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COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Nov. 13, 2019

Case No. 16CR094447

STATE OF OHIO

Plaintiff

Paul Griffin

Plaintiff's Attorney

VS

ROBERT FOX

Defendant

Pro Se

Defendant's Attorney

This matter is before the Court on Defendant's *pro se* Motion Requesting The Court To Make Proper Findings Of Facts And Conclusions Of Law In The May 10, 2019 Order Denying Post-Conviction Relief, filed November 8, 2019.

The State has not had an opportunity to respond.

The Motion For Findings of Fact and Conclusions of Law is well-taken and hereby GRANTED.

The Motion For Post-Conviction Relief and sentencing error, filed May 8, 2019, and the Motion For Post-Conviction Relief, dated May 22, 2019, but filed on November 12, 2019, are not well-taken and both are DENIED.

IT IS SO ORDERED. No Record.

See Judgment Entry.



JUDGE D. CHRIS COOK

cc: Griffin, Asst. Pros. Atty.
Defendant, *Pro Se*



**LORAIN COUNTY COURT OF COMMON PLEAS
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I. INTRODUCTION

This matter is before the Court on Defendant's *pro se* Motion Requesting The Court To Make Proper Findings Of Facts And Conclusions Of Law In The May 10, 2019 Order Denying Post-Conviction Relief, filed November 8, 2019.

The State has not had an opportunity to respond.

II. PROCEDURAL HISTORY

On May 8, 2019, the Defendant filed a pleading captioned, "Post Conviction Relief for sentencing error."

On May 10, 2019, this Court denied same.

On May 22, 2019, the Defendant mailed a pleading captioned, "Motion For Postconviction Relief" directly to this Court.

On July 1, 2019, the Defendant filed a Notice Of Appeal with the Ninth District Court of Appeals. (See Case No. 19CA011525.)

On July 9, 2019, this Court filed a Journal Entry that indicated that 1) the Motion of May 22, 2019, was never filed with the Clerk and; 2) that as a result of the Defendant having filed an appeal in the Ninth District, this Court had no jurisdiction to rule on the second motion, even if it had been properly filed. See: *State ex rel. E.C.O.T. v. Cuy.*



Cty. Court of C.P., 129 Ohio St.3d 30, 2011-Ohio-626; see also: *The State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d. 94 (1978).

On August 21, 2019, the Ninth District dismissed the Defendant's [attempted] appeal as that court lacked jurisdiction to hear it.¹

That brings us back to the pending Motion Requesting The Court To Make Proper Findings Of Facts And Conclusions Of Law In The May 10, 2019 Order Denying Post-Conviction Relief, filed November 8, 2019, which as noted, is well-taken and granted.

Prior to addressing that Motion, however, the Court would note that the Motion For Postconviction Relief dated May 22, 2019, was never filed. The Court has filed same on November 12, 2019, for the Defendant and will consider that motion *in pari materia* with the May 8, 2019, motion.

III. STATEMENT OF PERTINENT FACTS

On September 8, 2016, the Defendant, Robert L. Fox ("Fox"), was indicted on seven felony counts, to wit: Aggravated Robbery with three specifications², two counts of Robbery, both with the same specifications, two counts of Conspiracy, and two counts of Having Weapons While Under Disability. (See Case No. 16CR094447.)

Thereafter, on November 29, 2018, Fox was indicted on a new case (while on bond for this case) for two counts of Violating A Protection Order. (See Case No. 18CR099471.)

After multiple pre-trials, on January 11, 2019, Fox plead guilty on both cases.

On January 23, 2019, Fox was sentenced (after a merger analysis) to three-years on count one, Aggravated Robbery, consecutive to a three-year firearm specification for a total of six-years on this case.

On the same day, Fox was sentenced to 12-months in the second case (18CR099471) on count one (also after a merger analysis), Violating A Protection Order, which was run concurrent to this case (16CR094447), again, for a total aggregate prison term of six-years (with the three-year firearm specification "mandatory" time).

¹ That appeal was dismissed as App. R.5(A) does not apply to post-conviction proceedings and this Court's order of May 10, 2019, was not a final, appealable order because it failed to contain sufficient findings of fact and conclusions of law.

² Two firearm specifications and a repeat violent offender specification.



Fox's pending Motions For Postconviction Relief and for sentencing error, filed May 8, 2019, and his Motion For Postconviction Relief, dated May 22, 2019, but filed November 12, 2019, are now ripe for determination.

IV. ANALYSIS

STANDARD OF REVIEW

The Ninth District Court of Appeals has repeatedly stated,

Under Revised Code Section 2953.21(A)(2), a petition for post-conviction relief must be filed no later than 365 days after the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence, or, if no direct appeal is taken, 365 days after the expiration of the time to file an appeal. The trial court is not permitted to consider petitions filed outside of this period unless the petitioner was unavoidably prevented from discovering the facts on which he relies or, subsequent to the expiration of the deadline, the United States Supreme Court recognizes a new federal or state right that applies retroactivity to people in the petitioner's situation and the petition asserts a claim based on the new right. R.C. 2953.23(A)(1)(a). The petitioner must also show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted * * *." R.C. 2953.23(A)(1)(b).

State v. Higgins, 9th Dist., Summit No. 28215, 2017 –Ohio- 909, at ¶ 5.

And,

A final judgment of conviction bars a * * * defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised * * * on an appeal from that judgment. To obtain post conviction relief and avoid the preclusive effect of *res judicata*, a petitioner must present claims in his petition that are based on evidence outside of the original record that existed during direct appellate proceedings. *State v. Bulls*, 9th Dist. Summit No. 27713, 2015–Ohio–5094, ¶ 9.

State v. Tauwab, 9th Dist., Summit No. 28022, 2017-Ohio-81, ¶ 11.



Further,

A trial court may deny a post conviction relief petition without a 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. Res judicata is a proper basis upon which to dismiss a petition for post conviction relief without a hearing.

Id. at ¶ 16

A post conviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279; *State v. Herzberger*, 9th Dist., Lorain No. 16CA010899, 2017-Ohio-491, at ¶ 7.

Finally,

[C]iting Section 2953.21(C) [and] [i]nterpreting that section, the Ohio Supreme Court has explained that “[a]n evidentiary hearing is not automatically guaranteed each time a defendant files a petition for postconviction relief.” *State v. Broom*, 146 Ohio St.3d 60, 2016- Ohio-1028, ¶ 29. “A trial court has the discretion to deny a postconviction petition without discovery or 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 (1999), paragraph two of the syllabus. To warrant an evidentiary hearing in a postconviction proceeding, a petitioner must submit evidence outside the record that sufficiently establishes that the petitioner is entitled to relief on one or more asserted constitutional grounds. *Id.*

State v. West, 9th Dist., Summit No. 28668, 2017-Ohio-8474, at ¶13.

DECISION

TIMELINESS

In the case at bar, Fox plead guilty and was sentence to six-years in prison on January 23, 2019. Accordingly, he had until February 22, 2019, in which to file a direct appeal – he did not. In such a situation, Fox has 365 days after that date, or February 22, 2020, in which to file for post-conviction relief. As such, both of his motions are timely.



THE MERITS

Fox is correct that R.C. 2953.21(H) reads, in pertinent part, as follows,

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.

As noted by the Ninth District, this Court's Entry of May 10, 2019, did not contain formal findings of fact and conclusions of law.

This Entry does.

The gravamen of Fox's first motion, filed May 8, 2019, is 1); that the prosecutor had previously represented him; 2) that he was illegally interrogated; 3) that there was no evidentiary hearing; 4) there was no firearm test on record showing that the handgun found was operable; 5) that he should be sentenced to the same term as his co-defendant; and 6) that his co-defendant was ". . . 100 percent responsible for creating the legal problems."

This (first) motion is not supported by any affidavits, documentary evidence, or citations to the record.

In Fox's second motion, dated May 22, 2019, but filed November 12, 2019, he asserts two of the same arguments raised in the first motion, to wit: the prosecutor represented him in a previous matter and that his sentence should be "identical" to the sentence his co-defendant received.

This (second) motion is supported by a 15 paragraph Affidavit submitted by Fox himself. The Affidavit states, in pertinent part, that Fox was not knowingly involved in the crime, that he never owned, operated or bought a handgun, that he was beaten severely during the crimes, that he was illegally interrogated, that he was "entrapped" by his co-defendant and should receive the same identical sentence, and, that the prosecutor represented Fox in a similar case in 2004.

Fox's motions essentially overlap and thus the Court can dispose of them both by addressing the arguments in the first motion only; I shall address those arguments *seriatim*.

1) THE PROSECUTOR HAD PREVIOUSLY REPRESENTED HIM

This Court noted in its Entry of May 10, 2019, the following:



Of note, the Defendant alleges that the assistant prosecuting attorney who handled this matter represented the Defendant in 2004, thus should have recused himself. While perhaps true, the prosecutor on a number of occasions, both on the record and off, disclosed that he had represented the Defendant in the past in an unrelated matter; that that representation had nothing to do with this case; offered to recuse himself; and the Defendant and his counsel both consented to the prosecutor's continued involvement in this case.

While this Court did not actually review the transcripts from every hearing, pre-trial (there were 15), the plea or the sentencing hearings, this Court has a clear recollection that the prosecutor disclosed his prior representation and offered to recuse himself and that both Fox and his counsel acquiesced in the prosecutor handling the matter.

In any event, it is not the Court's duty to scour the record for the benefit of Fox but his duty to point to facts or deficiencies in the record to support his position.

Regardless, even *if* the prosecutor failed to disclose his prior representation, Fox could have raised this issue with the trial court at any time or in a direct appeal as Fox obviously recognized the prosecutor. To avoid the preclusive effects of *res judicata*, not to mention laches, waiver, or invited error, Fox must present claims in his petition that are based on evidence outside of the original record that existed during direct appellate proceedings. *Bulls, supra*.

As Fox never raised the issue in this Court and did not file a direct appeal, he cannot raise it for the first time *via* a post-conviction petition.

Further, Fox plead guilty!

Regarding guilty pleas, the Ohio Supreme Court has stated,

Crim.R. 11(B), captioned "Effect of guilty or no contest pleas," states that a plea of guilty "is a complete admission of the defendant's guilt."

State v. Griggs, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶ 10.

The information that a guilty plea is a complete admission of guilt, along with the other information required by Crim.R. 11, ensures that defendants enter pleas with knowledge of rights that they would forgo and creates a record by which appellate courts can determine whether pleas are entered voluntarily. See *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474; see, also, *State v. Ballard* (1981), 66 Ohio St.2d 473, 479-480, 20 O.O.3d 397, 423 N.E.2d 115.



Griggs, at ¶ 11.

As such, given Fox's guilty plea, whether the prosecutor represented Fox 15 years ago in an unrelated matter is of no accord.

Finally, even giving Fox 100% of the doubt that the prosecutor failed to disclose the representation and that Fox did not learn about the issue until after he plead would still not form a basis for post-conviction relief.

Again, as this Court noted in its May 10, 2019, Entry,

Ohio Professional Rule of Conduct 1.9, "Duties To Former Clients," is not applicable as 1) the case at bar is not ". . . in the same or a substantially related matter, and 2) the prosecutor did not ". . . use information relating to the representation to the disadvantage of the former client . . ." ³

Given the forgoing, it is clear that Fox is not entitled to post conviction relief on this issue as the prosecutor did disclose the prior representation and offered to recuse himself, Fox waived the issue by failing to raise it in this court and is precluded from raising it in a post-relief petition (or on appeal) and, since he did not file a direct appeal, the issue is *res judicata*. Moreover, Fox plead guilty to both indictments and even considering the matter in a light most favorable to Fox, there was no violation by the prosecutor of the Ohio Rules of Professional Conduct.

Simply put, if Fox believes that his rights were compromised by the prosecutor's prior representation he should have brought it to this Court's attention or filed a direct appeal. He cannot invite error by "holding his tongue" then, after the fact, raise the issue for the first time in a post-conviction petition.

2) FOX WAS ILLEGALLY INTERROGATED

If Fox believes he was improperly interrogated, he should have filed a motion to suppress in this Court. He failed to do so thus, the issue is waived and *res judicata*. Fox cannot raise suppression issues for the first time in a petition for post-conviction relief after a plea of guilty.

The Ohio Supreme Court recently addressed this issue,

A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion

³ This is, obviously, a circumstantial inference as the events occurred 15 years apart and appear to have no relation to each other.



to suppress. See *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78; *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 56.

State v. Beasley, 152 Ohio St.3d 470, 2018-Ohio-16, at ¶ 15.

3) THERE WAS NO EVIDENTIARY HEARING

There was no evidentiary hearing because Fox never requested one. He did not file any motion seeking an evidentiary hearing on any issue. As such, like number 2 above, he has waived the issue and cannot raise it anew.

4) THERE WAS NO FIREARM TEST ON RECORD SHOWING THAT THE HANDGUN FOUND WAS OPERABLE

This is an element of the firearm specifications that Fox waived when he plead guilty. "A guilty plea is a complete admission of guilt. Crim.R. 11(B)(1)." *Beasley, supra*, at ¶ 11. As such, Fox cannot raise issues he waived for the first time in a post-conviction petition.

5) FOX SHOULD HAVE BEEN SENTENCED TO THE SAME TERM OF INCARCERATION AS HIS CO-DEFENDANT

In the case at bar, Fox committed his crimes with a co-defendant, one Craig Swartz ("Swartz," see Case No. 16CR094600.)

Swartz was indicted on the same day that Fox was (September 8, 2016) for similar crimes, to wit: Aggravated Robbery with two specifications, two counts of Robbery with two specifications, and two counts of Conspiracy. As note *supra*, Fox was charged with seven crimes related to the incident – Swartz was charged with five.

Like Fox, Swartz plead to the indictment but much earlier, on April 23, 2018. And unlike Fox, the State dismissed the three-year firearm specifications in Swartz's case. Moreover, Fox plead to a repeat violent offender specification - Swartz was not charged with such a specification.⁴ And, Swartz was not charged with Having Weapons While Under Disability like Fox was.⁵

⁴ The obvious reason, of course, is that Fox had a more serious criminal history that made him eligible for the RVO – Swartz did not. See both Fox's and Swartz's respective PSI.

⁵ Again, pursuant to their respective PSI's, Fox has prior felony convictions that Swartz does not.



It is correct that Swartz received a less severe sentence; he was given a four-year sentence (three-years on the aggravated robbery – the same sentence as Fox) consecutive to a one-year firearm specification. As such, the only difference in the two sentences is that Fox plead to and received a three-year firearm specification where Swartz plead to and received a one-year firearm spec.

While this Court has no obligation to undergo a proportionality analysis, the differences in these two offender's situations are obvious and clearly justified different sentences.

That said, the Ohio Supreme Court has addressed the scope and propriety of an appellate court's ability to review a trial court's sentence, to wit:

The General Assembly has the sole authority to "define, classify, and prescribe punishment for offenses committed in Ohio." *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 12. Consistent with that authority, the General Assembly has given sentencing judges absolute discretion in balancing the need to "protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A).

State v. Moore, 8th Dist., Cuyahoga No. 99788, 2014-Ohio-5135, at ¶ 5.

And,

There is no mechanism in place to permit appellate review of discretionary sentencing decisions because the General Assembly seems to have made clear that appellate courts cannot review sentencing decisions for an abuse of discretion. See R.C. 2953.08(G)(2). However, the Ohio Supreme Court has continued to apply an abuse of discretion standard for appellate review. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 62–63 (Lanzinger, J., dissenting). And despite there being no mention of the phrase "meaningful review" contained in Title 29 of the Revised Code, the Supreme Court has stated that "[t]he legislature crafted the sentencing statutes in a manner that mandates individual consideration of each offense during sentencing and allows meaningful review of the sentence for each offense individually on appeal." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 20.

Moore, at ¶ 6.



And,

[A] sentence is not contrary to law because the trial court failed to impose a sentence that is the same as another offender who committed similar conduct. *State v. Graham*, 12th Dist. Warren No. CA2013-07-066, 2014-Ohio-1891, 2014 WL 1831461, ¶ 15, citing *State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404, 2013 WL 3982186, ¶ 13, and *State v. Isreal*, 12th Dist. Butler No. CA2010-07-170, 2011-Ohio-1474, 2011 WL 1119768, ¶ 73.

Moore, at ¶ 17.

Given the forgoing, the fact that Fox received a stiffer sentence than his co-defendant, Swartz, does not form the basis for post-conviction relief. This is particularly so where Fox has a more serious criminal history, plead guilty to a more serious firearm specification, and plead guilty to more charges (having weapons under disability). And recall, but for the firearm specification, Fox received the same sentence as Swartz (three-years on the aggravated robbery charge).

6) FOX'S CO-DEFENDANT WAS "... 100 PERCENT RESPONSIBLE FOR CREATING THE LEGAL PROBLEMS"

This argument is inapposite given Fox's plea of guilty. If Fox did not believe he was responsible for his involvement in the incident, he should have gone to trial. As noted *supra*, "A guilty plea is a complete admission of guilt. Crim.R. 11(B)(1)." *Beasley*, *supra*, at ¶ 11.

V. CONCLUSION

In order to succeed on a post-conviction relief petition, the Defendant must demonstrate by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offenses of which he was convicted.

Here, there was no trial because Fox plead guilty. A plea of guilty is a complete admission of the facts alleged and an admission of Fox's guilt.

Moreover, once Fox was formally sentenced, his sentence became a final judgment and as such, he is barred from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised on an appeal from that judgment. Fox did not appeal. As such, he cannot argue issues in a petition for post-conviction relief that should have been raised on appeal.



And, the fact that Fox received a harsher sentence than his co-defendant, not that this is even a cognizable claim for relief, is nevertheless amply supported by the record, the different charges they both plead to, their respective criminal histories, and the seminal fact that they both received the same underlying sentence for their crimes – the only difference being the disparate firearm specifications that both defendants plead to.

Finally, Fox has posited nothing outside of the record that sufficiently establishes that he is entitled to a hearing, let alone relief on any grounds, particularly constitutional ones.



JUDGE D. CHRIS COOK