

[Cite as *State v. Davis*, 2018-Ohio-751.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106012

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-574008-A

BEFORE: Jones, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 1, 2018

FOR APPELLANT

Dwayne Davis, pro se
Inmate No. 644653
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant Dwayne Davis, pro se, appeals from the trial court's 2017 judgments denying his pro se (1) petition to vacate or set aside his judgment of conviction or sentence and (2) motion for summary judgment. For the reasons that follow, we affirm.

{¶2} In 2013, Davis was indicted as a result of several burglaries he committed. After negotiations with the state, he pleaded guilty to two burglary counts and one intimidation of a crime victim or witness count. He was sentenced to a ten-year prison term.

{¶3} Davis filed a delayed appeal, in which he contended, among other things, that his trial counsel was ineffective for not filing a motion to suppress. His conviction was affirmed, however. *State v. Davis*, 8th Dist. Cuyahoga No. 102639, 2015-Ohio-4501.

{¶4} In 2014, approximately one year after he had been sentenced, Davis filed a motion, pro se, to withdraw his guilty plea, in which he again contended that his counsel was ineffective for failing to file a suppression motion. The trial court denied the motion. Davis appealed; this court affirmed the trial court. *State v. Davis*, 8th Dist. Cuyahoga No. 104149, 2016-Ohio-5850.

{¶5} In January 2017, Davis, pro se, filed a petition to vacate or set aside his judgment of conviction or sentence (i.e., a petition for postconviction relief), again based on a claim of ineffective assistance of counsel. In February 2017, Davis, pro se, filed a motion for summary judgment. The trial court denied both motions, finding the postconviction petition untimely. Davis now appeals, raising the following two

assignments of error for our review:

I. The trial court abused its discretion when it denied Appellant's postconviction petition where Appellant established exception needed pursuant to R.C. 2953.23(A)(1), R.C. 2953.23(A)(1)(b).

II. The trial court committed prejudicial error by denying Appellant summary judgment without setting forth specific facts which prove there remains a genuine issue to be litigated pursuant to Civ.R. 56(E).

{¶6} There are strict time limits for defendants seeking postconviction relief under R.C. 2953.21. Under subsection (A)(2) of the statute, a petition for postconviction relief must be filed no later than 365 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal or, if no appeal is taken, no later than 365 days after the expiration of time for filing the appeal.

{¶7} Davis admits that his petition was untimely, but contends that under R.C. 2953.23, his delay was excused. If a defendant's petition is untimely under R.C. 2953.21(A)(2), then it must comply with R.C. 2953.23(A)(1). Under that section, a trial court may not consider a delayed postconviction relief petition unless the petitioner satisfies two requirements.

{¶8} First, the petitioner must demonstrate either that (1) he or she 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 or her guilty but for constitutional error at trial. R.C. 2953.23(A)(1)(b).

{¶9} The time limit for filing petitions for postconviction relief is jurisdictional. *State v. Johns*, 8th Dist. Cuyahoga No. 93226, 2010-Ohio-162, ¶ 8. Thus, unless a

defendant demonstrates that the required findings under R.C. 2953.23(A) apply to him or her, the trial court lacks jurisdiction to consider an untimely postconviction relief petition.

State v. Thomas, 8th Dist. Cuyahoga No. 99972, 2014-Ohio-1512, ¶ 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). There is no need for a trial court to conduct an evidentiary hearing when it dismisses an untimely postconviction relief petition. *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 23.

{¶10} Davis contends that he was unavoidably prevented from discovering facts because the trial court denied pro se motions he filed while he was represented by counsel. In support of his contention, he cites a probable cause affidavit, a police incident report, his motion to dismiss, his motion to disclose favorable evidence and an affidavit from his girlfriend. None of this evidence was new, however — it all existed prior to Davis entering his guilty plea. Moreover, he filed his pro se motions while he was represented by counsel, and it has been established that defendants are not entitled to hybrid representation — a defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 32; *State v. Cody*, 8th Dist. Cuyahoga No. 100797, 2017-Ohio-1543, ¶ 15.

{¶11} Davis also failed to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. 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).

{¶12} 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 id.*, 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.

{¶13} Upon review, Davis failed to demonstrate by clear and convincing evidence that he would not have pled guilty but for his counsel’s decision not to file a motion to suppress. And we note that the police report attached to his petition shows that the officers were given consent to enter the apartment where Davis was arrested. We further note that the record demonstrates that Davis received substantial benefits from entering into his plea.

{¶14} In light of the above, the trial court properly found that Davis’s postconviction petition, which was filed more than three years after his conviction, was

untimely. The first assignment of error is overruled.

{¶15} There is also no merit to Davis's second assignment of error that the trial court erred in denying his motion for summary judgment. Because postconviction relief proceedings are quasi-civil,¹ the Civ.R. 56 summary judgment standard is modified. *State v. Boyd*, 2d Dist. Montgomery No. 18873, 2002 Ohio App. LEXIS 1025, 6-7 (Mar. 8, 2002).

Unlike the summary judgment procedure in civil cases, in postconviction relief proceedings, the trial court has presumably been presented with evidence sufficient to support the original entry of conviction, or with a recitation of facts attendant to an entry of a guilty or no-contest plea. The trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant. That conclusion is supported by common sense, the interests of eliminating delay and unnecessary expense, and furthering the expeditious administration of justice.

Id. at 7, citing *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999).

{¶16} Here, not only was Davis's petition untimely, but his claims, that had already twice been rejected by this court, were barred by the doctrine of res judicata. The trial court, therefore, properly denied his motion for summary judgment and the second assignment of error is overruled.

{¶17} 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.

¹*State v. Hollaman*, 8th Dist. Cuyahoga No. 72387, 1997 Ohio App. LEXIS 5787, 5 (Dec. 24, 1997), citing *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984).

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

KATHLEEN ANN KEOUGH, P.J., and
ANITA LASTER MAYS, J., CONCUR