

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

HAKEEM C. HERBERT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 JE 0008

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 21-CR-156

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. Jane M. Hanlin, Jefferson County Prosecutor, for Plaintiff-Appellee

Hakeem C. Herbert, *Pro se*, Defendant-Appellant

Dated: December 16, 2024

WAITE, J.

{¶1} Appellant Hakeem C. Herbert appeals an April 25, 2024 judgment entry of the Jefferson County Court of Common Pleas denying his motion styled “Post-Conviction Relief to Vacate or Set Aside Conviction.” Appellant includes wide ranging arguments challenging various search warrants and his conviction, based on allegations of false and inconsistent testimony and prosecutorial misconduct. Because it is clear that Appellant seeks to retry his case with evidence already known to him at the time of his trial, his arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The facts of the underlying proceedings are taken from the direct appeal, as follows:

Appellant's conviction was the result of an investigation into the import and trafficking of drugs in Jefferson County conducted by the Jefferson County Drug Task Force (“JCETF”). The investigation began in April of 2021, when United States Postal Service Inspector Byron Green (“Green”) identified two suspicious packages being shipped from California to Steubenville, Ohio, which did not include a proper name with the sender's address or the recipient's address. The recipient's address – 1096 Claire Avenue – was owned by Appellant.

. . .

Ultimately, the packages were seized and provided the basis for count two of the amended indictment, attempted possession of drugs, for which Appellant was acquitted at trial.

Roughly four months later on August 18, 2021, Cassandra Williams (“Williams”), who is employed by UPS as security personnel, telephoned Belmont County Sheriff’s Office Deputy Dustin Hilderbrand (“Deputy Hilderbrand”), to report the receipt by UPS of two suspicious packages. Deputy Hilderbrand was off-duty, and as the UPS facility is outside of the jurisdiction of the Belmont County Sheriff’s Department, Hilderbrand contacted Steubenville Police Department Detective and JCDTF member Thomas Ellis (“Detective Ellis”).

Relevant to the above-captioned appeal, the sender of one of the packages was identified as “George Millan” with a return address in California. The recipient of the package was “Lewis Harris” at “1112 Park Street” in Steubenville, Ohio. UPS's computer system flagged the package due to previous illegal activity at the delivery address.

Williams testified that she was in transit between the Mansfield, Ohio facility and the Brilliant, Ohio facility where the suspicious package was located, when UPS personnel in Brilliant opened the exterior packaging at 9:26 a.m. UPS employees in Brilliant sent photographs of the package to Williams via her mobile telephone and informed her the contents of the package were “heavily wrapped.” Williams instructed the UPS employees

to “stop the progress” so she could “contact the law.” (11/9/21 Hrg. Tr., p. 26.)

. . .

Detective Ellis arrived at the UPS facility in Brilliant, then waited for Williams to arrive. When Williams arrived, she asked Detective Ellis, “[i]n front of us, can you please open [the interior packaging].” At the hearing on the motion to suppress, Williams explained, “[b]ecause at that point, [I am] not trained to – on that type of – of what to expect. I [did not] know if it was fentanyl. I just [did not] know what was in that package.” (*Id.* at p. *621 29.) Williams further testified she was not trained to handle fentanyl.

. . .

Detective Ellis further testified that “once [he] was able to get through the [inner] packaging, [he] made an incision into the package where [he] observed – it was a compacted, hard, rock crystallized substance.” The substance field-tested positive for methamphetamine.

Williams telephoned Deputy Hilderbrand, who traveled to the UPS facility. Deputy Hilderbrand conducted a search for the recipient's name in the Accurant database and found no results. Ellis did a search for the recipient's name and address in the local Steubenville Police Department database, which likewise returned no results. As a consequence, Detective

Ellis and Deputy Hilderbrand decided to perform a controlled delivery of the package.

. . .

JCDTF officers conducted surveillance directly across the street from 1112 Park Street and after fifteen or twenty minutes, a black Honda arrived in front of the residence. The passenger, later identified as co-defendant Deon'bre Anderson-Bailey, retrieved the package from the porch. JCDTF officers then followed the vehicle from 1112 Park Street to 1300 Oregon Avenue, where Appellant, who was driving the automobile, exited the vehicle and entered the residence. Shortly thereafter, Anderson-Bailey, with the package in hand, exited the vehicle and entered the residence.

. . .

Approximately five to eight minutes later, law enforcement breached the door of 1300 Oregon Avenue. Anderson-Bailey and Appellant were both detained. Detective Ellis observed the exterior box open on a dining room table. Upon examination, Detective Ellis observed the methamphetamine and rock salt were no longer in the exterior box and the GPS monitor was on a coffee stand next to the dining room table.

The methamphetamine and rock salt were found in the back yard, having been discarded through a bathroom window. Neither Detective Ellis nor Detective Turner saw Appellant with the package in his actual

possession during their surveillance. The package of methamphetamine is the basis for count one of the amended indictment, for which Appellant was found guilty.

After Appellant and Anderson-Bailey were secured, and while officers remained at the residence, Detective Ellis prepared a search warrant for 1300 Oregon Avenue, 1096 Claire Avenue, and the package, which was signed by a municipal judge. During this process, officers stood outside 1096 Claire Avenue and 1300 Oregon Avenue.

. . .

A search of Appellant's person yielded his identification and the California identification card of an individual named Patrick Lee Thomas, whose nickname was "Mafia." A copy of the UPS receipt for the package was found on Appellant's mobile telephone.

After searching 1300 Oregon Avenue, JCDTF officers executed the search warrant at Appellant's residence at 1096 Claire Avenue. The search yielded baggies, vinyl gloves, a digital scale, razor blades, dry cleaning, mail, a credit card bearing Appellant's name, and three firearms inside the furnace.

One of those firearms, a Glock pistol, is the basis for count three of the amended indictment, having weapons while under disability, for which Appellant was acquitted. The location of the firearms in the furnace

provided the basis for count four of the amended indictment, tampering with evidence, which was dismissed by the trial court pursuant to Crim. R. 29 at the close of the state's case.

. . .

After the jury returned their verdicts, the trial court imposed a mandatory minimum sentence of eleven years and a mandatory maximum sentence of sixteen-and-a-half years. . . .

State v. Herbert, 2023-Ohio-4490, ¶ 3-27 (7th Dist.) (“*Herbert I*”).

{¶3} On direct appeal, this Court affirmed Appellant’s conviction and sentence in *Herbert I*. Thereafter, Appellant filed an unsuccessful application for reopening. *State v. Herbert*, 2024-Ohio-2459 (7th Dist.) (“*Herbert II*”). On March 22, 2024, Appellant filed a timely petition for postconviction relief and on April 25, 2024, the trial court denied the petition without a hearing. This timely appeal followed.

Postconviction Petition

{¶4} In order to successfully assert a postconviction petition, “the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction sufficient to render the conviction void or voidable under the Ohio or United States Constitutions.” *State v. Agee*, 2016-Ohio-7183, ¶ 9 (7th Dist.), citing R.C. 2953.21(A)(1).

{¶5} The petitioner bears the burden of demonstrating “substantive grounds for relief” using the record or any supporting affidavits. *Agee* at ¶ 9. However, as a

postconviction petition does not provide a forum to relitigate issues that could have been raised on direct appeal, res judicata bars many claims. Agee at ¶ 10.

{¶6} As a threshold issue, there is a timing component to a postconviction petition. R.C. 2953.21(A)(2) requires a petitioner to file a petition within one year after the trial transcripts are filed in the court of appeals. In relevant part, R.C. 2953.21(A)(2) provides that a postconviction petition:

[S]hall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction[.] . . . If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

{¶7} Ohio law sets forth a two-part exception to this rule if the petitioner can demonstrate that he meets the criteria found in R.C. 2953.23(A)(1)(a)-(b).

{¶8} Pursuant to R.C. 2953.23(A)(1)(a), the petitioner must either show that he “was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief, or, . . . 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.”

{¶9} In addition to the timeliness factor, the doctrine of res judicata “bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal.” *State v. Croom*, 2014-Ohio-5635, ¶ 7 (7th Dist.),

citing *State v. Ishmail*, 67 Ohio St.2d 16, 18 (1981). Only in instances where “an alleged constitutional error is supported by evidence that is *de hors* the record, res judicata will not bar the claim because it would have been impossible to fully litigate the claim on direct appeal.” *State v. Green*, 2003-Ohio-5142, ¶ 21 (7th Dist.), citing *State v. Smith*, 125 Ohio App.3d 342, 348 (12th Dist.1997). To overcome the res judicata bar, the petitioner must demonstrate that the claim could not have been appealed based on the original trial record. *Agee* at ¶ 11, citing *State v. Combs*, 100 Ohio App.3d 90, 97 (1st Dist.1994).

{¶10} Appellant’s trial transcripts in this matter were filed on March 30, 2023. He filed his postconviction petition on March 22, 2024. Thus, Appellant’s petition was timely filed. On April 25, 2024, the trial court denied the petition without holding a hearing. For ease of understanding, Appellant’s first assignment of error will be addressed last.

ASSIGNMENT OF ERROR NO. 2

The Trial Court Abused Its Discretion When It Failed To Grant Post-Conviction for Prosecutor Misconduct When the State Used False/And Or Fabricated Evidence And False/And Or Perjured Testimony In Order To Obtain Its Conviction. Hakeem Herbert Was Denied A Fair Trial, And Due Process, And His Fundamental Right to Personal Security Under U.S. Constitution Amendment V, Vi [Sic], And Xiv [Sic], And Ohio Const. Art[.] I, §1, §10, [§] 16 Due to Prosecutorial Misconduct.

{¶11} Appellant raises a wide-ranging number of claims within this assignment of error. Appellant raises several issues in regard to the testimony of Det. Ellis as to when and who opened the package, whether he performed a presumptive field test on the

substance found in the package, when he sought a search warrant, whether he attempted to contact the owner of the house where the package was to be delivered, why he did not stop Appellant at the time he retrieved the package, and whether he wore a body camera at the time the search was executed. Appellant also attacks Det. Ellis' actions in regard to the search warrant, questioning who determined the package was suspicious, why the package was deemed suspicious, and whether the correct package seizure form was ever provided to Appellant or was placed into the record. Appellant additionally contends that the Jefferson County Prosecutor committed misconduct, as she represented the state throughout the entirety of the proceedings and allowed alleged misstatements of fact and evidence to be presented at trial with knowledge of their falsity.

{¶12} Appellant does not, however, rely on new evidence, here. Each of these issues were thoroughly addressed by this Court, and any other “evidence” on which he now relies could have been addressed on direct appeal. All “evidence” and arguments now relied on by Appellant were known to him at the time of trial. There is no new evidence that has come to light since Appellant's conviction or last appeal. While there were instances of contradictory trial testimony, Appellant does not, now, cite to testimony that would have impacted his conviction. Most of the inconsistencies on which Appellant relies were addressed at trial and on appeal. However, some of Appellant's allegations involve a misunderstanding on Appellant's part as to what various officers stated in their testimony.

{¶13} As to prosecutorial misconduct, even though the prosecutor was undoubtedly aware of discrepancies within multiple officers' testimony, these were largely

addressed at trial. Even so, the record contains no evidence of wrongdoing on the prosecutor's part.

{¶14} Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

The Trial Court Abused Its Discretion When It Failed to Grant Post-Conviction for Trial Counsel Being Ineffective for Failing to Raise a Brady Violation or Challenge at The Suppression Hearing That the State Never Produced a Search Warrant Affidavit, To Seize Hakeem Appellant's Cell Phone. The State Also Failed To Produce Regis Holzworth Body Camera Footage, Or The Package Confiscated By Law Enforcement Receipt For The Package Addressed To The Appellant. Denying His Sixth Amendment Right to Effective Counsel and His Right to Effective Counsel and His Right to A Fair Trial, And Due Process Under U.S. Constitution Amendment V, Vi [Sic], And Xiv [Sic], And Ohio Const. Art[.] I, §1, §10 And [§] 16.

{¶15} Appellant contends that the prosecutor failed to produce the following items in discovery: a search warrant used to seize his cell phone, Det. Regis Holzworth's body camera video, and the correct package confiscation paperwork given to UPS.

{¶16} A review of the transcripts demonstrates that a search warrant for Appellant's phone appears on a USB drive that was admitted into evidence at his trial. As to Det. Holzworth's lack of a body camera video, this was a fact known to Appellant at trial. Even so, Det. Holzworth testified that his only role in this case was to assist in

securing the scene for the execution of the search warrant at Appellant's residence. (Trial Tr., p. 364.)

{¶17} As to the package confiscation receipt, there was some confusion whether the correct receipt was ever provided to the defense. Again, this fact was known to Appellant at the time of trial. Because Appellant could have raised this issue at trial and/or on original appeal, he is barred by *res judicata* from raising it, here.

{¶18} Accordingly, Appellant's third argument is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

The Trial Court Abused Its Discretion When It Failed to Grant Post-Conviction for Trial Counsel Being Ineffective for Failing To Investigate And Requests a Franks Hearing Due [to] False And Stale Evidence Used In The Probable Cause Affidavit And For Failing To Challenge The States [Sic] Prosecutorial Use Of False Evidence. Hakeem Herbert Was Denied a Fair Trial, And Due Process Under U.S. Constitution Amendment V, Vi [Sic], And Xiv [Sic], And Ohio Const. Art[.] I, §1, §10, And [§] 16 This Constitutes A Structural Error And Renders His Conviction Is Void.

{¶19} Appellant emphasizes that the only portion of the trial court's decision denying his petition that contains no analysis pertains to his prosecutorial misconduct argument. The court summarily concluded that it "sees none." (4/25/24 J.E., p. 2.) Appellant highlights that the state acknowledged the correct confiscation paperwork was not submitted. Appellant contends that once discovery was provided from the co-defendant's case, a *Franks* hearing should have been requested.

To obtain a *Franks* hearing, the movant must provide a substantial preliminary showing that a false statement was made either knowingly or intentionally, or with reckless disregard for the truth. The movant must also show that the allegedly false statements were necessary for the magistrate's determination of probable cause. Therefore, "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Franks*, 438 U.S. at 171-72 (footnote omitted).

U.S. v. Mastromatteo, 538 F.3d 535, 545 (6th Cir. 2008), citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

{¶20} While Appellant correctly identifies some inconsistent trial testimony and a discovery issue, he concedes that he received the relevant discovery prior to trial, contending that such discovery should have prompted a *Franks* hearing. The record reveals that as all of these allegations were known to Appellant at the time of trial, they should have been raised on direct appeal and are now barred.

{¶21} Appellant's fourth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 5

The Trial Court Abused Its Discretion When it failed to Grant Mr. Herbert's Motion For Discovery And Public Records Request To Get Supporting Documents To File His Post-Conviction.

{¶22} Appellant sought, at trial, some documents not traditionally provided through discovery. The documents sought pursuant to R.C. 149.43 include:

1. The entire investigative file, police work product, ex parte communications, any and all videos, body-cam videos, documents, reports, emails, notes, logs, chain or custody records for any and all evidence for incident report number 21-008285. **case No. 21-CR-156, and 21-CR-157, 21 BRA-988.**

2. Any and all videos, body-cam video documents and evidence turned over to the Jefferson County prosecutor's office, record related to the petitioner's arrest of Hakeem Herbert. **case No. 21-CR-156, and 21-CR-157, 21 BRA-988.**

3. Any, and all, **unredacted** prosecuting attorney work product files, trial preparations records used in **Case No. 21-CR-156, and 21-CR-157, 21 BRA-988.**

4. The Entire Trial Attorney work product in **Case No. 21-CR-156, and 21-CR-157, 21 BRA-988.**

(3/22/24 Motion for Discovery.)

{¶23} While Appellant now generally seeks to obtain this evidence to support his arguments, it is unclear what he expects to find in this request that will support his arguments, nor has he provided any reasonable basis for his belief these documents exist.

{¶24} Appellant also seeks a second group of documents. Those include:

1. The Jefferson's [sic] County full discovery files turned over to Herbert's trial counsel including any all documents, reports, laboratory test results, any all video not excluding body camera footage, and audio files, and jail calls and video visitation video files in connection, with **case No. 21-CR-156, and 21-CR-157.**

2. Any and all search warrants and probable cause affidavits granted or denied in this case.

3. Package confiscated by law enforcement document.

(3/22/24 Motion for Discovery.)

{¶25} Contrary to Appellant's argument, his motion did not go unaddressed. The record reveals that Appellant's girlfriend, who was a witness for the state, also submitted a records request. On October 21, 2024, the Jefferson County Clerk's Office sent Appellant correspondence indicating that the records he sought were provided to his girlfriend's representative. His girlfriend told the office that the records were being sought on Appellant's behalf, but she needed to have someone else pick them up for her. Apparently, they were picked up by her representative. It is unclear whether Appellant expected or authorized his girlfriend to obtain these records, or whether she provided them to him after she received them. Regardless, this record reveals that, to the extent records existed, these records were provided.

{¶26} Appellant's fifth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 6

The Trial Court Abused Its Discretion When It Failed To Strike State's Untimely Brief In Opposition Where It Failed To Request A Time Extension.

{¶27} Appellant contends that the trial court improperly accepted the state's brief, which was untimely filed without good cause.

{¶28} While the state's brief was untimely filed, a trial court retains wide discretion over its docket. *Adlaka v. Lambrinos*, 2017-Ohio-8014 (7th Dist.). Absent an abuse of that discretion (and none is apparent in the record) we will not instruct the trial court as to whether an untimely brief should be accepted by that court.

{¶29} Appellant's sixth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 1

The Trial Court Abused Its Discretion When It Failed To Grant Post-Conviction Without Evidentiary Hearing.

{¶30} Appellant contends that a timely filed postconviction petition requires the trial court to hold a hearing to determine whether grounds for postconviction relief exist. Appellant focuses his arguments on prosecutorial misconduct, which he argues cannot be established simply by viewing the record and petition, alone. The state provides no meaningful response.

{¶31} As Appellant notes, unless the petition, case files, and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. R.C. 2953.21(F). Clearly,

however, a petitioner is not automatically entitled to a hearing where the petition and record establish that the appellant is not entitled to relief. *State v. Tidwell*, 2021-Ohio-1286, ¶ 26 (7th Dist.), citing *State v. Cole*, 2 Ohio St.3d 112, 113 (1982).

{¶32} Appellant generally asserts that his claims require support from evidence *de hors* the record. It is apparent that most of Appellant’s arguments have been, or should have been, raised in his direct appeal and application for reopening. The Ohio Supreme Court has held “*res judicata* to be a proper basis upon which to dismiss without hearing an R.C. 2953.21 petition.” *Tidwell, supra*, citing *Cole, supra*, at 113; *State v. Perry*, 10 Ohio St.2d 175 (1967); *State v. Duling*, 21 Ohio St.2d 13 (1970). Although the court did not rely on *res judicata*, the court did briefly recognize that Appellant “then goes on to challenge certain facts, all of which were hashed out at trial and were available on Appeal.” (4/25/24 J.E., p. 3.) Further, Appellant did not attack any evidence outside of the record or allege that he had such evidence. Thus, there is nothing of record that supports the conclusion Appellant may be entitled to relief, and he offers no new evidence that was discovered after trial. In his filing, he merely seeks to retry his case in an effort to obtain an acquittal. Appellant has supplied nothing on which to base such a request, and certainly nothing to support postconviction relief.

{¶33} Appellant’s first assignment of error is without merit and is overruled.

Conclusion

{¶34} Appellant raises broad arguments that challenge various search warrants and his conviction based on his allegations of false and inconsistent testimony, and allege prosecutorial misconduct at his trial. Because it is clear that Appellant seeks to retry his

case with evidence already known to him at the time of trial, his arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.