[Cite as *State v. Lusane*, 2012-Ohio-402.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0040**
- vs -	:	
MATTHEW M. LUSANE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2005 TRC 11364.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Terry G.P. Kane, Kane & Kane, 111 East Main Street, Suite B, P.O. Box 167, Ravenna, OH 44266 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Portage County Municipal Court, Ravenna Division. In the disputed judgment, the trial court denied the motion of appellant, Matthew M. Lusane, to vacate his prior conviction in the underlying case for operating a motor vehicle while intoxicated. Before this court, appellant submits that the denial of his motion must be reversed because the evidence established that the trial court violated his right to due process in basing the conviction upon an improper guilty plea.

{¶2} On August 28, 2005, appellant was cited for four traffic offenses, including operating a vehicle while intoxicated ("OVI"), pursuant to R.C. 4511.19(A)(1). Since the four citations were issued in the city of Ravenna, Ohio, they were filed in the Ravenna Division of the Portage County Municipal Court, and the matter was designated as Case No. R2005 TRC 11364. Approximately seven days later, appellant was involved in a separate incident in which he was again cited for OVI and other traffic violations. Since the second incident occurred in the city of Kent, Ohio, the ensuing action was brought in the Kent Division of the Portage County Municipal Court and was assigned Case. No. K2005 TRC 4525.

{¶3} At the outset of the "Kent" proceeding, a public defender was appointed to represent appellant in both pending prosecutions; however, the two cases were never consolidated for any purpose. On November 1, 2005, a pretrial conference was held in the "Ravenna" proceeding. In a pretrial "report" which was issued the same day as the conference, it was stated that the state had offered to dismiss the remaining three traffic citations if appellant agreed to plead guilty to the OVI charge. The report did not state if appellant had expressly declined the offer, but it did also indicate that the case would be scheduled for a trial to the court.

{¶4} On December 7, 2005, two notices were mailed to the state and appellant in the "Ravenna" action. The first notice advised that a "jury pretrial" would be held on December 27, 2005. The second notice informed the parties that a jury trial had been scheduled for January 4, 2005. Following the releasing of the foregoing two notices, no other scheduling notices were ever sent in the "Ravenna" proceeding.

{¶5} In early December 2005, as part of the separate "Kent" action, appellant chose to enter a new plea of no contest to the one OVI charge. In response, the state

agreed to dismiss the remaining citations stemming from the "Kent' incident. After it had accepted appellant's new plea, the "Kent" trial court found him guilty of the OVI charge and sentenced him accordingly. The sentence included the requirement that appellant serve a term of 30 days in the county jail.

{¶6} No reference to the "Kent" plea is contained in the record of the "Ravenna" prosecution. Instead, the "Ravenna" record only indicates that, on December 27, 2005, the date of the scheduled "jury" pretrial, the trial court issued two journal entries. First, on the "jacket" of the case file, it was stated that appellant had entered a plea of guilty to the one OVI charge, and that the other three citations had been dismissed. Second, in a separate sentencing judgment, the trial court ordered him to serve a term of 30 days in the county jail, suspended his license to drive for two years, and fined him the sum of $550 and court costs.

{¶7} On the same date of the foregoing two entries, the clerk for the "Ravenna" trial court entered into the record a document which appears to have been executed by appellant. This document contains an acknowledgement that, in light of the sentencing judgment in the "Ravenna" proceeding, appellant owed the total sum of $616. As part of a second separate document also journalized on December 27, 2005, it was stated that appellant would not begin to serve the 30-day term under the "Ravenna" action until February 15, 2006.

{¶8} In the months after the release of the sentencing judgment, the "Ravenna" trial court rendered a number of orders which allowed appellant to perform community work service in lieu of paying the imposed fine. Furthermore, on at least one occasion, appellant filed a request to "set up" a payment plan for the total amount he owed under the "Ravenna" case, the "Kent" case, and three other prior criminal convictions.

{¶9} Approximately six years following the entry of the "Ravenna" conviction, appellant was involved in a new incident which led to his indictment on a single felony charge of operating a vehicle while intoxicated. As part of the factual allegations under the indictment, it was asserted that appellant had at least three prior convictions for OVI, including the "Ravenna" conviction from December 2005.

{¶10} In light of the seriousness of the new felony charge, appellant immediately moved the "Ravenna" trial court to vacate the prior OVI conviction in that specific case. As the sole basis for the motion, he essentially argued that no valid conviction had ever been entered in the "Ravenna" case because, as part of the plea agreement in the 2005 "Kent" proceeding, it had been stipulated that all four pending citations in the "Ravenna" case, including the OVI charge, would be dismissed.

{¶11} An evidentiary hearing was held on the motion to vacate. In testifying on his own behalf, appellant stated that he had no recollection of attending any proceeding at the Ravenna courthouse on December 27, 2005. In addition, he also presented the testimony of the stenographer who worked for the "Ravenna" trial court on the disputed date. The stenographer indicated that a review of her records showed that she did not take any notes for a hearing involving appellant on that particular day. Finally, the trial court considered a copy of the trial record from the separate "Kent" case.

{¶12} In denying appellant's motion to vacate the underlying conviction, the trial court made two findings of fact in its written judgment. First, the court found that there was nothing in the "Kent" trial record to support appellant's basic assertion that the plea agreement in the "Kent" case was intended to encompass the four "Ravenna" charges. Second, the trial court found that appellant had filed certain post-judgment requests in the "Ravenna" action.

{¶13} In appealing the ruling on the motion to vacate, appellant has raised one assignment of error:

{¶14} "The trial court erred to the prejudice of defendant-appellant in denying his motion to vacate the judgment of conviction for a third offense OVI charge entered on December 27, 2005."

{¶15} In contending that the trial court should have declared his conviction in the underlying case void, appellant submits that the evidence he presented at the "motion" hearing could only be interpreted to show that the conviction was not predicated upon a proper guilty plea. Specifically, he asserts that the evidence established that no "plea" hearing was ever conducted before the trial court on December 27, 2005. Building on this, appellant also argues that the entry of a valid guilty plea was not possible because the various requirements of Crim.R. 11, including the waiver of his constitutional rights, were never satisfied.

{¶16} At the outset of our legal analysis, this court would note that, in discussing the merits of his motion to vacate in his appellate brief, appellant has theorized that his motion should have been considered as a request for relief from judgment under Civ.R. 60(B). However, our review of the motion itself in the trial record shows that, in addition to being captioned as a motion to vacate, its contents did not contain any reference to Civ.R. 60(B). More importantly, the substance of the motion readily indicates that the basic request to vacate the prior conviction was based upon an alleged violation of his constitutional right to due process. That is, appellant asserted that he had been found guilty of a crime even though he had never entered such a plea before the trial court.

{¶17} In reviewing the substance of post-judgment motions similar in nature to appellant's submission, the Supreme Court of Ohio has expressly concluded that such a

motion should not be analyzed under Civ.R. 60(B) when a viable "criminal" remedy still exists. In *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, the defendant submitted a motion for relief from judgment under Civ.R. 60(B) after he had been convicted for a second time of aggravated murder. As the grounds for the motion, the defendant raised arguments of prosecutorial misconduct and double jeopardy. In ruling upon the merits of the motion, both the trial court and the appellate court held that the motion should be treated as a petition for postconviction relief under R.C. 2953.21.

{¶18} In upholding the lower court's characterization of the defendant's motion, the *Schlee* court first stated that courts in general have the ability to "recast" motions for the purpose of identifying the appropriate criteria for disposing of the actual merits. *Id*., at ¶ 12. The *Schlee* court then indicated that it had previously recognized a standard for determining when a post-judgment motion in a criminal action should be viewed as a petition for postconviction relief:

{¶19} "In [*State v. Reynolds,* 79 Ohio St.3d 158, 160, 679 N.E.2d 1131 (1997)] we concluded that a motion styled 'Motion to Correct or Vacate Sentence' met the definition of a petition for postconviction relief pursuant to R.C. 2953.21(A)(1), because it was '(1) filed subsequent to (the 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.'" *Schlee, supra*, at ¶ 12.

{¶20} In the instant case, the four requirements cited in *Schlee* were clearly met. First, appellant's motion to vacate was filed after his ability to pursue a direct appeal of the conviction had already extinguished. Second, the motion asserted a violation of his constitutional right to due process. Third, he sought to have the underlying conviction declared void. Fourth, appellant sought vacation of the December 2005 judgment. As a

result, appellant's motion to vacate should have been designated as a postconviction relief petition, not as a request for relief from judgment under Civ.R. 60(B).

{¶21} Given the proper characterization of appellant's motion/petition, this court must now determine whether his submission was filed in accordance with the governing statutory scheme for postconviction relief. *See State v. Tatum*, 1st Dist. No. C-040296, 2005-Ohio-903, at ¶ 10-11. R.C. 2953.21(A)(2) provides that if the defendant does not pursue a direct appeal of the underlying conviction, the petition for postconviction relief must be filed within 180 days after the expiration of the time for bringing the appeal. In this instance, the time for filing a direct appeal would have elapsed in late January 2006; thus, appellant's motion/petition was late by more than five years.

{¶22} Pursuant to R.C. 2953.23(A)(1)(a), a trial court can entertain an untimely postconviction petition when, inter alia, the petitioner can show that he was unavoidably prevented from discovering the facts which form the basis of the claim for relief. As part of his testimony during the "motion" hearing in this case, appellant stated that he did not become aware of the existence of the "Ravenna" conviction until he was indicted on the felony OVI charge in early 2011. However, as one of the two factual findings in support of its ruling, the trial court found that appellant had filed certain requests in the record of the "Ravenna" case after the issuance of sentencing judgment in December 2005. The clear inference to be drawn from this finding was that appellant had been aware of the conviction for the entire five years.

{¶23} Our review of the trial record in the "Ravenna" action confirms the finding of the trial court. First, the record shows that, on the same day the sentencing judgment was issued, appellant signed a document acknowledging that he owed a total amount of $616 in that case. Second, the record indicates that, on September 8, 2006, he filed a

request for the creation of a payment plan for the underlying debt. Third, the trial record shows, and appellant has admitted in his brief, that he made numerous requests during the intervening years to perform community work service in lieu of paying the imposed fine.

{¶24} Since the trial record contains considerable evidence from which it could be inferred that appellant had knowledge of the "Ravenna" conviction from the date it was rendered, he was required under R.C. 2953.21(A)(2) to comply with the 180 day limit for filing a petition for postconviction relief. In turn, because his motion/petition was not submitted in a timely manner, the substance of his underlying argument should not have been addressed. That is, appellant's motion/petition should have been overruled solely on the basis that it was not filed in accordance with the governing statute.

{¶25} As appellant's sole assignment of error lacks merit, it is the judgment and order of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.