[Cite as *State v. Ray*, 2020-Ohio-5004.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109455
v.	:	
DARREN RAY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 22, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-627373-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha L. Forchione, Assistant Prosecuting Attorney, *for appellee.*

Darren Ray, *pro se*.

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant Darren Ray ("Ray") appeals from the denial of his petition for postconviction relief. For the reasons that follow, we affirm.

Procedural and Substantive History

{¶ 2} On April 24, 2018, the Cuyahoga County Grand Jury indicted Ray on one count of having weapons while under disability in violation of R.C. 2923.13(A)(2), one count of receiving stolen property in violation of R.C. 2913.51(A), and one count of drug possession in violation of R.C. 2925.11(A). On June 26, 2018, Ray pleaded guilty to having weapons while under disability and drug possession, and the receiving stolen property count was dismissed.

{¶ 3} On July 27, 2018, the trial court sentenced Ray to two years of community control with the following conditions:

> 1. Defendant to abide by all rules and regulations of the probation department.
>
> 2. Defendant to be supervised by: Group D.
>
> 3. Report weekly for three months and every two weeks thereafter or as directed by PO.
>
> 4. Attend programming as indicated in case plan.
>
> 5. Defendant is ordered to pay a monthly supervision fee of $20.00.
>
> 6. Defendant is eligible for early termination request when all conditions have been met.
>
> 7. Random drug testing.
>
> 8. Conditions and terms of probation are subject to modification by the probation officer and approval of the court.

Ray was also informed that a violation of these terms and conditions may result in more restrictive sanctions, or a prison term of 36 months.

{¶ 4} On October 18, 2018, Ray was arrested and charged in Cleveland Municipal Court with one count of domestic violence, one count of aggravated menacing, and one count of unlawful restraint.

{¶ 5} On November 13, 2018, the trial court held a probation violation hearing. Following a full hearing, the trial court determined that Ray was in violation of his community control sanctions. The court terminated community control and sentenced Ray to 30 months in prison.

{¶ 6} On November 28, 2018, the domestic violence charges were dismissed for want of prosecution.

{¶ 7} On February 1, 2019, Ray filed a pro se motion to vacate void judgment. On February 13, 2019, the state filed a brief in opposition to Ray's motion. On April 24, 2019, the court denied this motion. On October 10, 2019, Ray filed a pro se "Motion to Certify Conflict — 60(B) Section 3, Motion to Vacate Void Judgment." On October 17, 2019, the state filed a brief in opposition to Ray's motion. On October 31, 2019, Ray filed a motion for an extension of time to respond to the state's brief in opposition. On November 15, 2019, Ray filed a response to the state's brief in opposition. On January 2, 2020, the court denied Ray's motion to vacate void judgment, stating in its journal entry that the issues were barred by res judicata. The journal entry also ordered that Ray's October 10, 2019 motion to certify a conflict was stricken "as inapplicable to this case," and found that Ray's October 31, 2019 motion for an extension of time was moot.

{¶ 8} On January 21, 2020, Ray filed a request for findings of fact and conclusions of law pursuant to Crim.R. 57 and Civ.R. 52. On January 27, 2020, the state filed a brief in response. On January 30, 2020, Ray filed a notice of appeal from the trial court's January 2, 2020 judgment denying his motion to vacate void judgment, presenting a single assignment of error for our review. On February 21, 2020, the trial court denied Ray's request for findings of fact and conclusions of law.

Law and Analysis

{¶ 9} In his sole assignment of error, Ray asserts that it was an abuse of discretion for the trial court to deny requested findings of fact and conclusions of law. Despite the language of this assignment of error, Ray did not appeal from the trial court's February 21, 2020 denial of his request for findings of fact and conclusions of law. He appealed the denial of his October 10, 2019 motion to vacate void judgment.

{¶ 10} Where 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. Reynolds*, 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997). We review a trial court's denial of a postconviction relief petition for an abuse of discretion. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). In general, a trial court abuses its discretion when its judgment is unreasonable, arbitrary, or unconscionable. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 46. In the context of postconviction

petitions, the trial court does not abuse its discretion in dismissing a petition without a hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition. *State v. Curry*, 8th Dist. Cuyahoga No. 108088, 2019-Ohio-5338, ¶ 15, *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15.

{¶ 11} Under the doctrine of res judicata, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *State v. Patrick*, 8th Dist. Cuyahoga No. 99418, 2013-Ohio-5020, ¶ 7, citing *Gravamen v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). When a petitioner seeks postconviction relief on an issue that was raised or could have been raised on direct appeal, the petition is properly denied by the application of the doctrine of res judicata. *State v. Tucker*, 8th Dist. Cuyahoga No. 84595, 2005-Ohio-109, ¶ 11, citing *State v. Edwards*, 8th Dist. Cuyahoga No. 73915, 1999 Ohio App. LEXIS 894 (Mar. 11, 1999). In order to overcome the res judicata bar, the petitioner must show, through the use of extrinsic evidence, that they could not have appealed the original constitutional claim based on the information in the original trial record. *State v. Cody*, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764, ¶ 16, citing *State v. Combs*, 100 Ohio App.3d 90, 97-98, 652 N.E.2d 205 (1st Dist.1994). Ray has not overcome res judicata here.

{¶ 12} Ray did not appeal the court's revocation of community control and imposition of prison. He also did not appeal the trial court's denial of his February 1, 2019 motion to vacate void judgment. Had Ray filed a direct appeal in this case, he could have made the same arguments he attempts to make now. Nothing in Ray's October 10, 2019 motion or his appellate brief refers to an argument that Ray would not have been able to make prior to that motion.

{¶ 13} Even if Ray's claims were not barred, he has not established substantive grounds for relief. In his October 10, 2019 motion, Ray challenged the procedural validity of his community control revocation hearing, arguing that a probable-cause hearing should have been held prior to the revocation hearing and that he was not provided written notice of the grounds on which the alleged violation was based.

{¶ 14} Because a trial court's revocation of community control can result in a serious loss of liberty, "a probationer must be accorded due process at the revocation hearing." *State v. Bailey*, 8th Dist. Cuyahoga No. 103114, 2016-Ohio-494, ¶ 9, citing *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Further, a defendant is generally entitled to a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his or her community control. *State v. Cox*, 8th Dist. Cuyahoga No. 105932, 2018-Ohio-748, ¶ 15.

{¶ 15} Some Ohio courts, however, have held that a probable-cause hearing is not strictly required in cases where the trial court held a preliminary hearing on

the same day as the revocation hearing, or in cases where the court did not conduct a separate preliminary and final revocation hearing. *Id.*; *State v. Patton*, 2016-Ohio-4867, 68 N.E.3d 273 (8th Dist.). Further, other Ohio courts have held that the failure to hold a separate preliminary and final revocation hearing does not require reversal of the court's judgment unless the record reflects that the defendant was prejudiced. *State v. Thompson*, 1st Dist. Hamilton Nos. C-140746 and C-140747, 2015-Ohio-2836, ¶ 6-7, citing *State v. Delaney*, 11 Ohio St.3d 231, 234, 465 N.E.2d 72 (1984). Moreover, because part of the purpose of a preliminary probable-cause hearing is to prevent unjust incarceration pending a final revocation determination, an appellant waives the right to protest the failure to afford him a preliminary hearing where he does not object until the final revocation hearing. *Delaney* at 233.

{¶ 16} Here, the record shows that Ray neither requested a preliminary hearing nor objected to the court's failure to hold a separate preliminary hearing. The first time he brought up this issue was in his initial motion to vacate void judgment. Further, we note that Ray's domestic violence charges were dismissed for want of prosecution, not because the charges lacked probable cause. Moreover, the trial court in this case found that Ray was in violation of his probation not only because of the additional criminal charges, but because, by Ray's own admission, he failed to complete a treatment program required by his case plan. Therefore, Ray was not prejudiced by any alleged failure to hold a preliminary hearing. Likewise, any failure to provide Ray with written notice of the grounds for the revocation is

not grounds for reversal, because Ray was sufficiently informed of the reasons for revoking his community control by the trial court's oral statements. *Delaney* at 235.

{¶ 17} With respect to the arguments Ray raised in his appellate brief, we reiterate that Ray did not appeal from the judgment entry denying his request for findings of fact and conclusions of law. App.R. 4 provides that "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." Because Ray did not appeal from the judgment entry denying his request for findings of fact and conclusions of law, his arguments related to that denial are not properly before this court and we are precluded from reviewing them. *Kuzniak v. Midkiff*, 7th Dist. Mahoning No. 05 MA 217, 2006-Ohio-6133, ¶ 20.

{¶ 18} Based on the foregoing, we find no abuse of discretion in the trial court's denial of Ray's petition. Ray's assignment of error is overruled.

{¶ 19} 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 out of this court directing the common pleas 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.

RAYMOND C. HEADEN, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR