

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-11-018

Appellee

Trial Court No. 08CR120

v.

Kai Ward

**DECISION AND JUDGMENT**

Appellant

Decided: May 4, 2012

\* \* \* \* \*

Mark Mulligan, Ottawa County Prosecuting Attorney, and  
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

K. Ronald Bailey, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Defendant-appellant, Kai Ward, appeals Ottawa County Court of Common Pleas' May 25, 2011 decision and judgment entry denying his petition for postconviction relief. Because we find that the trial court abused its discretion we reverse, in part.

{¶ 2} The relevant facts are as follows. On July 30, 2009, appellant entered guilty pleas to three counts of disseminating matter harmful to juveniles, R.C. 2907.31(A)(1), fifth degree felonies. Appellant also pled guilty to two counts of gross sexual imposition with a child less than 13 years of age, R.C. 2907.05(A)(4), third degree felonies. Pursuant to a plea agreement with the state, the state dismissed the remaining eight counts in the indictment which included five sex offense counts and three drug-related counts.

{¶ 3} On January 8, 2010, appellant was sentenced to 12 months of imprisonment for each of the fifth degree felonies, and five years of imprisonment for each of the third degree felonies. The five-year terms were ordered to be served consecutively but concurrent to the 12-month terms for a total of ten years of imprisonment.

{¶ 4} Appellant filed a direct appeal in the matter raising an assignment of error as to the imposition of consecutive sentences following *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellant also raised an assignment of error arguing that the trial court's sentence violated R.C. 2929.13(A), which provides that a court's sentence shall not impose an unnecessary burden on the state. Specifically, appellant argued that his health condition required costly treatment. We rejected appellant's arguments and affirmed the trial court's judgment. *See State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164.

{¶ 5} On July 7, 2010, while appellant's appeal was pending, he filed a petition for postconviction relief. Appellant argued that he was denied the effective assistance of trial

counsel where his counsel promised that he would receive probation by accepting the state's plea offer. He further stated that counsel was ineffective by failing to object to the prosecutor's statements at sentencing which, he argued, were in contravention of the plea agreement where the state agreed not to recommend a sentence or object to appellant's request for probation. The court denied the petition without a hearing finding that the matters raised could have been raised on direct appeal and that, because the case was pending on appeal, it lacked jurisdiction to "act inconsistently" with any decision from this court.

{¶ 6} On August 2, 2010, appellant filed an amended petition for postconviction relief. Appellant made arguments similar to those raised in his initial petition but also argued that relief was proper pursuant to the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Appellant also raised the issue of his poor health. Appellant supported the petition with his affidavit, the affidavits of his prior defense attorneys, and the January 8, 2010 sentencing hearing transcript.

{¶ 7} In response, the state argued that it did not breach the terms of the plea agreement as remembered by appellant. The state indicated that it did not make a recommendation at sentencing; rather, it merely recited some of the statements contained in the presentence investigation report which the court had reviewed.

{¶ 8} A hearing was held on the petition on March 28, 2011. Appellant testified that attorney Andrew Bucher represented him in the matter through the plea hearing.

Bucher's partner, attorney James Reinheimer, represented him at sentencing. Appellant stated that he completed school through second grade and that he cannot write but is getting better at reading.

{¶ 9} Appellant testified that Bucher advised him to enter a guilty plea and that he would be sentenced to probation. Appellant stated that attorney Bucher advised him not to tell the judge about the agreement. Appellant stated that he did not really understand that he could be sentenced to 11 years of imprisonment.

{¶ 10} Appellant testified that at the time he was sentenced he was suffering from stage one liver disease and was taking chemotherapy drugs. Appellant stated that the chemotherapy costs approximately \$4,300 per month and that he was paying for it through financing with the drug company. Appellant stated that he had been receiving chemotherapy in prison but that it was stopped after he had a bad reaction. Appellant stated that he has not gotten the CAT scan or lung biopsy he needs.

{¶ 11} Appellant was then cross-examined about the plea hearing. He admitted that the judge explained the maximum penalty for each count and that he could be sentenced to any amount of time in that range.

{¶ 12} The court then questioned appellant about his illness. Appellant was unable to state the exact nature of his liver disease. He indicated that he had hepatitis and cirrhosis and that these were deteriorating his liver; these diseases led to his "stage one," or pre-cancer diagnosis. He also stated that his lymph nodes were enlarged around his lungs.

{¶ 13} The affidavits of appellant’s defense counsel were admitted into evidence. Attorney Bucher stated that pursuant to the oral plea agreement with the state, the prosecutor agreed not to make a sentencing recommendation and not object to the defense recommendation of community control. He stated: “As a result of the plea deal entered into with the State of Ohio, it was my opinion that the Defendant was in a good position to receive community control, but it was not certain.”

{¶ 14} Attorney Reinheimer’s affidavit stated that he represented appellant at sentencing. Reinheimer stated that he explained appellant’s health condition and costs related to treatment. Reinheimer also indicated that the prosecutor advised the court to consider appellant’s prior charges involving minors and that the victim was seven years old. The prosecutor further stated that appellant would persist in such conduct.

{¶ 15} On May 25, 2011, the trial court denied appellant’s petition. The court found that appellant’s ineffective assistance of counsel and cruel and unusual punishment claims were barred by res judicata. This appeal followed.

{¶ 16} Appellant raises four assignments of error for our review:

1. The trial court erred in denying appellant’s amended petition for post-conviction relief on the basis that appellant could have raised on appeal his arguments presented in the amended petition for postconviction relief.

2. The trial court erred in failing to grant appellant’s amended petition for postconviction relief, pursuant to Santobello v. New York.

3. The trial court erred in denying appellant relief pursuant to appellant's ineffective assistance of counsel at appellant's sentencing hearing.

4. The trial court erred in failing to find appellant's sentence to be violative of appellant's Eighth Amendment right against cruel and unusual punishment, as guaranteed by the Ohio Constitution, when appellant receives ineffective healthcare while incarcerated in the state of Ohio.

{¶ 17} We first note that the standard of review on appeal from postconviction proceedings is whether the trial court abused its discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 57. A trial court abuses its discretion when its judgment is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 18} Appellant's first assignment of error asserts that the trial court erroneously denied his petition for postconviction relief on the basis that the arguments were barred by res judicata in that they could have been raised on direct appeal. Res judicata does bar postconviction relief claims that were raised or could have been raised on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraphs eight and nine of the syllabus; *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus. Where a petitioner, represented by new counsel on appeal, alleges ineffective assistance of trial counsel, that petitioner is not entitled to postconviction relief unless he presents evidence dehors the record to show that trial counsel was ineffective. In other words, the petitioner

must present evidence outside the record that could not have been raised on direct appeal of his conviction. *See State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus.

{¶ 19} Under certain circumstances, a petitioner will be allowed an evidentiary hearing on the petition. According to R.C. 2953.21(C), a petitioner is entitled to a hearing when, upon review of the petition and the record, the trial court finds that there are “substantive grounds for relief.”

{¶ 20} In the present case, the trial court held a hearing on appellant’s petition. Appellant testified at the hearing and the affidavits of his defense attorneys were admitted into evidence. Upon review, we find that as to the argument that the state failed to adhere to the oral plea agreement, and that counsel was ineffective for failing to object, the court abused its discretion by summarily dismissing the argument as being barred by res judicata. The affidavits provided in support of the petition were not part of the trial proceedings and could not have been included in the record before this court on direct appeal.

{¶ 21} Conversely, we agree that appellant’s arguments as to his sentence being in violation of the Eighth Amendment’s proscription against cruel and unusual punishment could have and were raised on his direct appeal. This court held that appellant failed to demonstrate that appellant’s sentence imposed an unreasonable burden on the state and was contrary to law. *Ward, supra*, at ¶ 9-10. Further, any arguments regarding appellant’s lack of medical care in prison are not a proper subject of a postconviction

petition. Such actions are limited to claims of “void or voidable” judgments. *See* R.C. 2953.21(A)(1)(a).

{¶ 22} Accordingly, we find that appellant’s first assignment of error is well-taken, in part. Appellant’s second and third assignments of error are moot. Finally, based on our disposition of appellant’s first assignment of error, we find that appellant’s fourth assignment of error is not well-taken.

{¶ 23} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Ottawa County Court of Common Pleas is reversed, in part. The matter is remanded for consideration on the merits of appellant’s postconviction petition arguments regarding the alleged breach of the oral plea agreement. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.