

[Cite as *State v. Wright*, 2010-Ohio-1899.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 23330, 23403 23404, 23521
v.	:	T.C. NO. 77 CR 1006 78 CR 840
DWAINE WRIGHT	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 30th day of April, 2010.

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DWAINE WRIGHT, #43808-061, U.S.P. Hazelton, P.O. Box 2000, Bruceton Mills, W.V. 26525
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notices of Appeal of Dwaine Wright, filed March 19, 2009, in case no. CA 23330, April 28, 2009, in case nos. CA 23403 and CA 23404; and July 1, 2009, in case no. CA 23521.

{¶ 2} Case No. CA 23330 includes two cases. In the first case, no. 1977-CR-1006,

Wright was indicted on one count of robbery and two counts of abduction. Wright pled guilty to robbery, and in exchange, the other charges were dismissed. Wright was sentenced to a prison term of two to 15 years. In 1978, Wright was released on shock probation, he violated the terms of his release, his probation was revoked and Wright was returned to prison. One of the grounds for his revocation was an arrest for aggravated burglary, in case no. 1978 CR 840. Wright pled guilty to the lesser included offense of burglary and was sentenced to a term of two to 15 years to be served consecutively to the remaining sentence in case no. 1977-CR-1006. In 1981, Wright filed a petition for post-conviction relief in case no. 1978 CR 840, alleging ineffective assistance of counsel. That petition was denied.

{¶ 3} On November 25, 2008, Wright filed pro se Petitions “for Writ of Coram Nobis or an Alternative Remedy,” in case nos. 1977-CR-1006 and 1978-CR-840. According to Wright, he is mentally incompetent, his pleas were not made knowingly and voluntarily, and his trial counsel was ineffective. Attached to the Petitions are the following unauthenticated documents: 1) Psychological Evaluation Report, prepared by Tyrone Payne, PH.D., and dated December 21, 1999; 2) Psychological Evaluation Report, prepared by Mary Ann Jones, PH.D., and dated February 20, 2003; 3) a Medical Advice Request, signed by Bruce J. Goldsmith, Ph.D. and dated April 3, 2003, which notes that Wright alleges, “I hear things,” and “people make fun of me,” and states in part, “Please advise on severity of clmt’s mental allegations.” ;4) an Ohio Bureau of Disability Determination Authorization for Release of Information, dated September 5, 1999, authorizing Dunbar High School to release Wright’s records for the adjudication of a social security and/or supplemental security income disability claim; 5) a Mental Residual Function Capacity Assessment, dated January 24, 2000; 6) a Psychiatric Review Technique, dated January

24, 2000; 7) portions of a presentence investigation report, a portion of which provides, “For several of his criminal cases in the Montgomery County Common Pleas Court, Wright underwent psychiatric and forensic evaluations to determine if he was competent to stand trial. On all occasions when he was examined, Wright was found competent and medical staff could not conclude he was suffering from any active mental illness.”; and 8) a document entitled “document 104,” which Wright describes as “the relevant page” from a federal matter, dated October 10, 2006.

{¶ 4} On February 12, 2009, the trial court issued a decision overruling Wright’s “Writs”. The trial court characterized the writs alternatively as a petition for post-conviction relief and/or a motion to withdraw guilty plea. The court determined, pursuant to R.C. 2953.21(A)(2), “petitioner’s post-conviction relief request is untimely. The Petition was filed approximately thirty years after the convictions. Additionally, Petitioner has not alleged any facts in the Petition or attached materials which would support an untimely petition.” Regarding Wright’s motion to withdraw his plea, the trial court determined that Wright was required, pursuant to Crim.R. 32.1, to demonstrate a manifest injustice and also that Wright “failed to pursue his Petition for an unreasonable length of time.” Wright appealed, in case no. CA 23330.

{¶ 5} While the appeal was pending, Wright filed petitions for post-conviction relief in case nos. 1977-CR-1006 and 1978-CR-840, which the trial court denied on April 10, 2009. Wright appealed, in case nos. CA 23403 and CA 23404. Wright also filed a motion to withdraw his guilty pleas in case no. 1977 CR 1006, which the trial court overruled on June 19, 2009. Wright appealed, in case no. CA 23521.

{¶ 6} We consolidated the above appeals, and our resolution of the issues raised in Case

No. 23330 will resolve the issues presented in all four appeals.

{¶ 7} “As a preliminary matter, we conclude that the trial court acted reasonably in treating Wright’s Petitions for a Writ of Coram Nobis as a petition for post-conviction relief or, in the alternative, a motion to withdraw his guilty plea. The phrase ‘coram nobis’ is ‘obsolescent if not obsolete in most jurisdictions.’ Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press 1987) 155. It is “the name of a writ of error directed to a court for review of its own judgments and predicated on alleged errors of fact.” *Id.* The purpose behind Ohio’s post-conviction relief statutes is similar; they ‘permit trial courts to consider factual information that may come to light after a defendant’s trial, [but] not * * * to advance new legal theories using the same underlying facts.’ *State v. Williamitis*, Montgomery App. No. 21321, 2006-Ohio-2904, at ¶18. Thus, the trial court acted reasonably in construing Wright’s petition as a petition for post-conviction relief. Further, because Wright alleged that a “manifest injustice” had occurred, the trial court reasonably construed his petition, in the alternative, as a motion to withdraw his guilty plea pursuant to Crim.R. 32.1.” *State v. Wright*, Montgomery App. Nos. 23301, 23462, 23597, 2010-Ohio-1512, ¶ 5.

{¶ 8} Herein, Wright repeats the arguments he made in the trial court, namely that he received ineffective assistance of counsel, that he did not understand his plea, and that his plea was not knowingly and intelligently made.

{¶ 9} Wright’s petition for post-conviction relief clearly was not filed within the time limitation set forth in R.C. 2953.21(A)(2). We note, R.C. 2953.21 provides, for convictions prior to September 21, 1995, petitions for post conviction relief must be filed no later than one year after the date of conviction. See § 2, AM. S.B. No. 4. Even under this extended standard,

Wright's petition is grossly late. "The trial court lacks jurisdiction to consider an untimely petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, at ¶7. Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if he was unavoidably prevented from discovering the facts upon which he relies to present his claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to his situation. *Id.* If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b)." *Wright*, ¶ 7. "The phrase 'unavoidably prevented' means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *State v. McDonald*, Erie App. No. E-04-009, 2005-Ohio-798, ¶ 19.

{¶ 10} Wright has failed to demonstrate that he was unavoidably prevented from raising these facts in a timely manner. Accordingly, the trial court lacked jurisdiction to consider the substance of his argument. R.C. 2953.23(A)(1)(a). The trial court correctly overruled the petition for post-conviction relief.

{¶ 11} Wright also contends that the trial court violated his rights by accepting his pleas, that the pleas were taken in violation of Crim.R. 11 and *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, and that a "manifest injustice" resulted. "As the trial court observed, a motion to withdraw a guilty plea pursuant to Crim.R. 32.1 is not governed by the time restrictions imposed on post-conviction proceedings in R.C. 2953.21, and the two remedies are not mutually exclusive. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶14.

{¶ 12} “Crim.R. 32.1 states: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” The burden of establishing the existence of a manifest injustice is on the party seeking to withdraw the plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 264.

{¶ 13} “Although Crim.R. 32.1 does not contain a time limit for filing a post-sentence motion to withdraw a plea, a trial court may take into consideration the passage of time between entry of a plea and a defendant’s attempt to withdraw it. *Smith*, [supra]; *State v. Bush*, [supra], ¶14. ‘The more time that passes between the defendant’s plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time.’ *State v. Francis*, 104 Ohio St.3d 490, 497, *** 2004-Ohio-6894, ¶40.” *Xenia v. Jones*, Greene App. No. 07-CA-104, 2008-Ohio-4733, at ¶9.” *Wright*, 11-13.

{¶ 14} The trial court overruled the motion to withdraw due to the length of Wright’s unreasonable delay. We further note, a transcript of Wright’s plea in case no. 1978 CR 840 is not before us, and we must presume the regularity of the proceedings below in the absence of a transcript and affirm. *Shirley v. Kruse*, Greene App. No. 2006-CA-12, 2007-Ohio-193. The transcript of Wright’s plea, in case no. 1977-CR-1006, is before us, and it undermines his claims of manifest injustice. The transcript reveals a complete and thorough Crim.R. 11 colloquy in which Wright not only indicated that he understood the

proceedings but further articulated, in his own words, his understanding of the plea agreement and the waiver of his rights.

{¶ 15} For the foregoing reasons, Wright’s “Issues Presented” in Case No. 23330 are overruled.

{¶ 16} As we mentioned above, our resolution of the issues in Case No. 23330 also disposes of the issues raised in Case Nos. 23521, and 23403/23404 and 223341. The judgments in all four cases will be affirmed.

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GRADY, J. and RINGLAND, J., concur.

(Hon. Robert P. Ringland, Twelfth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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