[Cite as *State v. Davies*, 2017-Ohio-7961.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-A-0013**
- vs -	:	
ROBERT DAVIES,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2001 CR 00165.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Robert Davies, pro se, 7455 Harmon Road, Conneaut, OH 44030 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Robert R. Davies, pro se, appeals the judgment of the Ashtabula County Court of Common Pleas denying his motion to vacate his conviction and to dismiss the indictment. Appellant filed this motion 15 years after he pled guilty to possession of crack cocaine. At issue is whether the court erred in denying his motion. For the reasons that follow, we affirm.

{¶2} On June 8, 2001, police pulled over a vehicle for a traffic violation. After the driver was cited, the officer found the passenger, appellant, had an active arrest warrant against him. The officer searched appellant and found a "knotted-up plastic baggy" on him containing a yellow substance. When asked by the officer what it was, appellant said, "just what you think it is." A field-testing officer tested a piece of the substance, which tested positive for crack cocaine.

{¶3} Appellant was arrested and transported to jail. After the drugs were submitted into evidence, they were found to weigh approximately 2.5 grams.

{¶4} Appellant was indicted for possession of crack cocaine, a felony-four. He pled not guilty. While the case was pending, the parties exchanged discovery.

{¶5} On November 6, 2001, appellant, who at all times was represented by counsel, pled guilty to the lesser included offense of possession of crack cocaine, a felony-five. The trial court found appellant's guilty plea was voluntary; accepted the plea; and found him guilty. On December 31, 2001, appellant was sentenced to two years of community control and ordered to serve 4-6 months at NEOCAP, a correctional treatment facility.

{¶6} Appellant did not appeal his conviction. Instead, 15 years later, on December 5, 2016, he filed a pro-se motion to vacate his conviction and to dismiss the indictment. In support, he argued that in November 2016, at his request, the state gave him information, which, he argued, entitled him to an acquittal. The court treated the motion as a petition for postconviction relief. In opposition, the state argued appellant's motion was barred by res judicata. The trial court agreed, finding the information

appellant received was available to him and his attorney when he pled guilty in 2001, and dismissed the petition without a hearing.

{¶7} Appellant appeals the trial court's judgment, asserting two assignments of error. They are related and thus considered together. They allege:

{¶8} "[1.] The trial court committed reversible error in dismissing Defendant-Appellant's petition for post-conviction relief on res judicata grounds, based on an unsupported finding that the discovery Defendant obtained from the Prosecutor and Public Defender in 2016 was available to Defendant and his attorney in 2001 at the time he entered his guilty plea.

{¶9} "[2.] The trial court lacked subject-matter jurisdiction over the actual possession of crack cocaine charge where the substance presented to the grand jury was not the substance in Defendant-Appellant's possession."

{¶10} A defendant attempting to challenge a conviction or sentence through a petition for postconviction relief under R.C. 2953.21 is not automatically entitled to a hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282 (1999).

{¶11} A court is not required to hold a hearing unless the petitioner puts forth evidence demonstrating a cognizable claim of constitutional error. *State v. Adams*, 11th Dist. Trumbull No.2003-T-0064, 2005-Ohio-348, ¶36. That is, a petitioner must put forth evidence 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 * * *." R.C. 2953.21(A)(1)(a).

{¶12} "[A] defendant's petition may be denied without a hearing when the petition, supporting affidavits, documentary evidence, files, and records do not

demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Adams, supra*, citing *Calhoun, supra*, at 281. Generally, an appellate court reviews the dismissal of a petition for postconviction relief for an abuse of discretion. *State v. Hendrix*, 11th Dist. Lake No. 2012-L-080, 2013-Ohio-638, ¶7. However, if a trial court denies a petition on legal grounds, e.g., by application of the doctrine of res judicata, this court's review is de novo. *State v. Butcher*, 11th Dist. Portage No. 2013-P-0090, 2014-Ohio-4302, ¶6.

{¶13} Appellant argued in his motion that his conviction must be vacated because in November 2016, the prosecutor provided him with a copy of the 2001 BCI report, which, he argued, showed the drugs BCI tested (and for which he was indicted) were not the same drugs that were found on him. He based this argument on the fact that the police officers said the crack cocaine was yellow and weighed approximately 2.5 grams, while the BCI report said the crack was white and weighed 2.12 grams "net."

{¶14} Appellant argues that, contrary to the trial court's judgment, his petition was not barred by res judicata because the BCI report was outside the record when he was convicted so, in his view, he was free to file a motion to vacate at any time. However, the well-established case law does not support his argument.

{¶15} "In the context of criminal cases, 'a convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or *could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, or on appeal from that judgment.'" (Emphasis added.) *State v. Dudas*, 11th Dist. Lake No. 2007-L-169, 2008-Ohio-3261, ¶17, quoting *State v. Szefcyk*,

77 Ohio St.3d 93, 96 (1996). Further, "'[t]o avoid the application of res judicata, the evidence supporting appellant's claim must assert competent, relevant and material evidence outside the trial court's record, *and it must not be evidence that existed or was available for use at the time of trial*.'" (Emphasis added.) *State v. Waskelis*, 11th Dist. Portage Nos. 2012-P-0152, 2013-P-0010, 2013-Ohio-4121, ¶22, quoting *State v. Schrock*, 11th Dist. Lake No.2007-L-191, 2008-Ohio-3745, ¶21.

{¶16} Appellant conceded in his motion that the BCI report was received by the prosecutor's office on August 30, 2001, and that on the same date, the prosecutor gave his attorney the state's responses to his discovery requests. Appellant also conceded that "the lab report was provided in discovery * * *." Thus, the report was unquestionably in existence and available to appellant and his attorney on November 6, 2001, when appellant pled guilty. As a result, appellant's argument is barred by res judicata.

{¶17} Further, appellant was precluded from asserting his argument that the prosecution presented the wrong drugs to the grand jury because he pled guilty. The United States Supreme Court has held: "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

{¶18} The Supreme Court, in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), further held:

> **{¶19}** In most States a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his

> constitutional challenges to * * * admissibility of various pieces of evidence * * *. A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. * * * Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. * * * It is in this sense, therefore, that ordinarily "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id*. at 289, quoting *Tollett, supra*, at 267.

{¶20} The United States Supreme Court, in *Haring v. Prosise*, 462 U.S. 306 (1983), held: "' * * * [A] counseled plea of guilty is an admission of factual guilt [ ] so reliable that * * * it quite validly removes the issue of factual guilt from the case.'" (Emphasis omitted.) *Id*. at 321, quoting *Menna v. New York*, 423 U.S. 61, 62-63, n. 2 (1975). Thus, by entering his guilty plea, appellant admitted his factual guilt and removed the issue of his factual guilt, including any issue raised by the BCI report, from the case.

{¶21} Further, appellant argues he was entitled to a hearing because his plea was not voluntary inasmuch as the BCI report did not comply with R.C. 2925.51. This statute allows a lab report to be used in evidence in lieu of the lab technician's testimony if a notarized statement of the signer's qualifications is attached to the report; the report includes notice to the defendant of his right to demand live testimony; and the defendant does not demand live testimony. However, appellant did not argue in his motion that his guilty plea was involuntary. As a result, that argument is waived.

{¶22} In any event, even if appellant had raised this issue in his motion, he could not demonstrate his plea was involuntary because he failed to file the transcript of his plea hearing on appeal. Without a transcript of the change-of-plea hearing, this court

must presume the regularity of the hearing and affirm. *State v. Mack*, 11th Dist. Portage No. 2005-P-0033, 2006-Ohio-1694, ¶17. Since appellant failed to provide us with the transcript of the guilty-plea hearing, we must presume his plea was entered voluntarily.

{¶23} The issues appellant raises here, i.e., whether the drug tested by BCI was the drug found on him and whether the BCI report failed to comply with the requirements in R.C. 2925.51 were *evidentiary issues* that appellant could have raised at trial if he wished to do so. However, instead, he opted to plead guilty to a lesser charge, hoping he would receive probation, which he did. However, in taking advantage of this plea bargain, he *waived these challenges*.

{¶24} Further, since these issues involved evidentiary matters, they had no effect on the trial court's subject-matter jurisdiction to adjudicate the charge in the indictment. There is no question that the indictment properly alleged the elements of the crime. Appellant's argument that the state knowingly presented "false and fraudulent" evidence to the grand jury, resulting in an indictment that was void and the court's loss of subject-matter jurisdiction, is not supported by any evidence and therefore has no merit.

{¶25} Finally, we note that appellant's argument that the substance tested by BCI was not the substance that was found on him is not persuasive for three reasons. *First*, while the officer who logged in the drug at the police station said it weighed 2.5 grams, the officer qualified this by saying that weight was "approximate." Further, BCI weighed in the drug at "net" 2.12 grams. Here, "net" presumably means that the packaging material was excluded from the weight determination. Further, the net weight would presumably not include any pieces of the drug used in testing. Thus,

there was no real discrepancy in the weight of the drug. *Second*, there is no dispute that both the drug found on appellant and the drug tested by BCI was a "rock" of crack cocaine. *Third*, it is unclear whether the "knotted-up plastic baggy" in which the drug was found was clear or discolored from age, dirt, or otherwise or whether the lighting conditions in the field were such that it made the substance appear yellow.

{¶26} Moreover, appellant's argument that the BCI report does not comply with the requirements of R.C. 2925.51 lacks merit because he has not presented any evidence that the notarized statement and notice were not attached to the original report.

{¶27} For these reasons, we hold the trial court did not err in finding that appellant's motion was barred by res judicata and in implicitly finding the court had subject-matter jurisdiction of this matter.

{¶28} For the reasons stated in this opinion, the assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.