

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

EVAN PORTER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0033

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CR 214

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Reversed and Remanded.

Atty. J. Kevin Flanagan, Belmont County Prosecutor, *Atty. Daniel Fry*, Assistant Prosecuting Attorney, 47 A-West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. John M. Jurco, John M. Jurco, LLC P.O. Box 783, St. Clairsville, Ohio 43950 for Defendant-Appellant.

Dated: December 20, 2021

Robb, J.

{¶1} Defendant-Appellant Evan Porter appeals the decision of Belmont County Common Pleas Court denying his postconviction petition. The issue in this case is whether the trial court abused its discretion in denying the petition without issuing findings of fact or conclusions of law. For the reasons expressed below the decision of the trial court is reversed and the matter is remanded with instructions for the trial court to issue findings of fact and conclusions of law.

Statement of the Case

{¶2} A complaint was filed in Belmont County Common Pleas Court, Juvenile Division, alleging Appellant to be a delinquent child. The complaint alleged Appellant committed five counts of rape, in violation of R.C. 2907.02(A)(1)(B), first-degree felonies if committed by an adult. 2/20/18 Juvenile Complaint. The state asked for a discretionary transfer from the Juvenile Division to the Common Pleas Court General Division. At the Probable Cause Hearing, the Juvenile Division noted that at the time of the alleged offenses Appellant was 17 years of age. The Juvenile Division found probable cause to believe Appellant committed the offenses and scheduled the matter for an Amenability Hearing. At the Amenability Hearing, each party stipulated to every element of the offenses and the operative facts. After considering the appropriate factors, the Juvenile Division transferred the matter to the General Division. 9/20/18 J.E.

{¶3} On October 19, 2018 a Bill of Information for rape in violation of R.C. 2907.02(A)(1)(c), a first-degree felony was filed. 10/22/18 Bill of Information. On October 31, 2018 a hearing was held; Appellant waived the formal reading of the Bill of Information and consented to Arraignment. Appellant expressed in writing and orally a desire to enter a guilty plea to the charge. A plea colloquy was held and the trial court accepted the guilty plea. Sentencing was ordered for a later date. 10/31/18 J.E.

{¶4} The trial court granted Appellant's request to file a sentencing memorandum under seal. 11/13/18 Motion; 11/16/18 J.E. After considering the memorandum, the PSI and the victim impact statements, the trial court sentenced Appellant to 11 years in prison,

5 years of postrelease control, and indicated Appellant as a Tier III sex offender. 11/16/18 J.E.

{¶15} Appellant filed a pro se notice of appeal. In that notice, Appellant specifically indicated the new evidence for the appeal is that the medication, Abilify, he was taking has side effects the trial court should have considered during sentencing. 11/27/18 Pro Se Notice of Appeal. It appears counsel was appointed and the notice of appeal was later amended by counsel. 1/22/19 Amended Notice of Appeal. Appellant voluntarily dismissed the appeal in September 2019. 9/26/19 Appeal No. 18 BE 0054 J.E.

{¶16} In July 2020, Appellant asked the trial court about the status of his postconviction relief petition. The trial court addressed the inquiry and noted it had not received the request. 7/28/20 J.E.

{¶17} On August 13, 2020, Appellant filed a Petition to Vacate or Set Aside Judgment of Conviction or Sentence. Appellant claimed he was denied effective assistance of counsel in that counsel failed to inform the sentencing court about the side effects of Abilify, failed to inform the sentencing court of his Asperger's diagnosis, and failed to inform the court about the abuse he endured in the past. Appellant also claimed the Juvenile Division's prosecutor grew up with his mother and they did not get along. He claimed the prosecutor failed to inform the court of this conflict of interest. Appellant also asserted his counsel knew of this relationship and did not inform the court of the alleged conflict of interest. He also claimed his right to a speedy trial was violated because it took 9 months for his case to be bound over from the juvenile system to the adult system. 8/13/20 Petition.

{¶18} Counsel was appointed and a hearing was held on the petition. 8/17/20 J.E.; 10/6/20 J.E. The trial court denied the petition stating, "Defendant's Petition to Vacate or Set Aside Judgment of Conviction or Sentence and Defendant's Motion for Expert Assistance are respectfully Overruled." 10/6/20 J.E.

{¶19} Appellant timely appealed that decision. 11/5/20 Notice of Appeal.

Assignment of Error

“The trial court abused its discretion in denying/overruling the Appellant’s Petition to Vacate or Set Aside Judgment of Conviction or Sentence without issuing findings of fact and conclusions of law.”

{¶10} Appellant asserts the trial court failed to issue findings of fact and conclusions of law when it denied the petition for postconviction relief. He claims this deficiency requires reversal and remand for issuing findings of fact and conclusions of law.

{¶11} The state does not address the alleged lack of findings of fact and conclusions of law, but argues the postconviction relief petition is barred by res judicata.

{¶12} 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.” “The purpose of requiring findings of fact and conclusions of law is to apprise the petitioner of the basis for the court’s disposition and to facilitate meaningful appellate review.” *State v. Maxwell*, 8th Dist. Cuyahoga No. 107758, 2020-Ohio-3027, ¶ 12. However, a trial court is not required to issue findings of fact and conclusions of law when it dismisses an untimely or successive petition for postconviction relief. See *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155, ¶ 6; *State ex rel. Carroll v. Corrigan*, 84 Ohio St.3d 529, 530, 705 N.E.2d 1226 (1999).

{¶13} R.C. 2953.21(A)(2)(a) states a petition “shall 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 or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. 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.”

{¶14} Here, the notice of appeal from the sentencing was filed on November 27, 2018. The docket indicates the trial transcript was filed in the Court of Appeals on December 28, 2018. There were later requests for more transcripts. The last notice of transcript was filed June 13, 2019, which was for the sentencing transcript that was

necessary for the appeal. Thus, the time for filing the postconviction relief petition began to run on June 13, 2019 and 365 days would be in mid-June 2020. *See State v. Deaton*, 2019-Ohio-2128, 137 N.E.3d 696, ¶ 13-15 (2d Dist.) (The term “trial transcript” as used in R.C. 2953.21(A)(2) means those transcripts of the trial court proceedings that are objectively necessary for inclusion in the appellate record. This definition takes into account appellate record supplementation of unnecessary or irrelevant transcripts, perhaps filed with the intent of pushing back the postconviction relief limitation period. A sentencing transcript is objectively necessary.). It is noted the appeal was voluntarily dismissed in mid-September 2020. However, that does not affect the deadline for the petition which was in mid-June 2020 - in the midst of the Covid-19 pandemic.

{¶15} The Ohio Supreme Court has explained effective March 27, 2020, the General Assembly tolled certain statutory time limits because of the COVID-19 global health emergency. *Chapman Enterprises, Inc. v. McClain*, __ Ohio St.3d __, 2021-Ohio-2386, __ N.E.3d __, ¶ 10. Statute of limitations set to expire between March 9, 2020 and July 30, 2020 were tolled. *Id.*, quoting H.B. 197, Section 22(A). This included any criminal, civil, or administrative time limitation under the Revised Code. *Id.*, quoting H.B. 197, Section 22(A). The tolling period ended July 30, 2020. *Id.* at ¶ 11.

{¶16} The Ohio Supreme Court did set forth the effect of that tolling. However, their website set forth scenario explanations. The one pertinent to this case provides:

Q: WHAT DOES “TOLL” MEAN?

A: Tolling serves to effectively freeze time from the date the tolling begins, which is March 9, 2020, until the expiration of the order.

* * *

Q: HOW DOES TOLLING APPLY?

A: How tolling applies is fact dependent. The following examples of a defendant’s answer are demonstrative:

Example 1 – Defendant is served on March 3, 2020: Normally the defendant’s answer would be due 28 days thereafter, on March 31, 2020.

However, because this deadline falls within the emergency period, it is tolled effective the beginning of the emergency period, which is March 9, 2020. Because six days had already passed before the deadline was tolled, it means that once the emergency period ends, the defendant will have 22 days left to file an answer.

<https://www.supremecourt.ohio.gov/tolling/>

{¶17} Therefore, the filing of the August 13, 2020 postconviction petition was timely; when the tolling lifted on July 30, 2020, Appellant had more than 14 days to file the petition for it to be timely. As the postconviction petition was timely and it was the first postconviction petition filed, the trial court was required to issue findings of fact and conclusions of law.

{¶18} Here, the trial court stated the following in overruling the petition, “Defendant’s Petition to Vacate or Set Aside Judgment of Conviction or Sentence and Defendant’s Motion for Expert Assistance are respectfully Overruled.” 10/6/20 J.E. It is noted the last line of this judgment entry states, “All subject to further order of Court.” 10/6/20 J.E. No further order with findings of fact and conclusions of law is in the record.

{¶19} The trial court did not comply with the mandate in R.C. 2953.21(H) to make findings of fact and conclusions of law. As stated above, the purpose of that requirement is to inform the petitioner of the basis for denial and to aid appellate review. The findings of fact and conclusions of law required by R.C. 2953.21(H) should be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision and enable it to determine the grounds on which the trial court reached its decision. *State v. Jacks*, 5th Dist. Licking No. 99 CA 113, 2000 WL 329740 (Feb. 29, 2000), citing *State v. Lester*, 41 Ohio St.2d 51, 322 N.E.2d 656 (1975). This judgment entry, which is three paragraphs long, does not accomplish the mandate. It is unclear what the basis was for the denial.

{¶20} That said, the state argued and continues to argue res judicata. In the interest of judicial economy, we will address the res judicata argument.

{¶21} “A post-conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Stefen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994); see also *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679,

860 N.E.2d 77, ¶ 48. To prevail on a petition for PCR, the defendant must establish a violation of his constitutional rights which renders the judgment of conviction void or voidable. R.C. 2953.21. The doctrine of res judicata bars the further litigation of issues that were or could have been raised previously in a direct appeal. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. As we have stated, “[p]ostconviction relief is a narrow remedy, and res judicata bars any claim that was or could have been raised at the time of trial or a direct appeal.” *State v. Moore*, 7th Dist. No. 12 MA 91, 2013-Ohio-1431, ¶ 18.

{¶22} As stated above, Appellant claimed he was denied effective assistance of counsel in failing to inform the sentencing court about the side effects of Abilify, failing to inform the sentencing court of his Asperger’s diagnosis, and failing to inform the court about the abuse he endured in the past. Appellant also claimed the prosecutor before the Juvenile Division grew up with his mother and they did not get along. He claimed the prosecutor failed to inform the court of this conflict of interest. Appellant also asserted his counsel knew of this relationship and did not inform the court of the alleged conflict of interest. He also claimed that his right to a speedy trial was violated because it took 9 months for his case to be bound over from the juvenile system to the adult system. 8/13/20 Petition.

{¶23} The trial court held a hearing on the petition. The majority of Appellant’s claims involve ineffective assistance of counsel. Alleged instances of ineffective assistance of trial counsel are reviewed under the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). These cases provide that trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland* at 689; *Bradley* at 142. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel’s conduct fell below an objective standard of reasonableness and that his or her errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial court proceeding would have been different. *Bradley* at 142.

{¶24} Analysis begins with claims of ineffective assistance of counsel by not informing the sentencing court of the Abilify, Asperger’s diagnosis, and his past abuse. Counsel for both parties acknowledges that a sentencing memorandum was filed but under seal by defense counsel. The sentencing memorandum sets forth past abuse, his Asperger’s diagnosis, and his use of the Abilify medication. Admittedly, the memorandum does not lay out the side effects of Abilify. Regardless, these issues could have been raised in a direct appeal. The information regarding them was before the sentencing court. Thus, the state’s argument probably has merit; res judicata bars these arguments because they could have been raised in the direct appeal.

{¶25} Likewise, any speedy trial argument could have been raised in the direct appeal and is barred by res judicata. *State v. Grimes*, 2d Dist. Montgomery No. 26636, 2017-Ohio-25, ¶ 11 (Failure to seek dismissal on speedy-trial grounds—could have been raised on direct appeal.); *State v. Lofton*, 4th Dist. Pickaway No. 12CA21, 2013–Ohio–1121, ¶ 8 (Speedy trial rights issues are matters that could have been raised in a first appeal of right.).

{¶26} The last issue is the Juvenile Prosecutor’s relationship with Appellant’s mother. This claim may not have been barred by res judicata because the relationship was not part of the record and thus, could not have been raised. A postconviction 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. *City of Westlake v. Dunn*, 8th Dist. Cuyahoga No. 109934, 2021-Ohio-2590, ¶ 10. However, the allegations do not raise a basis for relief. Appellant claims that relationship affected his sentencing. The Juvenile Prosecutor had no involvement in his sentencing. Likewise, the description of the relationship of Appellant’s mother and the Juvenile prosecutor growing up together and not getting along probably does not provide a basis for recusal.

{¶27} Accordingly, the state’s arguments probably provide a basis for denying the petition. However, that does not negate the trial court’s requirement to issue findings of fact and conclusions of law. Despite probably reaching the correct result, the trial court’s decision is reversed and the matter is remanded with instructions for the trial court to

issue findings of fact and conclusions of law as is required in R.C. 2953.21(H). The sole assignment of error has merit.

Donofrio, P J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is reversed. We hereby remand this matter to the trial court with instructions to issue findings of facts and conclusions of law consistent with this Court's Opinion. 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.