct appeal,

he has waived those claims and they are barred by res judicata.

{¶20} In the second assignment of error, Cody claims that the trial court abused its discretion by denying his petition based on his argument that Counts 3-9 and 13-23 of the indictment should have been dismissed. Counts 13-23 were vacated on direct appeal; therefore, any argument as to them is moot.

{¶21} Counts 3-9 charged Cody with money laundering. In its findings of fact and conclusions of law, the trial court found, in part, that Cody identified no set of facts from outside the record that identified why jurisdiction and venue were not capable of being raised in his direct appeal. We agree.

{¶22} In his direct appeal, Cody raised a jurisdictional challenge as to the identity fraud counts, Counts 13 to 23. He certainly could have raised any argument with respect to jurisdiction on the money laundering convictions, Counts 3-9, in that appeal as well if he wanted to challenge the trial court's jurisdiction and venue. Because he did not, his claim is barred by res judicata.

{¶23} In the third assignment of error, Cody challenges the alleged withholding of exculpatory evidence. He claims that the state withheld military and intelligence community files on him and such actions "occurred de hors the record." He argues that because the state's actions occurred outside the record he was only able to bring the current claim in a petition for postconviction relief as opposed to direct appeal.

{¶24} The trial court disagreed and again found that the sole support for Cody's argument was contained in his own self-serving affidavit. The court determined that

Cody failed to show that the state withheld any military files, files concerning Cody's relationship to any other federal agency, or other exculpatory material, and identified no set of facts from outside the record. We agree; Cody fails to support his claim that the state acted outside the record or that he was prevented from making this claim on direct appeal with more than unsupported assertions.

{¶25} During pretrial discovery, Cody made multiple discovery requests, which the state responded to. Although many of the state's responses were that the discovery Cody requested did not exist, Cody is unable to provide any evidence that the state acted improperly.

{¶26} The issue Cody complains of could have been fairly determined without resorting to evidence outside the record; therefore, he is barred by res judicata from raising these issues in a postconviction petition.

{¶27} In light of the above, the first, second, and third assignments of error are barred by res judicata and are overruled.

### **Postconviction Petition Hearing**

{¶28} It is well-established that a petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *Jackson*, 64 Ohio St.2d 107, 110-113, 413 N.E.2d 819. 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). Pursuant to R.C. 2953.21(C), before granting a hearing, 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 and supporting affidavits, all the files and records pertaining to the proceedings. *Id.*

{¶29} 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.

{¶30} In the fourth assigned error, Cody argues that the trial court should have held a hearing on his claim that his sentence was discriminatory, disproportionate, and excessive. In his fifth assigned error, Cody argues that the trial court erred when it did not hold a hearing on his claims against the prosecutor.

{¶31} Cody provided nothing to the trial court to warrant an evidentiary hearing. All of his claims about his sentence or against the state were ones that were either presented or could have been presented on direct appeal. Because Cody failed to set forth sufficient operative facts to establish substantive grounds for relief, he was not entitled to a hearing on his petition. The fourth and fifth assignments of error are overruled.

### **Summary Judgment**

{¶32} In the sixth assigned error, Cody claims the trial court erred in granting summary judgment in favor of the state. In the seventh assignment of error, Cody claims the trial court erred in granting summary judgment to the state without holding an

evidentiary hearing to determine Cody's credibility.

{¶33} As discussed previously, the trial court did not err when it denied Cody's petition without holding a hearing. Nor did the court need to hold a hearing in order to assess the veracity of Cody's affidavits. When reviewing a postconviction petition, "a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905, at paragraph one of the syllabus. When determining the credibility of supporting affidavits in postconviction relief proceedings, courts should consider all relevant factors including:

(1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

*Id.* at 285.

{¶34} The court further reasoned:

Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court. A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.

*Id.*

{¶35} In this case, the same trial court presided over Cody's trial from the beginning through trial and sentencing. This included a large portion of time during which Cody represented himself, filed over 120 pro se motions, and had numerous in-court appearances. Thus, the trial court had a high degree of direct contact with the petitioner and was in the best position to judge the veracity of his affidavits. We cannot find that the trial court erred in granting summary judgment without holding a hearing.

{¶36} The sixth and seventh assignments of error are overruled.

### **Findings of Fact and Conclusions of Law**

{¶37} In the eighth and ninth assigned errors, Cody challenges the trial court's findings of fact and conclusions of law. Cody argues that the trial court erred in adopting the state's proposed findings of fact and conclusions of law verbatim. A trial court does not err when it adopts a party's proposed findings of fact and conclusions of law as its own if it has thoroughly read the document to ensure that it is completely accurate in fact and law. *State v. Williams*, 8th Dist. Cuyahoga No. 99357, 2013-Ohio-2706, ¶ 25, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 87666, 2006-Ohio-6588; *see also Anderson v. Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (when a trial judge adopts proposed findings verbatim the findings are those of the court and may be reversed only if clearly erroneous).

{¶38} Civ.R. 52 provides that it is within the trial court's discretion to "require any or all of the parties to submit proposed findings of fact and conclusions of law." This court has previously held that a trial court's adoption of the findings of fact and

conclusions of law submitted by the state does not, by itself, deprive the petitioner of a meaningful review of his or her petition for postconviction relief and does not constitute error. *Williams* at *id.*, citing *Thomas* and *State v. Powell*, 90 Ohio App.3d 260, 629 N.E.2d 13 (1st Dist.1993).

{¶39} Cody has been unable to show that the trial court erred in adopting the state's proposed findings of fact and conclusions of law or that the format of the order was faulty; again Cody makes unsupported assertions in an attempt to bolster his claims.

{¶40} We find no error in the trial court's adoption of the state's proposed findings of fact and conclusions of law.<sup>2</sup> The eighth and ninth assigned errors are overruled.

{¶41} 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 court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of

---

<sup>2</sup>We do not consider that portion of the findings of fact and conclusions of law that dealt exclusively with vacated Counts 13-23.

the Rules of Appellate Procedure.

---

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and  
TIM McCORMACK, J., CONCUR