

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL ANDREW J. CHAMBERS
INMATE NUMBER A595662
WARREN CORRECTIONAL INSTITUTION
P. O. BOX 120
5787 STATE ROUTE 63
LEBANON, OHIO 45036,

Case No. 10-1505

Original Action in Mandamus

Relator,

v.

HONORABLE THOMAS M. MARCELAIN
JUDGE, LICKING COUNTY COURT OF
COMMON PLEAS
LICKING COUNTY COURTHOUSE
NEWARK, OHIO 43055,

Respondent.

Motion

**MOTION TO DISMISS OF RESPONDENT
JUDGE THOMAS M. MARCELAIN**

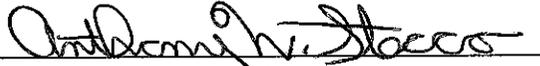
Now comes Respondent, the Honorable Thomas M. Marcelain, Judge of the Licking County Court of Common Pleas, by and through counsel, the Licking County Prosecutor's Office, who moves this Honorable Court pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure and Supreme Court Practice Rule X for an Order dismissing Relator's Original Complaint in Mandamus on the ground that it is moot.

Further grounds in support of Respondent's Motion to Dismiss are contained in the Memorandum in Support that is attached hereto and incorporated herein.

FILED
SEP 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Respectfully Submitted,

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

by 

Anthony W. Stocco (9061501)
Assistant Prosecutor
Licking County Prosecutor's Office
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COUNSEL FOR RESPONDENT,
JUDGE THOMAS M. MARCELAIN,
LICKING COUNTY COURT OF
COMMON PLEAS

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Because the Licking County Court of Common Pleas has issued findings of fact and conclusions of law in its Judgment Entry denying Relator's Petition for Post-Conviction Relief pursuant to Ohio Revised Code Section 2953.21, Relator's Complaint in Mandamus is moot and, therefore, should be dismissed.

FACTS

On August 26, 2010, Relator Andrew J. Chambers (hereinafter "Relator") filed a Complaint seeking a Writ of Mandamus ordering Respondent Thomas M. Marcelain, Judge of the Court of Common Pleas (hereinafter "Respondent") to issue findings of fact and conclusions of law in his ruling on Relator's Petition for Post-Conviction Relief pursuant to Ohio Revised Code Section 2953.21. Two days prior, on August 24, 2010, Respondent issued a Judgment Entry denying Relator's Petition for Post-Conviction Relief pursuant to Ohio Revised Code

Section 2953.21, that included findings of fact and conclusions of law. A copy of Respondent's August 24, 2010 Judgment Entry is attached hereto as Exhibit "A".

By means of a background, in Case No. 2008-CR-00435, Licking County Court of Common Pleas, Relator pled no contest to aggravated robbery (Ohio Revised Code 2911.01(A)(1) and/or (A)(3)), kidnapping (Ohio Revised Code Section 2905.01(A)(2) and/or (A)(3)), and two counts of kidnapping (Ohio Revised Code Section 2905.01(A)(2)), and he pled guilty to felonious assault (Ohio Revised Code Section 2903.11(A)(1) and/or (A)(2)) and tampering with evidence (Ohio Revised Code Section 2921.12(A)(1)). Relator was sentenced on November 26, 2008 to a term of incarceration in the penitentiary to be followed by a period of post-release control. On May 14, 2009, Relator filed a Notice of Appeal (State v. Chambers, 2010 WL 2638763 (Ohio App. 5 Dist.)).

Thereafter, Relator filed a petition for post-conviction relief pursuant to Ohio Revised Code Section 2953.21 on June 8, 2009; and, on June 8, 2009, Respondent issued a Judgment Entry denying the same.

In his appeal, Relator argued that Respondent committed reversible error by denying Relator's petition without making findings of fact and conclusions of law. The Fifth District Court of Appeals, on June 28, 2010, held that the trial court was required to issue findings of fact and conclusions of law, the denial of the petition without findings of fact and conclusions of law was not a final appealable order, and "the proper remedy is for [Relator] to seek a writ of mandamus directing the trial court to issue findings of fact and conclusions of law." State v. Chambers, 2010 WL 2638763 (Ohio App. 5 Dist.), at p.2. As mentioned above, Respondent issued a Judgment Entry on August 24, 2010 that denied Respondent's Petition for Post-Conviction Relief pursuant to Ohio Revised Code Section 2953.21 and included findings of fact

and conclusions of law. See, Respondent's August 24, 2010 Judgment Entry, a copy of which is attached hereto as Exhibit "A".

Once again, on August 26, 2010, Relator filed a Complaint in Mandamus seeking an Order requiring Respondent to issue findings of fact and conclusions of law. Whether or not Relator was aware that the requested findings of fact and conclusions of law had already been issued, the requested relief had occurred prior to the filing of Relator's Complaint.

ARGUMENT

According to the Ohio Supreme Court, "It is well-established that the extraordinary writ of mandamus '...will not issue to compel a public official to perform a legal duty which has been completed.'" State ex rel. Gantt v. Coleman, 6 Ohio St.3d 5, 5, 450 N.E.2d 1163, 1163 (1983) (quoting State ex rel. Bréaux v. Court of Common Pleas (1977), 50 Ohio St.2d 164, 363 N.E.2d 743 [citing State ex rel. Bowman v. Asmann (1925), 113 Ohio St. 394, 149 N.E. 328]). In Gantt, this Court held that it is proper to dismiss an action in mandamus on the grounds of mootness when a trial court rules on a post-conviction proceeding during the pendency of an action in mandamus. According to the Eighth District Court of Appeals, an application for a writ of mandamus is properly denied on the basis of mootness when a trial court issues findings of fact and conclusions of law in its ruling on a request for post-conviction relief. See, State ex rel. Williams v. Corrigan, 2003 WL 22255031(Ohio App. 8 Dist.). Herein, Respondent issued findings of fact and conclusions of law prior to the filing of Relator's Complaint, thereby rendering the issue moot.

Pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, the failure to state a claim upon which relief can be granted is a defense to a claim for relief in a pleading. Since

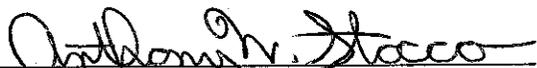
Relator's claim for relief has already occurred and thereby rendered the same moot, Relator has failed to state a claim upon which relief can be granted.

According to the courts, "A court may take judicial notice of mootness. 'In fact, an event that causes a case to be moot may be proved by extrinsic evidence outside the record.'" State ex rel. McCuller v. Corrigan, 2007 WL 1219310 (Ohio App. 8 Dist.), at p.1 fn. 1 (quoting Pewitt v. Lorain Correctional Inst., 64 Ohio St.3d 470, 472, 1992-Ohio-91, 597 N.E.2d 92 and State ex rel. Nelson v. Russo, 89 Ohio St.3d 227, 228, 2000-Ohio-141, 729 N.E.2d 1181). This Court may take judicial notice of Respondent's August 24, 2010 Judgment Entry denying Relator's Petition for Post-Conviction Relief pursuant to Ohio Revised Code Section 2953.21 that contains findings of fact and conclusions of law. A copy of Respondent's August 24, 2010 Judgment Entry is attached hereto as Exhibit "A".

Furthermore, "A writ of mandamus will not issue to compel an act already performed." State ex rel. Jerningham v. Court of Common Pleas of Cuyahoga County, 74 Ohio St.3d 278, 279, 658 N.E.2d 723, 724 (1996). The act that Relator requests already has been performed; and, as a result thereof, a writ of mandamus is not warranted.

WHEREFORE, Respondent respectfully requests that this Honorable Court dismiss Relator's Complaint in Mandamus on the ground that it is moot.

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

by 
Anthony W. Stocco (0061501)
Assistant Prosecutor
Counsel for Respondent

PROOF OF SERVICE

I certify that a copy of this Motion to Dismiss was served upon Relator Andrew J. Chambers, Inmate Number A595662, by directing a copy of the same to him at Warren Correctional Institution, P.O. Box 120, 5787 State Route 63, Lebanon, Ohio 45036, by ordinary U.S. mail, postage pre-paid, this 16th day of September, 2010.

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

by Anthony W. Stocco
Anthony W. Stocco (0061501)
Assistant Prosecutor
Counsel for Respondent

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

PLEAS COURT
LICKING CO. OHIO

State of Ohio,

2010 AUG 24 : AM 8: 50

Plaintiff,

GARY R. WALTERS
CLERK

CASE NO. 08 CR 00435

v.

Andrew Chambers,

Defendant.

THIS IS A TRUE AND CERTIFIED
JUDGMENT ENTRY OF ORIGINAL ON FILE
COMMON PLEAS COURT
LICKING COUNTY, OHIO

AUG 31 2010

I. NATURE OF THE PROCEEDINGS

Gary R. Walters
Clerk of Courts

This matter is before the Court on defendant's petition for post-conviction relief pursuant to R.C. 2953.21. For the reasons set forth below the petition is denied.

II. FACTS

On November 26, 2008, defendant pleaded guilty to felonious assault and tampering with evidence. He also entered no contest pleas to aggravated robbery and three counts of kidnapping. On May 14, 2009, defendant filed a motion for leave to file a delayed appeal which was denied. On June 8, 2009, filed a petition for post-conviction relief. Defendant's petition was denied by entry of June 8, 2009, and defendant's appeal of that entry was dismissed because this Court did not issue findings of fact and conclusions of law.

III. STANDARD OF REVIEW

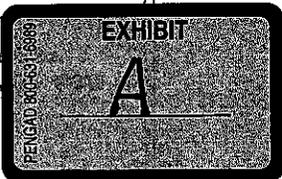
R.C. 2953.21 states:

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, 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.

Judge
Thomas M. Marcelain
740-670-5777

Judge
Jon R. Spahr
740-670-5770

Courthouse
Newark



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...

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition.

“According to the postconviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282. Before granting a hearing on the petition, the court must determine whether there are grounds to believe petitioner was denied his rights so as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. R.C. 2953.21.

“Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary 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.” *Calhoun* at 279 (¶2 of the syllabus). “A trial court's decision to grant or deny the petitioner an evidentiary hearing is left to the sound discretion of the trial court.” *State v. Scott*, 5th Dist. No. 2006CA00090, 2006-Ohio-4694, ¶34, citing *Calhoun*. Thus, before a hearing is granted,

the petitioner bears the initial burden in a post-conviction proceeding to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness. Broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions. General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing.

State v. Jackson (1980), 64 Ohio St.2d 104, 111.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant raises five assignments of error. His first allegation is that he was denied effective assistance of counsel because his trial counsel failed to consult with an expert on Post-Traumatic Stress Disorder (PTSD). Defendant asserts he may have been sentenced differently had the court been aware that he suffered from PTSD.

“Reversal of a conviction for ineffective assistance requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.” *State v. Ketterer* (2006), 111 Ohio St.3d 70, 78. “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. “The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

Despite defendant's contention, trial counsel did raise the issue of defendant's PTSD at sentencing. Trial counsel obtained a continuance of sentencing to acquire defendant's mental health records from the army, and raised the issue of defendant's condition in a sentencing memorandum filed November 25, 2008. Thus, defendant's assertions are insufficient to rebut the presumption of counsel's competence. Further, as the PTSD issue

was raised prior to sentencing, defendant could have raised the issue on appeal, and it is barred by *res judicata*.

“If an alleged constitutional error could have been raised and fully litigated on direct appeal, the issue is *res judicata* and may not be litigated in a postconviction proceeding.” *State v. Kinley* (1999), 136 Ohio App.3d 1, 7. Constitutional issues cannot be considered in post-conviction proceedings under post-conviction relief statute where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before judgment of conviction or on direct appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175.

Accordingly, defendant’s alleged error based upon ineffective assistance is not well taken.

Defendant’s second contention is that trial counsel did not adequately investigate his PTSD or the factual circumstances of and defenses to the charges against him. This contention is supported only by defendant’s own assertions and narrative of events provided in his petition. This narrative wholly contradicts the facts as read by the State at defendant’s sentencing which defendant acknowledged. Defendant’s assertions are not sufficient to overcome the presumption of competence nor are they sufficient to entitle him to an evidentiary hearing. Further, this claim is barred by *res judicata* as it could have been raised on direct appeal.

Defendant’s third assertion is that his plea was not intelligently and voluntarily made because he was coerced by trial counsel into making a plea. Defendant asserts trial counsel promised he would only receive a five-year sentence.

Defendant provides no evidence to support this assertion. Defendant signed a plea form that stated no promises were made to him to induce him to plea other than the State was to dismiss counts 1 and 7 of the indictment, the State was recommending a ten-year sentence, and defendant was requesting a sentence of less than five years. It is clear no promise was made to him. Further, *res judicata* applies to this claim as it could have been raised on direct appeal.

Defendant's fourth contention is that there was structural error within the indictment. Again, the doctrine of *res judicata* applies. This is an error that should have been raised on direct appeal as well.

Finally, defendant contends that false or misleading testimony was provided to the Grand Jury to obtain the indictment against him. Defendant merely asserts that this is the case based upon his version of the facts and the face of the indictment itself. Defendant asserts that he did not have a knife during the alleged events, and the indictment charges him with having used a knife. This assertion is not sufficient to entitle defendant to an evidentiary hearing. Further, defendant's contention could have been raised on direct appeal.

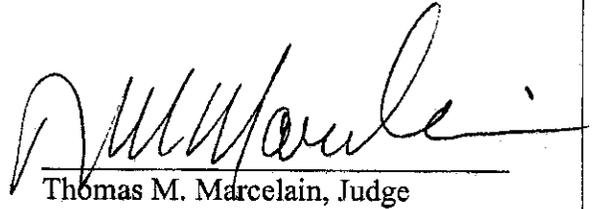
Defendant's conclusory allegations that he was denied effective assistance of counsel do not entitle him to an evidentiary hearing on his petition. *Jackson*, supra. Defendant has not set forth sufficient operative facts that would entitle him to relief, and all of his alleged errors are barred by the doctrine of *res judicata*.

V. CONCLUSION

For the reasons set forth above, defendant's petition for post-conviction relief is DENIED.

It is so ORDERED. There is no just cause for delay. This is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



Thomas M. Marcelain, Judge

Copies to:

Daniel H. Huston, Esq., Assistant Prosecuting Attorney
20 S. 2nd St., Newark, OH 43055

Keith Bryant, Probation Officer
Adult Court Services, Courthouse, Newark, OH 43055

Andrew Chambers, #595-662, Defendant
Warren Correctional Institution, P. O. Box 120, Lebanon, OH 45036