[Cite as *State v. Pugh*, 2023-Ohio-4736.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DONNIE DWAYNE PUGH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0001

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 21 CR 56

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

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor and *Atty. Jacob A. Manning*, Assistant Prosecutor, 52160 National Road, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

Atty. Sterling E. Gill, II, 1544 East Broad Street, Suite 201, Columbus, Ohio 43203, for Defendant-Appellant

Dated: December 21, 2023

WAITE, J.

{¶1} This is an appeal of the denial of Appellant Donnie Dwayne Pugh's petition for postconviction relief in Belmont County Court of Common Pleas Case No. 21 CR 0056. Appellant pleaded guilty to first degree felony possession of cocaine, and he was sentenced in September 2021. Appellant appealed the judgment and it was affirmed on appeal. *State v. Pugh*, 7th Dist. Belmont No. 21 BE 0041, 2022-Ohio-3437. In October 2022, Appellant filed a petition for postconviction relief. He attached an affidavit from his fiancée Carrie Mitchell in support. The court denied the petition on the grounds that all matters raised by the affidavit arose before Appellant had pleaded guilty.

{¶2} On appeal Appellant argues that the trial court merely copied and pasted the contents of its final judgment from the state's brief. Appellant is mistaken, and more importantly, he fails to point to any actual error in the judgment entry. Appellant also argues that Carrie Mitchell's affidavit required that a hearing be held regarding the petition for postconviction relief because it alleged that his attorney made promises that induced his guilty plea. The affidavit is based on facts that existed when Appellant pleaded guilty, and did not require that a hearing be held. Further, the record affirmatively shows that no promises were made to Appellant, and a self-serving affidavit cannot create a question of fact requiring a hearing. Neither assignment of error has merit, and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On March 4, 2021, Appellant was indicted on one count of trafficking in cocaine pursuant to R.C. 2925.03(A)(2), a first-degree felony; one count of possession of cocaine pursuant to R.C. 2925.11(A), a first-degree felony; one count of tampering with

evidence in violation of R.C. 2921.12(A), a third-degree felony; and one count of having weapons under a disability pursuant to R.C. 2923.13(A), a third-degree felony.

{¶4} The indictment was based on events from November 2020. On November 10, 2020, the Belmont County Sheriff's Office received information from the El Paso, Texas Police Department that a suspected package containing drugs had been shipped from El Paso, Texas to an address in Martins Ferry, Ohio via the United Parcel Service (UPS). Sheriff's deputies obtained a search warrant and intercepted the package on November 12, 2020. Deputies confirmed that the package contained 77 grams of cocaine and then delivered it to the address indicated on the package. Appellant opened the door and brought the package inside. Deputies then executed a warrant for the residence and found that Appellant had attempted to flush the cocaine down the toilet.

{¶5} On September 16, 2021, Appellant entered into a Crim.R. 11 plea agreement. Appellant agreed to plead guilty to one count of first degree felony possession of cocaine, in exchange for the state dismissing the other three charges (one of which was also a first degree felony). The state also agreed to remain silent at sentencing. The court held a sentencing hearing on September 27, 2021, where Appellant was sentenced to ten to fifteen years in prison. The court filed its final order of sentencing on September 30, 2021. The court noted that Appellant had three prior felony convictions.

{¶6} On October 19, 2021, Appellant filed a notice of appeal to this Court. The trial transcript was filed in the appeal on December 21, 2021. Appellant raised three assignments of error. In the second assignment Appellant contended his counsel was

ineffective for not raising an entrapment defense. On September 29, 2022, this Court overruled the assignments of error and affirmed the conviction and sentence.

{¶7} On October 28, 2022, Appellant filed a petition for postconviction relief with the trial court. He attached an affidavit from his fiancée Carrie Mitchell to the petition. The affidavit contains a description of Appellant's version of the events of November 12, 2020, and of conversations that occurred between Appellant and his attorney. Appellant's petition argued that his counsel was ineffective for not pursuing an entrapment defense.

{¶8} Appellee opposed the petition on November 14, 2022. The trial court overruled the petition without a hearing on December 1, 2022. This timely appeal followed.

Review of Petition for Postconviction Relief

{¶9} Appellant is claiming rights under R.C. 2953.21(A)(1)(a)(i), which states:

> (A)(1)(a) A person in any of the following categories may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief:
>
> (i) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that 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[.]"

{¶10} "[A] trial court's decision regarding a postconviction petition filed pursuant to R.C. 2953.21 will be upheld absent an abuse of discretion when the trial court's finding is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 60. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶11} "A criminal defendant is not automatically entitled to a postconviction hearing." *State v. Everson*, 7th Dist. Mahoning No. 14 MA 0072, 2016-Ohio-3419, ¶ 22. The trial court must first determine if there are substantive grounds to believe "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). "Absent a showing by the petitioner of substantive grounds to believe there was such an infringement of the petitioner's Constitutional rights, the trial court may dismiss the petition without a hearing." *State v. Everson*, 7th Dist. Mahoning No. 14 MA 0072, 2016-Ohio-3419, ¶ 22.

{¶12} The doctrine of *res judicata* applies to postconviction relief proceedings. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph eight of the syllabus. *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. Ishmail*, 67 Ohio St.2d 16, 18, 423 N .E.2d 1068 (1981); *State v. Croom*, 7th Dist. Mahoning No. 13 MA 98, 2014-Ohio-5635, ¶ 7.

{¶13} Appellant's petition was timely 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[.]" R.C. 2953.21(A)(2)(a).

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY CUTTING AND PASTING FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM BELMONT DEFENDANT MATTHEW HARTUNG'S CASE NO. 20 CR 0313 WHICH MEANS THE TRIAL COURT DID NOT PROVIDE THE CORRECT FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO EACH GROUND SET FORTH IN APPELLANT'S PETITION ACCORDING TO *STATE V. MAPSON*, 1 OHIO ST.3D 217, 219, 438 N.E.2D 910 AND *STATE V. LESTER* (1975), 41 OHIO ST.2D 51.

{¶14} Appellant argues that the trial court simply cut and pasted its judgment entry material from Appellee's response to the petition for postconviction relief, constituting error. It is not clear from Appellant's brief how this alleged act by the trial court amounts to reversible error. The cases cited by Appellant do not discuss this issue. Appellant relies on *State v. Mapson*, 1 Ohio St.3d 217, 219, 438 N.E.2d 910, 913 (1982), in support. *Mapson* does not contain any holding that supports Appellant. The issue in *Mapson* was whether a judgment entry denying a petition for postconviction relief was a final appealable order if it did not attach findings of fact and conclusions of law. *Mapson* held that the bare-bones judgment entry was not final, but this was overruled by *State ex rel.*

Penland v. Dinkelacker, 162 Ohio St.3d 59, 2020-Ohio-3774, 164 N.E.3d 336. Thus, *Mapson* should not be cited as authority. Further, the trial court did file findings of fact and conclusions of law, in contradiction to Appellant's argument.

{¶15} Appellant also cites *State v. Lester*, 41 Ohio St.2d 51, 322 N.E.2d 656 (1975), in support. *Lester* held that a postconviction relief petition dismissed on the grounds of res judicata should contain findings of fact and conclusions of law explaining this conclusion. *Id.* at 55. Once again, the trial court's judgment entry in this case does contain findings of fact and conclusions of law, and res judicata was not one of the reasons cited for dismissing the petition. Therefore, *Lester* does not support Appellant's argument on appeal.

{¶16} Appellant claims that the court incorrectly pasted the name "Mr. Hartung" into finding of fact number one, thus depriving Appellant of a complete set of findings. It is clear, though, that any error alleged by Appellant was made by Appellant himself rather than the trial court. Appellant's petition for postconviction relief mentions Mr. Hartung: "Depriving Mr. Hartung of his constitutional rights makes his convictions voidable." (10/28/22 Petition, p. 3.) The trial court quoted this line in its findings of fact and conclusions of law for the sake of accuracy: "The Court gives no weight or consequence to Defendant's allegation that 'Depriving Mr. Hartung of his constitutional rights makes his convictions voidable,' ". (12/1/22 Judgment Journal Entry, p. 1.) Mr. Hartung's name was part of a quotation taken from Appellant's petition. The error was made by Appellant, not the trial court. The fact that Mr. Hartung's name is included in the findings of fact was certainly induced by Appellant. "A party cannot complain about induced error." *State v. Combs*, 62 Ohio St.3d 278, 287, 581 N.E.2d 1071 (1991).

{¶17} The trial court's findings of fact and conclusions of law explain very clearly why the petition was dismissed. The petition alleged that his trial counsel failed to present a defense of entrapment. Appellant's petition was based on the affidavit of Carrie Mitchell. Ms. Mitchell had sent a letter to the trial court prior to Appellant pleading guilty, but she mentioned none of the things that are in the postconviction relief affidavit. Her affidavit describes alleged misconduct by Appellant's attorney that occurred prior to Appellant's guilty plea. The trial court noted that a guilty plea waives ineffective assistance of counsel arguments except for those touching upon whether the plea was made knowingly, voluntarily, and intelligently. *State v. Lett*, 7th Dist. Mahoning No. 15 MA 0128, 2016-Ohio-4811, ¶ 52. Any alleged problems with Appellant's counsel and his intention not to pursue an entrapment defense were known by Appellant prior to pleading guilty, and yet he went forward with his guilty plea. Thus, the allegations in the affidavit do not affect whether Appellant's plea was made knowingly, voluntarily, and intelligently.

{¶18} Appellant does not allege any other error except for the trial court's mention of Mr. Hartung's name. Therefore, his first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY NOT ORDERING AN EVIDENTIARY HEARING BASED UPON THE AFFIDAVIT OF CARRIE MITCHELL.

{¶19} Appellant contends that he should have been afforded a hearing based on the contents of Carrie Mitchell's affidavit. His brief does not discuss what parts of the affidavit required the court to have a hearing. The affidavit states that Appellant lived with

Mitchell; that she gave Appellant permission to accept deliveries at her house and to open packages; that he was home alone and retrieved a package from the porch; that he opened the package, noticed it was a powdery substance, and tried to flush it down the toilet; that Mitchell and Appellant jointly hired an attorney who counseled Appellant to enter a plea agreement; that people told Appellant that his attorney had substance abuse problems; that his attorney explained why he would not present an entrapment defense; that his attorney promised the first degree felony charges would "go away;" and his attorney promised that at most Appellant would receive a sentence of six months of community control if he pleaded guilty.

{¶20} Most of the facts presented in the Mitchell affidavit are irrelevant in this appeal because they do not relate to the voluntariness of Appellant's plea. "[A] guilty plea waives all errors on appeal except for errors related to the voluntariness of the plea." *State v. Mihelarakis*, 7th Dist. Belmont No. 03 BE 39, 2004-Ohio-3047, ¶ 11. The only allegations that potentially do relate to the voluntariness of the plea are that Appellant's counsel supposedly promised to have one or more charges dismissed and that Appellant would receive a community control sentence.

{¶21} Appellant is correct that a guilty plea that is induced by promises or threats is rendered involuntary and void. *Machibroda v. United States*, 368 U.S. 487, 493, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962); *State v. Brooks*, 7th Dist. Mahoning No. 79 C.A. 102, 1979 WL 207498, *3. Appellant is not correct that the mere mention of such a promise or threat in an affidavit attached to a petition for postconviction relief automatically requires that a hearing be held.

{¶22} Appellant acknowledges that a petition for postconviction relief cannot rely on evidence dehors the record that was known about or could have been utilized at the time of trial. "[T]he evidence dehors the record must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the defendant wished to use it." *State v. Cowan*, 11th Dist. No. 2001-P-0109, 151 Ohio App.3d 228, 2002-Ohio-7271, 783 N.E.2d 955, ¶ 15, aff'd, 101 Ohio St.3d 372, 2004-Ohio-1583, 805 N.E.2d 1085. Mitchell's affidavit is a reworking of facts that Appellant included in his brief in his prior appeal of this case, *State v. Pugh*, 7th Dist. Belmont No. 21 BE 0041, 2022-Ohio-3437. Although Appellant's recitation of facts in that brief were not in the record at that time, he based his arguments on appeal on those facts. In this appeal, Appellant presents the same set of facts, but in the form of an affidavit from Mitchell. It is apparent that Appellant knew about the facts contained in Mitchell's affidavit prior to pleading guilty because he based his arguments in the prior appeal on those facts.

{¶23} Even more important is that the record affirmatively reflects that no promises were made to Appellant. Item number five in the trial court's change of plea judgment entry states: "He was tendering his plea of guilty voluntarily and without any promises and that he understood that the sentencing recommendation contained in the written Plea of Guilty Petition was not binding upon the Court." (9/24/21 J.E.).

{¶24} "Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. A letter or affidavit from the court, prosecutors or defense counsel alleging a defect in the plea process may be sufficient to rebut the record on review and require an evidentiary hearing." *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823, 826 (1983).

A self-serving affidavit may be one submitted by the defendant himself, or by a girlfriend, fiancée, spouse, parent, other family member, or close friend. *State v. Saylor*, 125 Ohio App.3d 636, 709 N.E.2d 231 (12th Dist.1998); *State v. Moore*, 99 Ohio App.3d 748, 750, 651 N.E.2d 1319, 1320 (1st Dist.1994).

{¶25} Although put in the form of an affidavit from his fiancée, the evidence Appellant offered to support his petition was the same self-serving evidence he attempted to present on direct appeal. Appellant has not pointed to any irregularity in the plea process or at sentencing to undermine the trial record that affirmatively shows his plea was voluntary. He has not provided any other evidence that counsel made promises about charges being dropped, about receiving a specific sentence, or that Appellant relied on such promises when entering the guilty plea.

{¶26} Interestingly, in Appellant's prior appeal, the alleged promise that counsel made was that he could make the "felony 1" go away. (2/11/22 Brief in Appeal No. 21 BE 41, p. 3.) This is exactly what counsel did. The first-degree felony for trafficking in cocaine was dismissed as part of the plea agreement. Therefore, in the first appeal Appellant did not even describe a broken promise. Mitchell's affidavit in this appeal changes that factual assertion to a promise to make "the Felony 1's go away." (10/28/22 Petition, Mitchell Affidavit, p. 1.) This slight change may have been an attempt to make the alleged promise look like it covered both first degree felony charges, but this contradicts Appellant’s earlier assertion.

{¶27} Everything in Mitchell's affidavit was known to Appellant when he pleaded guilty and could have been brought up to the prosecutor in the Crim.R. 11 proceedings, or to the trial judge at the change of plea hearing or the sentencing hearing. Although the

Mitchell affidavit itself did not exist when Appellant pleaded guilty, the information in it did exist. If Appellant believed that his counsel made promises that induced him to enter his plea, he had a duty to bring this to the attention of the trial judge prior to entering his plea. Appellant has not cited to anything in the record showing coercion or irregularity in the plea process or at sentencing. Therefore, the trial court did not abuse its discretion in dismissing the petition for postconviction relief without a hearing.

{¶28} For all these reasons, Appellant's second assignment of error is overruled.

Conclusion

{¶29} This is an appeal of the denial of a petition for postconviction relief without a hearing. On appeal Appellant argues that the trial court erroneously copied and pasted an incorrect name into its findings of fact and conclusions of law. Appellant contends that the court merely copied and pasted the state's brief into the final dismissal entry and by doing so deprived him of an unspecified constitutional right. Appellant's single example of erroneous cutting and pasting actually came from Appellant's petition for postconviction relief, not the state's response. Appellant fails to point to any actual deficiency in the court's decision. Appellant also argues that the affidavit from his fiancée Carrie Mitchell required that a hearing be held on Appellant's petition. The affidavit is based on facts that existed when Appellant pleaded guilty and did not require a hearing on the petition for postconviction relief. The affidavit does not present a question of fact as to whether Appellant's plea was made knowingly, voluntarily, and intelligently. Neither assignment of error has merit, and the judgment of the trial court is affirmed.

Robb, 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 Belmont 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.