[Cite as *State v. Tauwab*, 2017-Ohio-81.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 28022
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
AMIR J. TAUWAB	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 2014-02-0347

DECISION AND JOURNAL ENTRY

Dated: January 11, 2017

CELEBREZZE, Judge.

{¶1} Defendant-Appellant, Amir Tauwab, appeals from the judgment of the Summit County Court of Common Pleas, denying his petition for post-conviction relief. This Court affirms.

I

{¶2} In February 2014, a grand jury indicted Tauwab on one count of grand theft auto. Tauwab attended his arraignment and pleaded not guilty, but later failed to appear at a scheduled pre-trial. His failure to appear led the court to issue a capias for his arrest that remained outstanding for eight months before Tauwab then filed several pro se motions. One of those motions, filed December 3, 2014, was a motion to dismiss his indictment due to a speedy trial violation.

{¶3} Tauwab sought a dismissal of his indictment on the basis of R.C. 2941.401. He averred that he had been incarcerated since at least April 25, 2014, and, on that date, he had

forwarded the prison warden documents, requesting a final disposition in this matter. It was Tauwab's position that he had fulfilled the statutory requirements set forth in R.C. 2941.401, had not been brought to trial within the requisite time period, and, therefore, was entitled to a dismissal. The State, however, responded that it had never received written notice that Tauwab was available for trial. On December 17, 2014, the trial court denied Tauwab's motion on the basis that neither it, nor the State, had received notice of his request to be brought to trial.

{¶4} Following the court's denial of his motion, Tauwab filed a reply brief in support of his motion as well as a motion for reconsideration. The trial court denied his motion to reconsider, but allowed him to make an oral motion to dismiss on the same grounds at his March 4, 2015 pre-trial. The State then filed a written brief in opposition to the oral motion to dismiss. In its brief in opposition, the State argued that Tauwab was not entitled to a dismissal under R.C. 2941.401 because he had neglected to comply with the statute's notice provisions. The State attached to its brief affidavits from Carolyn Young and Julie Loomis, two employees of the Ohio Department of Rehabilitation and Correction. On March 16, 2015, the trial court denied Tauwab's motion. Although the court determined that Tauwab had set forth a prima facie case that he had complied with R.C. 2941.401's notice provisions, the court found that the State had rebutted his prima facie showing. As such, the court set the matter for trial.

{¶5} After a jury was empaneled, Tauwab decided to retract his not guilty plea and plead no contest to the charge of grand theft auto. As a part of his plea, Tauwab agreed to forfeit any right or interest he might have in the 2013 Hyundai Equus that was the subject of his charge. The trial court sentenced him to six months in prison, ordered his interest in the subject vehicle forfeited, and ordered the vehicle returned. The court also ordered the Summit County Clerk of Courts to issue a clear title for the vehicle.

{¶6} Tauwab appealed from the trial court's denial of his motion to dismiss, and this Court affirmed the trial court's judgment. *See State v. Tauwab*, 9th Dist. Summit No. 27736, 2015-Ohio-3751. Specifically, we determined that Tauwab had failed to show that he properly invoked his speedy trial rights under R.C. 2941.401 by delivering the necessary statutory notices to the prison's warden. *Id.* at ¶ 13-15.

{¶7} Shortly before this Court issued its decision, Tauwab filed a petition for post-conviction relief. He also later filed a motion for summary judgment. The basis for both his petition and motion for summary judgment was once again that his speedy trial rights under R.C. 2941.401 had been violated. The State moved to dismiss Tauwab's petition, and he filed a brief in opposition to the dismissal. He also filed a motion to vacate the court's orders about the title to the vehicle at issue, should he prove successful on his petition for post-conviction relief. The State filed a brief in opposition to both Tauwab's motion for summary judgment and his motion to vacate. Subsequently, the court denied all of Tauwab's outstanding motions.

{¶8} Tauwab now appeals from the court's judgment and raises one assignment of error for our review.

II

Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING TAUWAB'S PETITION FOR POST CONVICTION RELIEF, MOTION FOR SUMMARY JUDGMENT AND MOTION TO VACATE TITLE.

{¶9} In his sole assignment of error, Tauwab argues that the trial court erred by denying his petition for post-conviction relief, as well as his motion for summary judgment and motion to vacate. We do not agree.

{¶10} "Generally, this Court reviews a trial court's denial of a [post-conviction relief] petition for an abuse of discretion." *State v. Perry*, 9th Dist. Summit No. 26766, 2013-Ohio-4466, ¶ 7. "When a trial court denies a petition solely on the basis of an issue of law, however, this Court's review is de novo." *State v. Childs*, 9th Dist. Summit No. 25448, 2011-Ohio-913, ¶ 9. Because the trial court here denied Tauwab's petition on the basis of res judicata, we review this matter de novo. *See State v. Wharton*, 9th Dist. Summit No. 27656, 2015-Ohio-4566, ¶ 9.

{¶11} "[A] final judgment of conviction bars a * * * defendant who was represented by counsel 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 * * * on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "[T]o obtain post-conviction relief and avoid the preclusive effect of res judicata, a petitioner must present claims in his petition that are based on evidence outside of the original record that existed during direct appellate proceedings." *State v. Bulls*, 9th Dist. Summit No. 27713, 2015-Ohio-5094, ¶ 9.

> "Presenting evidence outside the record[, however,] does not automatically defeat the doctrine of res judicata. Such evidence must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim[.] Evidence outside the record must demonstrate that the claims advanced in the petition could not have been fairly determined on direct appeal based on the original trial court record without resorting to evidence outside the record."

(Internal quotations and citations omitted.) *State v. Fry*, 9th Dist. Summit No. 2012-Ohio-2602, ¶ 4, quoting *State v. Dovala*, 9th Dist. Lorain No. 08CA009455, 2009-Ohio-1420, ¶ 10.

{¶12} R.C. 2941.401 affords a prisoner a statutory right to be brought to trial on an untried indictment "within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of

the place of his imprisonment and a request for a final disposition." The statute provides that the written notice and request for final disposition "shall be given or sent by the prisoner to the warden * * * having custody of him, who shall promptly forward it * * * to the appropriate prosecuting attorney and court * * *." R.C. 2941.401. "In its plainest language, R.C. 2941.401 grants an incarcerated defendant a chance to have all pending charges resolved in a timely manner * * *. It does not, however, allow a defendant to avoid prosecution simply because the state failed to locate him." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶ 25.

{¶13} On direct appeal, this Court determined that Tauwab failed to properly invoke his speedy trial rights under R.C. 2941.401. *Tauwab*, 2015-Ohio-3751, at ¶ 15. We affirmed the trial court's conclusion that the prison warden never received any written notice and request for final disposition from Tauwab. *Id.* at ¶ 13. In doing so, we considered the affidavits of Ms. Young and Ms. Loomis and the documents that Tauwab provided the court in support of his motion. *Id.* at ¶ 14. We noted that Ms. Young, the Assistant Chief for the Bureau of Records Management, had averred that the Department of Rehabilitation and Correction had "never received a communication from Tauwab regarding the request for a final disposition or the other required notices." *Id.* We further noted that Ms. Loomis, an assistant to the warden at Trumbull Correctional Institution, likewise had averred that the warden's office "had no records reflecting receipt of Tauwab's purported notices * * *." *Id.* Additionally, we noted that Tauwab had not filed any of the required statutory notices with the trial court until December 3, 2014, the date that he filed his motion to dismiss. *Id.* We concluded that the trial court did not err by denying Tauwab's motion to dismiss for a violation of his speedy trial rights. *Id.* at ¶ 15.

{¶14} In support of his petition for post-conviction relief, Tauwab relied upon another affidavit that he completed on his own behalf and several unauthenticated items. He averred

that, after filing his direct appeal, he learned from another inmate that one of the prison warden's secretaries had returned rather than processed the statutory notices that the inmate had sent to the warden's office. Tauwab averred that the inmate, William Johnson, had been told that "it was his responsibility, not [the warden's], to forward speedy trial documents to the court." The unauthenticated photocopies attached to Tauwab's petition were: (1) a copy of a "Response to Kite" from "Ms. Montgomery" to "Johnson" that reads "You are responsible for sending the Notice of Availability to the court"; (2) a copy of a notice of availability under R.C. 2941.401, signed by William Johnson; and (3) a copy of a written notice addressed to the warden of Trumbull Correctional Institution and signed by William Johnson. Tauwab argued that his affidavit and the foregoing unauthenticated items evidenced the fact that Ms. Loomis perjured herself when she submitted an affidavit for the State. According to Tauwab, the evidence he submitted was proof that the warden's office did not immediately scan notices of availability and requests for final disposition for processing. Instead, at least one secretary at the office returned the notices to inmates under the misconception that the warden's office was not responsible for them. Because Ms. Loomis lied and her affidavit was the "only evidence" the State offered in response to his motion to dismiss, Tauwab argued, he was entitled to relief.

{¶15} The trial court denied Tauwab's petition for post-conviction relief on the basis that this Court had already determined that no violation of his speedy trial rights had occurred and Tauwab had failed to set forth any additional evidence to negate that conclusion. Tauwab maintains that the trial court erred in its determination because he set forth evidence that Ms. Loomis perjured herself. He argues that Ms. Loomis' affidavit was critical to the trial court's and this Court's rejection of his speedy trial claim. He further argues that, at a minimum, he was entitled to an evidentiary hearing on the basis of his new evidence.

{¶16} A trial court may deny a post-conviction relief petition without holding a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus. Further, "[r]es judicata is a proper basis upon which to dismiss a petition for post[-]conviction relief without a hearing." *State v. Griffin*, 9th Dist. Lorain No. 14CA010680, 2016-Ohio-2988, ¶ 14. Having reviewed the record, we cannot conclude that the trial court erred when it denied Tauwab's petition without holding a hearing.

{¶17} Although Tauwab attached new evidence to his petition for post-conviction relief, he failed to demonstrate that, absent that evidence, his claims "could not have been fairly determined on direct appeal * * *." *Fry*, 2012-Ohio-2602, at ¶ 4, quoting *Dovala*, 2009-Ohio-1420, at ¶ 10. The items that Tauwab attached to his petition were not authenticated and none of them pertained directly to him. Instead, they pertained to another individual, whom Tauwab identified as a fellow inmate at the prison. Even assuming that prison officials wrongfully rejected another inmate's statutory notices, however, Tauwab never presented any evidence that his own statutory notices were similarly rejected and returned to him. For example, he never claimed to have received correspondence from the warden's office, notifying him that he was responsible for sending his own statutory notices to the appropriate court. There also was no evidence that the "Ms. Montgomery" referenced in Tauwab's attachments handled Tauwab's statutory notices or was even employed as a secretary for the warden at the time that he allegedly sent his notices. In essence, Tauwab asked the trial court to afford him relief on the basis of speculation. *See State v. Ross*, 9th Dist. Summit No. 27180, 2014-Ohio-2038, ¶ 10, quoting *State v. English*, 9th Dist. Lorain No. 99CA007408, 2000 WL 254912, *4 (Mar. 8, 2000)

("Conjecture built upon insufficiently supported speculation does not establish substantive grounds entitling a defendant to post[-]conviction relief.").

{¶18} Even assuming that the new evidence Tauwab presented somehow undercut Ms. Loomis' affidavit, her affidavit was not the only evidence upon which the trial court and this Court relied in rejecting Tauwab's speedy trial argument. The State also presented the affidavit of Ms. Young. Ms. Young stated that she notified Tauwab of his pending indictment on May 7, 2014, but that her office never received any communication from him requesting a trial on his indictment. On direct appeal, this Court reviewed Ms. Young's affidavit in conjunction with the affidavit of Ms. Loomis and the copies of the statutory notices that Tauwab claimed to have submitted to the warden. *See Tauwab*, 2015-Ohio-3751, at ¶ 13-15. Following our review of those items, we specifically rejected Tauwab's claim that he properly invoked his speedy trial rights. *Id.* The new evidence that Tauwab presented in support of his petition did not advance his claim that he did, in fact, properly invoke his rights. *See Fry*, 2012-Ohio-2602, at ¶ 4, quoting *Dovala*, 2009-Ohio-1420, at ¶ 10. Accordingly, although Tauwab attached new evidence to his petition, the doctrine of res judicata still applies here, and the trial court did not err by denying his petition without a hearing. *See Bulls*, 2015-Ohio-5094, at ¶ 9; *Fry* at ¶ 4. *See also Griffin*, 2016-Ohio-2988, at ¶ 14.

{¶19} To the extent Tauwab argues that the trial court erred by denying his motion for summary judgment, his motion was premised upon the same arguments as his petition for post-conviction relief. The Ohio Supreme Court has held that "where a criminal defendant, subsequent to his or her direct appeal [or the expiration of the time for filing an 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 post[-]conviction relief as

defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 160 (1997). Because Tauwab's motion for summary judgment and petition for post-conviction relief are one in the same, we need not separately determine whether the trial court erred by denying his motion for summary judgment. Likewise, we need not determine whether the trial court erred by denying his motion to vacate. Tauwab's motion to vacate was premised upon his succeeding on his petition for post-conviction relief. Because we have rejected his arguments regarding his petition, we likewise reject his argument concerning his motion to vacate. Tauwab's sole assignment of error is overruled.

III

{¶20} Tauwab's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

FRANK D. CELEBREZZE, JR.
FOR THE COURT

MOORE, J.
CONCURS.

CARR, P. J.
DISSENTING.

{¶21} As the trial court merely ruled that Tauwab's petition for post-conviction relief was moot, I would find that the trial court did not make adequate findings of fact and conclusions of law and dismiss the appeal for lack of a final, appealable order. *State v. Beard*, 9th Dist. Lorain No. 07CA009240, 2008-Ohio-3722, ¶ 3.

(Celebrezze, J., of the Eighth District Court of Appeals, sitting by assignment.)

APPEARANCES:

AMIR J. TAUWAB, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.