[Cite as *State v. Jayjohn*, 2021-Ohio-2286.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 20CA722
	:	
vs.	:	
	:	DECISION AND JUDGMENT
DANNY L. JAYJOHN, II,	:	ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Danny L. Jayjohn, II, Chillicothe, Ohio, Appellant Pro Se.

Trecia Kimes-Brown, Vinton County Prosecutor, William L. Archer, Jr., Assistant Vinton County Prosecutor, McArthur, Ohio, for Appellee.

Smith, P.J.

{¶1} Danny L. Jayjohn, II appeals the entry of the Vinton County Common Pleas Court entered July 10, 2020. On appeal, Jayjohn, "Appellant," challenges the trial court's decision implicitly denying Appellant's "Motion to Correct Void Sentence, Request Evidentiary Hearing." Appellant's motion for postconviction relief contains both constitutional and non-constitutional claims. Our review has led us to conclude that the trial court lacked jurisdiction to entertain the constitutional claim set forth in Appellant's untimely postconviction petition. Therefore,

we modify the judgment appealed to reflect the dismissal of Appellant's constitutional claim. To the extent that Appellant's non-constitutional claims are also barred by application of the doctrine of res judicata or are otherwise meritless, said claims are hereby overruled. The judgment is affirmed as modified.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On July 22, 2016, Appellant was indicted on seven counts as follows:

Count One	Burglary	R.C. 2911.12(A)(2)
Count Two	Burglary	R.C. 2911.12(A)(2)
Count Three	Breaking and Entering	R.C. 2911.13(B)
Count Four	Breaking and Entering	R.C. 2911.13(B)
Count Five	Vandalism	R.C. 2909.05(A)
Count Six	Theft	R.C. 2913.02(A)(1)
Count Seven	Possessing Crim. Tools	R.C. 2923.24(A)

{¶3} On April 3, 2019, Appellant entered guilty pleas to Counts One and Two, both felonies of the second degree. The State of Ohio dismissed Counts Three through Seven. Appellant signed a "Plea of Guilty" form which acknowledged that the State would recommend a four-year prison term on Count One and three-year prison term on Count Two, with the

sentences to be served consecutively to each other for a total seven-year prison term.[1] Appellant was sentenced on April 3, 2019, with the trial court following the State's recommendation. Both the "Plea of Guilty" form and the "Sentencing Entry" were journalized on April 8, 2019.

{¶4} Appellant did not file a direct appeal. On June 29, 2020, Appellant filed a "Motion to Correct Void Sentence, Request Evidentiary Hearing." Generally, Appellant asserted that his trial counsel rendered inadequate legal analysis and defense by failing to investigate critical issues concerning the case. Chiefly, Appellant argued that the alleged crime area was not an "occupied structure" as required by the burglary statute. He concluded that his guilty plea, therefore, was a "manifest injustice." Appellant requested "adequate analysis of [the] matter and that of the punishment issued." The trial court's entry dated July 10, 2020, states in part, "There are no unresolved issues pending before this Court; therefore, the Court declines to consider the filing of Defendant for any purpose."

{¶5} This timely appeal followed.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED

[1] Counts One and Two specified that Appellant "by force, stealth, or deception trespassed into an occupied structure or in a separately secured occupied portion of an occupied structure, that is the permanent or temporary habitation of [the victim] when [the victim was] present or likely present, with purpose to commit in habitation a criminal offense." Counts One and Two involved two separate victims.

APPELLANT'S MOTION TO CORRECT VOID SENTENCE, REQUEST EVIDENTIARY HEARING.

II. THE APPELLANT'S CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION AND SENTENCE.

{¶6} Appellant's underlying motion was captioned "Motion to Correct Void Sentence, Request Evidentiary Hearing." " ' "[C]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged." ' " *State v. Brown,* 4th Dist. Scioto No. 16CA3770, 2017-Ohio-4063, at ¶ 19, quoting *State v. Burkes,* 4th Dist. Scioto No. 13CA3582, 2014-Ohio-3311, ¶ 11, quoting *State v. Schlee,* 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12.

{¶7} The Supreme Court of Ohio has held that " '[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.' " *State v. Osborn,* 4th Dist. Adams No. 18CA1064, 2018-Ohio-3866, at ¶ 7, quoting *State v. Reynolds,* 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. A "Motion to Correct or Vacate Sentence, despite its caption, meets the definition of a

motion for postconviction relief set forth in R.C. 2953.21(A)(1), because it is a motion that was (1) filed subsequent to [defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence." *Reynolds* at 160. In this case, Appellant's underlying motion contains a constitutional claim alleging the ineffective assistance of counsel. Therefore, the motion meets the definition of a petition for postconviction relief pursuant to R.C. 2953.21. *Osborn, supra,* at ¶ 10.[2]

{¶8} As a preliminary matter, we point out that the trial court's language in the appealed from entry does not deny, overrule, or dismiss Appellant's postconviction motion. It simply states as set forth above, that "*the trial court declines to consider the filing for any purpose."* (Emphasis added.) While it is strongly preferred that the language of an entry be explicit, we observe that generally motions that are not expressly ruled upon when a case is concluded are presumed overruled. *See State v. Wright,* 4th Dist. Scioto Nos. 15CCA3705, 15CA3706, 2016-Ohio-7995, at fn.2; *See also*, *State v. Whitaker,* 8th Dist. Cuyahoga No. 83824, 2004-Ohio-5016, at ¶ 32 (No error where the trial court failed to rule on various pro se motions

[2] Although Appellant did not file a direct appeal, R.C. 2953.21 (A)(2)(2) provides that postconviction petitions may be filed 365 days after the expiration of the time for filing a notice of appeal if no direct appeal is taken. Given that Appellant has filed a motion seeking correction of his sentence, we construe his irregular motion as meeting the criteria for a petition for postconviction relief.

filed after the conclusion of trial). Given the trial court's additional language indicating there were "no unresolved issues pending before this court," we find the trial court implicitly denied Appellant's motion. Furthermore, an order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed. R.C. 2953.23(B). *See State ex rel. Penland v. Dinkelacker*, Slip Opinion No. 2020-Ohio-3774, paragraph two of the syllabus.

A. STANDARD OF REVIEW

{¶9} " '[P]ostconviction relief petitions are used to assert claims that there was a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio or United States Constitutions.' " *Osborn* at ¶ 8, quoting *State v. Kelly,* 4th Dist. Scioto No. 14CA3637, 2014-Ohio-5840, ¶ 4. "It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record." *Id*. at ¶ 5; citing *State v. Shaffer,* 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, ¶ 9; *State v. Knauff,* 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 18. A trial court's decision to grant or deny an R.C. 2953.21 petition for postconviction relief should be upheld absent an abuse of discretion. *See Osborn, supra,* at ¶ 9, citing, *State v. Bennett,* 4th Dist. Scioto No. 15CA3682, 2015-Ohio-3832, ¶ 9; *State v.*

Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. An "abuse of discretion" is more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *See State v. Herring,* 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Adams,* 60 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *Bennett, supra*; citing *State ex rel. Duncan v. Chippewa Twp. Trustees,* 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1,* 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

B. LEGAL ANALYSIS

{¶10} The postconviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *See State v. Smith,* 4th Dist. Highland No. 19CA16, 2020-Ohio-116; *State v. Calhoun,* 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905. The postconviction relief proceeding is designed to determine whether "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A)(1)(a). Postconviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Smith, supra.* It is a means to

resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *See State v. Teets,* 4th Dist. Pickaway No. 17CA21, 2018-Ohio-5019, ¶ 14. "This means that any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly." *State v. Apanovitch,* 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 35.

{¶11} A criminal defendant seeking to challenge a conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun, supra,* 86 Ohio St. 3d 279 at 282, citing *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing, the trial court must determine whether substantive grounds for relief exist. R.C. 2953.21(D). In making such a determination, the court shall consider the petition, supporting affidavits, documentary evidence, and all the files and records from the case. *See Calhoun* at 284, (noting that R.C. 2953.21 "clearly calls for discretion in determining whether to grant a hearing" on a petition for postconviction relief).

{¶12} "Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a violation of the petitioner's constitutional rights." *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, ¶ 11.

Moreover, before a hearing is warranted, the petitioner must demonstrate that the claimed "errors resulted in prejudice." *Calhoun* at 283. A court may dismiss a petition for postconviction relief without a hearing when the petitioner fails to submit evidentiary material "demonstrat[ing] that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Id*. at paragraph two of the syllabus. *See also State v. Lewis,* 4th Dist. Ross No. 10CA3181, 2011-Ohio-5224, ¶ 11; *State v. Slagle,* 4th Dist. Highland No. 11CA22, 2012-Ohio-1936, ¶ 14.

{¶13} Appellant's postconviction motion presented both constitutional and non-constitutional claims. Generally, our Court affords considerable leeway to pro se litigants. *See State v. Headlee,* 4th Dist. Washington No. 2009-Ohio-873, at ¶ 6; s*ee also Besser v. Griffey*, 88 Ohio App.3d 379, 382, 623 N.E.2d 1326, 1328 (4th Dist. 1993); *State ex rel. Karmasu v. Tate,* 83 Ohio App.3d 199, 206, 614 N.E.2d 827, 832 (4th Dist. 1992). "Limits do exist, however. Leniency does not mean that we are required 'to find substance where none exists, to advance an argument for a pro se litigant or to address issues not properly raised.' " *Headlee, supra,* quoting *State v. Nayar,* 4th Dist. Lawrence No. 07CA6, 2007-Ohio-6092, at ¶ 28. Instead of addressing the assignments of error separately, in the

interests of justice, we will attempt to address Appellant's individual claims as we interpret them, beginning with his constitutional claim.

1. Ineffective Assistance of Counsel.

{¶14} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *State v. Bradford*, 4th Dist. Adams No. 20CA1109, 2020-Ohio-4563, at ¶ 16, citing, *Strickland v. Washington*, 104 S. Ct. 2052, 466 U.S. 668 (1984); *accord Hinton v. Alabama,* 134 S. Ct. 1081, 571 U.S. 263, 272 (2014) (explaining that the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶15} In the underlying motion, Appellant asserts that there is insufficient evidence of burglary to convict him and indicates the crime for which he pled guilty was actually a breaking and entering offense. Appellant relates this to his allegation that his trial counsel rendered ineffective assistance of counsel by failing to investigate the "crime area." We further interpret this as meaning that his counsel failed to investigate the

crime scene and argue forcefully against a burglary conviction. However, based upon our review of the record, we need not address Appellant's constitutional claim of ineffective assistance as Appellant's postconviction motion was untimely filed.

{¶16} There are limitations with regard to the filing of a postconviction relief petition, as well as strict filing requirements. *See Osborn, supra*, at ¶ 11. R.C. 2953.21(A)(2) provides that a petition for postconviction relief must be filed no later than either: (1) 365 days from the date on which the trial transcript was filed in the court of appeals in the direct appeal of the judgment of conviction; or (2) 365 days after the expiration of the time for filing the notice of appeal, if no direct appeal is taken. R.C. 2953.21(A)(2). In this case, Appellant did not file a direct appeal of the April 8, 2019 sentencing entry. Therefore, his motion should have been filed no later than 365 days after the expiration of the time for filing the notice of appeal. Appellant filed his postconviction motion on June 29, 2020. Our calculations indicate that Appellant missed the filing deadline for his postconviction motion by 53 days.

{¶17} Further, if a defendant fails to file his petition within the prescribed period, the trial court may entertain the petition only if: (1) the petitioner shows either that he was unavoidably prevented from discovery of

the facts upon which he must rely to present the claim for relief or that the United States Supreme Court recognized a new federal or state right that applies retroactively to him; and (2) the petitioner shows by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. R.C. 2953.23(A)(1); *Osborn, supra.*

{¶18} In his motion and on appeal, Appellant claims he received ineffective assistance, but he does not support this claim. Appellant does not argue he was unavoidably prevented from discovering facts related to his claim, nor does he provide clear and convincing evidence of constitutional error. Appellant has provided no affidavits or other supporting documentation. In failing to do so, Appellant relies solely on the credibility of the assertions set forth in the body of his petition.

> Such a practice is deleterious, if not fatal, to a petition for postconviction relief as " * * * the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness."

State v. Burgess, 11th Dist. Lake No. 2003-L-069, 2004-Ohio-4395, at ¶ 23, quoting *State v. Jackson,* 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), at syllabus.

{¶19} Appellant has also characterized his legal counsel as "coercive." He further contends that evidence of police misconduct "has surfaced" which would tend to exonerate him. To the extent that these allegations may relate to the ineffective assistance claim, Appellant has again failed to provide supporting documentation. Under these circumstances, Appellant's claims are broad, conclusory, and fail to demonstrate substantive grounds for relief. *See Burgess, supra,* citing, *State v. Pankey,* 68 Ohio St.2d 58, 59, 428 N.E.2d 413 (1981).

{¶20} In cases where a postconviction motion is untimely and an appellant fails to argue one of the exceptions set forth in R.C. 2953.23 (A)(1), we do not apply an abuse of discretion standard of review to the argument but instead conclude that the trial court lacked jurisdiction to entertain such motions. *Osborn, supra*, at ¶ 12. Therefore, to the extent that Appellant's constitutional claim was filed as part of an untimely postconviction motion, we find the trial court lacked jurisdiction to address Appellant's argument.

1. Non-constitutional Claims

   a. Sufficiency of the Evidence

{¶21} Appellant argued in his motion and on appeal that there was insufficient evidence of the elements of the crime of burglary. A claim

regarding the sufficiency of the evidence is one that could and should have been raised by Appellant on direct appeal. " 'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.' " *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *see also State v. Davis,* 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 28. " ' "Res judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised." ' " *State v. Creech,* 4th Dist. Scioto No. 19CA3877, 2020-Ohio-582, ¶ 11, quoting *State v. Heid,* 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 18, quoting *State v. Montgomery,* 2013-Ohio-4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).

{¶22} In this case, Appellant would have known at the time he entered his guilty pleas of any insufficiency in the evidence against him. Appellant did not pursue a direct appeal. Thus, his claim in this regard is barred by res judicata.

b. "Coercive Nature" of Counsel

{¶23} Appellant does not fully explain this claim and does not connect it to his ineffective assistance claim. However, we surmise that Appellant would surely have known at the time he entered his guilty pleas of any alleged coercion from his counsel. An exception to the res judicata bar exists when the petitioner presents competent, relevant, and material evidence outside the record that was not in existence and available to the petitioner in time to support the direct appeal. *See State v. Wilson,* 7th Dist. Belmont No. 15BE0074, 2016-Ohio-8548, at ¶ 9, citing, *State v. Bayless*, 12th Dist. Nos. CA2013-10-020 and CA2013-10-021, 2014-Ohio-2475, ¶ 10. For a defendant to avoid dismissal of the petition by operation of res judicata, the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court record, and it must not be evidence that existed or was available for use at the time of trial. *See State v. Cole,* 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982). Based on the above, and the lack of supporting evidentiary materials, we conclude this claim is also barred by res judicata.

c. Alleged "Police Misconduct"

{¶24} This claim may be characterized as a bald assertion that is

broad, conclusory, and unsupported. Appellant does not seriously argue this claim or connect it to his other claims. Based on the above, we also conclude this claim is barred by res judicata.

d. Voluntariness of Pleas

{¶25} Appellant also asserts his guilty plea was involuntarily, unintelligently, and unknowingly made and thus, unenforceable. Appellant argues there were "no specific series of questions" by the trial court ascertaining whether Appellant understood the "full nature of the proceedings that involved occupied or unoccupied structure of the charging offense(s)." In the underlying motion, Appellant set forth his challenge to Crim.R. 11 as "pertaining to the court ensuring that Defendant understands the full nature of the offense charged and the penalty to which he is subjected."

{¶26} Generally, the ultimate inquiry when reviewing a trial court's acceptance of a guilty plea is whether the defendant entered the plea in a knowing, intelligent, and voluntary manner. *See State v. Barlow*, 4th Dist. Scioto No. 16CA3772, 2019-Ohio-4384, at ¶ 12, citing, *State v. Coleman,* 4th Dist. Ross Nos. 16CA3555, 16CA3556, 16CA3557 & 16CA3558, 2017-Ohio-2826, ¶ 6, citing *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. A defendant enters a knowing, intelligent, and

voluntary plea when the trial court fully advises the defendant of all the constitutional and procedural protections set forth in Crim.R. 11(C) that a guilty plea waives. *See Coleman, supra.* Crim.R. 11 provides in pertinent part:

> (C) Pleas of Guilty and No Contest in Felony Cases.
>
> * * *
>
> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶27} Here, Appellant failed to file a direct appeal. Because this non-constitutional claim could have been raised in a timely direct appeal but was not, it is now barred by res judicata. *State v. Brown, supra,* at ¶ 35; citing *State v. Knowles*, 10th Dist. Franklin No. 15AP-991, 2016-Ohio-2859, ¶ 14.

{¶28} Even assuming Appellant's claim regarding his plea is not barred by res judicata, based on the record, we would be unable to find Appellant's plea less than knowing and voluntary. Appellant has not provided us with a transcript of the sentencing hearing. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings and affirm." *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Moreover, "[t]he duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Id*. Because Appellant's argument regarding the trial court's compliance with Crim.R. 11 requires review of the sentencing transcript, which is not part of the record, we would be required to presume the validity of the trial court's proceedings and affirm.

e. Void Sentence

{¶29} "The determination of whether a judgment is void is a question of law." *State v. Cave,* 4th Dist. Scioto No. 20CA3921, 2021-Ohio-874, at ¶ 5. (Internal citations omitted.) In the underlying motion, Appellant moved the court for an order to correct his void criminal sentence for burglary "which should have been for breaking and entering." Other than this, Appellant makes no substantive "voidness" argument.

{¶30} Relative to Appellant's assertion, the State points out that Appellant negotiated an agreed sentence.[3] Given Appellant's omission in providing a sentencing transcript, we may reasonably conclude based upon the record before us that Appellant entered an agreed sentence of seven years. "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1).

{¶31} Moreover, in *State v. Harper,* 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, the Supreme Court of Ohio "signaled a return to the traditional view of a void sentence." *See Cave, supra,* at ¶ 9, quoting, *State v. Henderson,* 161 Ohio St. 3d 285, 2020-Ohio-4784, 162 N.E.3d 776, at 25. "A sentence is void when a sentencing court lacks jurisdiction over the

[3] In Appellant's case, his original sentencing entry notes the "joint sentence recommendation." The "Plea of Guilty" form sets forth the same as a "plea recommendation." At Page 2 of Appellant's underlying motion to correct void sentence, Appellant also indicates the agreed nature of his sentence.

subject matter of the case or personal jurisdiction over the accused." *Harper, supra,* at ¶ 42.[4] Appellant has not argued that the sentencing court lacked jurisdiction over the subject matter of his case or personal jurisdiction over him. Appellant has not argued that his sentence is void for any reason other than he was sentenced on two burglary counts as opposed to two breaking and entering counts, yet the record demonstrates he entered voluntary pleas and negotiated an agreed sentence. Based on the foregoing, we find no merit to Appellant's argument that his sentence is void and must be corrected.

f. Failure to Hold Hearing

{¶32} Appellant does not seriously pursue this claim as it is mentioned only in the title of his postconviction motion and in a case citation without corresponding argument. As set forth above at Paragraph 32, a criminal defendant seeking to challenge a petition for postconviction relief is not automatically entitled to an evidentiary hearing. Specifically, a petitioner is not entitled to a hearing if his claim for relief is belied by the record and is unsupported by any operative facts other than Defendant's own self-serving affidavit or statements in his petition, which alone are legally insufficient to rebut the record on review. In reviewing petitions for

[4] The Supreme Court in *Harper* specifically held that "any error in the trial court's exercise of its subject matter jurisdiction in imposing post-release control rendered [the Tenth District] court's judgment voidable, not void." *Id*. at paragraph one of the syllabus.

postconviction relief, a trial court may, in the exercise of its sound discretion, weigh the credibility of affidavits submitted in support of the petition in determining whether to accept the affidavit as true statements of fact. (Citations and internal quotations omitted.) *See State v. Quinn,* 2017-Ohio-8107, 98 N.E.3d 1184, ¶ 35 (2d Dist.). As previously indicated, Appellant provided no evidentiary materials to support his alleged substantive claims. Thus, the trial court did not abuse its discretion by failing to conduct a hearing upon his motion.

C. CONCLUSION

{¶33} Based on the foregoing, we overrule both of Appellant's assignments of error. Appellant's constitutional claim raised under his first assignment of error is barred as it is an untimely petition for postconviction relief. As a result, and as set forth above, the trial court lacked jurisdiction to consider it and should have dismissed, rather than denied, the claim. Accordingly, the judgment appealed is affirmed but modified, under the authority of App.R. 12(A)(1)(a), to reflect the dismissal of Appellant's constitutional claim. The judgment of the trial court shall remain intact with respect to Appellant's remaining meritless claims.

JUDGMENT AFFIRMED AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED AS MODIFIED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.