

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. CT2017-0017
DAYWON L. REESE	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Muskingum County Court of Common Pleas, Case No. CR2015-0267

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: June 7, 2017

APPEARANCES:

For: Plaintiff-Appellee
MICHAEL HADDOX
By GERALD V. ANDERSON II
27 North Fifth Street
P.O. Box 189
Zanesville, Ohio 43702

For: Defendant-Appellant
DAYWON REESE
15708 McConnelsville Road
Caldwell, OH 43724

Gwin, J.

{¶1} Appellant appeals the February 28, 2017 judgment entry of the Muskingum County Court of Common Pleas denying his petition for post-conviction relief. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} On January 15, 2016, appellant Daywon Reese entered a plea of guilty to one count of possession of drugs (cocaine), a felony of the first degree, in violation of R.C. 2925.11(A); three counts of possession of drugs (oxycodone), felonies of the fifth degree, in violation of R.C. 2925.11(A); one count of possession of drugs (alprazolam), a misdemeanor of the first degree, in violation of R.C. 2925.11(A); and one count of possession of drugs (marijuana), a misdemeanor of the fourth degree, in violation of R.C. 2925.11(A). The trial court sentenced appellant and issued a sentencing entry on February 25, 2016.

{¶3} On February 14, 2017, appellant filed a motion to withdraw guilty plea pursuant to Criminal Rule 32, arguing he was denied effective assistance of counsel creating a manifest miscarriage of justice due to his counsel's erroneous advice that he enter guilty pleas to enhanced degree felonies for possession of cocaine based on gross weight that included other material instead of the weight of the actual cocaine. On February 24, 2017, appellant filed a petition for post-conviction relief pursuant to R.C. 2953.21 seeking to set aside his pleas as void, again arguing he was denied effective assistance of counsel that violated his right to counsel and right to due process due to his trial counsel's erroneous advice that he enter guilty pleas to enhanced-degree felonies

for trafficking in cocaine based on gross weight that included other material instead of the weight of the actual cocaine.

{¶4} The trial court denied his motion to withdraw on February 16, 2017. The trial court also denied his petition for post-conviction relief on February 28, 2017. Appellant filed appeals on each of these denials.

{¶5} Appellant first appealed the trial court's denial of his motion to withdraw. In *State v. Reese*, 5th Dist. Muskingum No. CT2017-0015, 2017-Ohio-_____, this Court overruled appellant's assignments of error and affirmed the trial court's denial of his motion to withdraw plea.

{¶6} In this case, appellant appeals the February 28, 2017 judgment entry of the Muskingum County Court of Common Pleas and assigns the following as error:

{¶7} "I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE COUNSEL'S ERRONEOUS ADVICE THAT HE ENTER GUILTY PLEAS TO ENHANCED-DEGREE FELONIES FOR POSSESSION OF DRUGS (COCAINE) BASED ON GROSS WEIGHT THAT INCLUDED OTHER MATERIAL, INSTEAD OF THE WEIGHT OF THE ACTUAL COCAINE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

{¶8} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S POST-CONVICTION RELIEF PETITION WITHOUT A HEARING WHEN THE COURT FILES, AND RECORD, AND DOCUMENTATION SUPPORTED SUCH AN EVIDENTIARY HEARING.

{¶9} “III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO ISSUE FACTS AND CONCLUSIONS OF LAW AS REQUIRED BY R.C. 2953.21.”

III.

{¶10} We first address appellant’s third assignment of error because it is dispositive of appellant’s appeal. Appellant argues in his third assignment of error that the trial court erred in denying his petition for post-conviction relief without making findings of fact and conclusions of law as required by R.C. 2953.21. We agree.

{¶11} Pursuant to R.C. 2953.21, when a trial court denies a petition for post-conviction relief without a hearing, the trial court shall make and file findings of fact and conclusions of law. The findings of fact and conclusions of law should be explicit enough to give the appellate court a clear understanding of the basis of the trial court’s decision and to 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). The purpose of requiring the trial court to include findings of fact and conclusions of law in its judgment entry is to sufficiently apprise both the petitioner and the potential appellate court of the grounds for its decision. *State v. Staats*, 5th Dist. Stark No. 2015CA00207, 2016-Ohio-2921.

{¶12} The Supreme Court has held that a trial court “need not issue findings of fact and conclusions of law when it dismisses an untimely [post-conviction-relief] petition.” *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, 781 N.E.2d 155. If a petition for post-conviction relief is untimely, the trial court had no clear duty to issue findings of fact or conclusions of law. *Dillon v. Cottrill*, 5th Dist. Muskingum No. CT2014-

0053, 2015-Ohio-1785. Further, a trial court “has no duty to issue findings of fact and conclusions of law on successive or untimely petitions for post-conviction relief.” *State ex rel. George v. Burnside*, 118 Ohio St.3d 406, 2008-Ohio-2702, 889 N.E.2d 533.

{¶13} This is the first post-conviction petition appellant filed and is therefore not a successive petition. Thus, we must determine whether appellant’s petition was timely. Appellant did not file a direct appeal of the February 25, 2016 sentencing entry. Under the current version of R.C. 2953.21(A)(2), effective March 23, 2015, a petition for post-conviction relief must be filed no later than 365 days after the expiration of time for filing a direct appeal. A timely post-conviction petition had to be filed no later than 365 days after the expiration of the time for filing the direct appeal, or on March 26, 2017. Appellant filed his petition on February 27, 2017. Thus, his petition was timely.

{¶14} In this case, the trial court did not make any findings of fact and conclusions of law, and denied the petition for post-conviction relief in a one sentence judgment entry without stating its reasons for denying the petition. We therefore sustain appellant’s third assignment of error and reverse and remand this matter to the trial court to make findings of fact and conclusions of law. We will not address appellant’s first and second assignments of error as they are moot based upon our disposition of appellant’s third assignment of error.

{¶15} Based on the foregoing, the February 28, 2017 judgment of the Muskingum County Court of Common Pleas is reversed and remanded to the trial court for proceedings consistent with this opinion.

By Gwin, J.,

Delaney, P.J., and

Baldwin, J., concur