[Cite as *Westlake v. Dunn*, 2021-Ohio-2590.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF WESTLAKE,	:	
Plaintiff-Appellee,	:	Nos. 109934 and 109935
v.	:	
JACOB M. DUNN,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 29, 2021

Civil Appeal from the Rocky River Municipal Court
Case Nos. 18 CRB 1737 and 18 CRB 2127

Appearances:

Michael P. Maloney, City of Westlake Director of Law, and John J. Spellacy, Assistant Prosecuting Attorney, *for appellee*.

Bremke Law, L.L.C., and Giovanna V. Bremke, *for appellant*.

LISA B. FORBES, J.:

{¶ 1} Jacob M. Dunn ("Dunn") appeals from the Rocky River Municipal Court's journal entry denying his postconviction petition. After reviewing the facts of the case and pertinent law, we affirm the lower court's decision.

I. Facts and Procedural History

{¶ 2} On August 10, 2018, Dunn was charged with aggravated menacing and telecommunications harassment in Rocky River M.C. No. 18 CRB 1737. The victim of these offenses was Dunn's estranged wife, H.D., and her coworker. On August 13, 2018, the court issued a domestic violence temporary protection order ("the TPO") against Dunn in Rocky River M.C. No. 18 CRB 1759. The TPO prohibited Dunn from contacting H.D. directly or through a third party. On September 28, 2018, Dunn was charged with violating the TPO in Rocky River M.C. No. 18 CRB 2127.

{¶ 3} On January 8, 2019, Dunn pled no contest to aggravated menacing and violating the TPO in Rocky River M.C. Nos. 18 CRB 1737 and 18 CRB 2127. At the plea hearing, the court had defense counsel and the prosecutor "present the facts in this case so that the Court can consider them to determine if they support a guilty finding." Two underlying events formed the basis of the TPO violation.

{¶ 4} First, Dunn admitted that he "contacted the victim's sister * * * in an effort to speak with or convey information relative to a vehicle or some moneys involved * * *. [T]he evidence * * * would indicate [that Dunn] violated the order by attempting to have a third party contact with the alleged victim in this case * * *."

{¶ 5} Second, Dunn admitted that he "changed names of the albums of the music titles" on his and H.D.'s shared Napster music account. "[T]here were at least two instances. One was — one of the album titles had been changed to quote, I want us to work. Do you? I'll do anything, quote. Another read, 'I love you more than

ever.' Then the mention of '[H.D.], do you still love me?' So he violated the order playing nice if you will."

{¶ 6} The court sentenced Dunn to community-control sanctions on February 11, 2019. Dunn did not file a direct appeal of his convictions or sentence.

{¶ 7} On August 28, 2019, Dunn filed a motion to withdraw guilty plea in Rocky River M.C. No. 18 CRB 1737. On February 13, 2020, the court held a hearing on Dunn's motion and denied it the same day. Dunn did not appeal the court's denial of his motion.

{¶ 8} On June 5, 2020,[1] Dunn filed a "petition to vacate or set aside judgment of conviction or sentence" in Rocky River M.C. Nos. 18 CRB 1737 and 18 CRB 2127. The court held a hearing on July 30, 2020, and on August 6, 2020, denied the postconviction petition, finding that Dunn "did not establish there was a manifest miscarriage of justice." It is from this order that Dunn appeals.

II. Law and Analysis

A. Petition for Postconviction Relief

1. Standard of Review

{¶ 9} "A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen*,

[1] R.C. 2953.21(A)(2) requires petitions for postconviction relief to "be filed no later than [365] days after * * * the expiration of the time for filing the appeal" if no direct appeal of the judgment was taken. Dunn argues that, although he missed this statutory deadline, Am.Sub.H.B. 197 tolled deadlines that were set to expire between March 9, 2020, and July 30, 2020. Westlake does not dispute or otherwise address the timeliness of Dunn's petition.

70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). We review a lower court's ruling on a postconviction relief petition filed pursuant to R.C. 2953.21 for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. 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." *Id*.

{¶ 10} "R.C. 2953.21(A) requires a petitioner for postconviction relief to allege a 'denial or infringement' of his rights under the Ohio or United States Constitutions." *State v. Warmus*, 8th Dist. Cuyahoga No. 99962, 2014-Ohio-928, ¶ 8. "The petition is meant to get to constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *Id*. at ¶ 29.

> Petitioners must state all grounds for relief on which they rely, and they waive all other grounds not set forth in the petition. R.C. 2953.21(A)(4). In determining whether substantive grounds for relief exist, the trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support of the petition.

State v. Jordan, 8th Dist. Cuyahoga No. 109345, 2021-Ohio-701, ¶ 7.

2. Dunn's Petition and the Lorain Testimony

{¶ 11} Dunn argues that the municipal court should have granted his petition based on "newly discovered evidence." According to Dunn, the newly discovered evidence is H.D.'s testimony given at a hearing held on February 6, 2019, in another domestic violence civil protection order case filed by H.D. against Dunn in Lorain County ("the Lorain Testimony"). *See Dunn v. Dunn*, Lorain C.P. Dom. Rel. No. 18DV084852. Dunn was present for the Lorain Testimony and argues that

it requires that his conviction for violating the TPO in the Rocky River Municipal Court be vacated. Specifically, Dunn argues as follows:

> The nature of the allegations of violating the protection order include that [H.D.] believed that Mr. Dunn was trying to communicate with her by changing the titles of the playlists in their joint Napster music account. In these transcripts, which were attached to his post-conviction petition, [H.D.] indicates that she does not know when the titles of the playlists were changed because she had not accessed the music account for a while and that he could have changed these playlist titles prior to when the protection order took place.

{¶ 12} According to Dunn, "there is no proof that [the titles of the playlists] were changed after the temporary protection order was in place * * *," therefore, there is no proof that he violated the TPO.

{¶ 13} Attached to Dunn's petition are two exhibits. First is an affidavit of an attorney stating that he requested the Lorain Testimony transcript, it was "prepared * * * and dated September 20, 2019," and he "provided a copy of [this transcript] to Jacob Dunn after [he] received [it] in September 2019." Second is a copy of the Lorain Testimony transcript.

{¶ 14} The pertinent part of the Lorain Testimony concerns one of the two incidents that lead to Dunn's conviction for violating the TPO. According to H.D., on September 12, 2018, she was exercising at the gym when she accessed the Napster account that she shared with Dunn and saw that the titles for playlists had changed. Asked if she knew when they were changed, H.D. testified, "Actually, yes. They were changed right before I went to the police because when I got into the gym, before I went tanning, I was listening to the music, and then when I got out of tanning to get

onto the treadmill and pulled up the music, that's when they were there." According to H.D., "[t]hey were a regular playlist" before she went tanning.

> Q: And it wasn't until after you got out of the tanning booth that they changed?
>
> A: Correct.
>
> * * *
>
> Q: Had you accessed these accounts prior to September 12?
>
> A: I believe so. I'm not a hundred percent sure because I really didn't start using it until I went back to actually do the gym.

3. Rocky River Municipal Court Hearing Testimony

a. TPO Hearing

{¶ 15} At the August 13, 2018 hearing granting the TPO, the Rocky River Municipal Court had the following colloquy with Dunn:

> THE COURT: Stay away from [H.D. and her son], and not be present within 1,000 feet.
>
> You are not to initiate or have any contact with them whatsoever. So you can't text them, Tweet them, Instagram, Snapchat, Facebook, nothing on social media. You can't send flowers, letters, packages, or anything. Do you understand?
>
> If they would contact you, you cannot respond. Do you understand that?
>
> DUNN: Yes, I do.
>
> * * *
>
> THE COURT: You cannot cause or encourage any third person to do anything that you can't do. All right. So you can't get a co-worker, brother, sister, aunt, uncle, anybody to harass [H.D.]. Do you understand?
>
> DUNN: Hundred percent.

b. Sentencing Hearing

{¶ 16} At Dunn's February 11, 2019 sentencing hearing, his probation officer stated on the record that Dunn "reported the TPO violation" as follows: "I tried to give my wife money to repair her car, and I tried to reach out to her electronically before the TPO was in effect." The probation officer further stated that Dunn "does admit to technically violating the TPO. * * * He did not know about the TPO. He did relabel the playlist on Spotify into questions for her."

{¶ 17} Dunn's counsel stated that Dunn "went through a range of emotions and behaved totally inappropriate. He admits to that, Your Honor. He's not going to deny that."

{¶ 18} H.D. gave a victim impact statement at the sentencing hearing that included the following:

> THE COURT: Has he contacted you since that [TPO]?
>
> H.D.: He just contacted me through the Rhapsody thing.
>
> THE COURT: What's Rhapsody?
>
> H.D.: Our music account where he was asking me if I still loved him, and you know, he was trying to work things out.
>
> THE COURT: Is that like a social media network?
>
> H.D.: It's a music, a music app. It was a shared account.

{¶ 19} Dunn spoke on the record at his sentencing hearing and stated the following:

> As far as the TPO violation goes, I'm guilty of that. I admitted to that. I did not know at the time — * ** I don't know the rules of the TPO for the most part. I figured out the hard way, unfortunately. * * * And

another thing, I have not stalked her. Outside of that TPO thing, I have not been anywhere near her since that first week of August.

c. Motion to Withdraw Guilty Plea Hearing

{¶ 20} Approximately one year later, at the February 13, 2020 hearing on Dunn's motion to withdraw his guilty plea, his argument is the same argument that he presented in his postconviction motion and the same argument he presents on appeal: That H.D.'s testimony did not prove that he accessed the shared music account after the TPO was issued, and that he "learned [this] on February the 6th during the [Lorain Testimony] hearing."

{¶ 21} The state opposed Dunn's motion by arguing that there was no "newly discovered" evidence, because "he's the one that changed the titles to the songs," and he "knew when he made the changes * * *." Furthermore, the state argued that the TPO violation was based on two underlying events, one of which was not being challenged, and that the conduct occurred after the TPO was issued.

{¶ 22} In denying Dunn's motion, the court found that there was no "confusion of the facts" as to when Dunn "made changes that appear to me to be communication" with H.D. The court further stated that when it issued the TPO, it made it "very clear" to Dunn what he could and could not do.

d. Motion for Postconviction Relief Hearing

{¶ 23} At the July 30, 2020 hearing on Dunn's postconviction petition, defense counsel stated that Dunn "would like to reopen the case to try to get the testimony that was used in the other civil case, would be extremely detrimental in

this case." Defense counsel also argued that the transcript of this testimony was not "discovered" until September 25, 2019.

{¶ 24} In its August 6, 2020 journal entry denying Dunn's petition for postconviction relief, the court stated the following:

> The Court finds that petitioner did not establish there was a manifest miscarriage of justice. Defendant filed a motion to vacate plea, and after a full hearing, defendant was overruled on February 13, 2020. During the hearing on this petition, defendant raised the same issues raised as part of his overruled motion. As part of the hearing on defendant's petition, the Court looked at all police reports from the cases, including police reports from cases that were dismissed as part of the plea. The Court found the defendant entered a negotiated plea. Defendant avoided pleading to a domestic violence charge, which is automatically enhanceable to a felony and non-expungeable. Defendant said the transcript he provided showed that there was new evidence proving the victim was unaware when the playlist names were changed. The transcript was known to defendant before the plea, so this was not newly discovered evidence.
>
> The TPO violation included two things: contact with the victim's sister to get a message to the victim, along with changing the names of playlists on Napster, which were his way of communicating with the complaining witness. The messages included use of her first name, * * * stating "I love you more than ever." Both of these are clear violations of the protection order and defendant's plea was supported completely by the facts presented in this case.
>
> Defendant did not meet his high burden of proving that this petition should be granted because defendant failed to demonstrate a manifest miscarriage of justice.

4. The Trial Court Did Not Abuse Its Discretion

{¶ 25} Upon review, we find that the municipal court's denial of Dunn's postconviction petition is supported by competent and credible evidence in the record. Dunn has not alleged a "denial or infringement" of his constitutional rights. The Lorain Testimony is not newly discovered evidence under the law. The date that

Dunn changed the playlist names was always known to him because he was the one who did it. Although the Lorain Testimony was given after Dunn pled guilty, he was not unavoidably prevented from discovering this evidence in a timely manner.

{¶ 26} Newly discovered evidence typically comes into play when a defendant is seeking a new trial. The Ohio Supreme Court set forth the following requirements regarding motions for a new trial based upon newly discovered evidence:

> To warrant the granting of a motion for a new trial on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result of a new trial if granted; (2) has been discovered since the trial; (3) is such as could not in the exercise of due diligence have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶ 27} In this case, Dunn pled no contest to violating the TPO. All the material facts were known to him at the time he pled, and the Lorain Testimony does not "disclose a strong probability" of an acquittal on the charge. The court did not abuse its discretion in denying Dunn's petition, and his first assignment of error is overruled.

B. Findings of Fact and Conclusions of Law

{¶ 28} Pursuant to R.C. 2953.21(H), when a "court does not find grounds for granting" a petition for postconviction relief, "it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition." This court has held that "[t]he purpose of requiring findings of fact and conclusions of

law is to apprise the petitioner of the bases for the court's disposition and to facilitate meaningful appellate review." *State v. Maxwell*, 8th Dist. Cuyahoga No. 107758, 2020-Ohio-3027, ¶ 12.

{¶ 29} In his second assignment of error, Dunn argues that the "assertions and facts that the Court relies on are incorrect." Specifically, he argues that at the hearing on his petition, the state "repeatedly claims that [he] pled guilty on February 11, 2019 which is inaccurate and the Court goes along with it indicating those are her records * * * [w]hen in fact * * * on January 8, 2019, [he] pled guilty."

{¶ 30} Upon review, we find that the court made findings of fact and conclusions of law in accordance with R.C. 2953.21(H). The prosecutor mistakenly stated at the hearing on his postconviction petition that Dunn pled guilty on February 11, 2019, which is after the Lorain Testimony was given. The court's journal entry appears to mirror this and states that "the transcript was known to defendant before the plea * * *." However, as explained in our analysis of Dunn's first assignment of error, Dunn pled guilty on January 8, 2019, which is before the Lorain Testimony. Nonetheless, the facts were known to Dunn prior to his plea.

{¶ 31} Accordingly, we find that this misstatement is not material to the court's findings of fact and conclusions of law. Dunn's second assignment of error is overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of out of this court directing the Rocky River Municipal Court 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.

LISA B. FORBES, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR