

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

JOHN B. STEVENS,

Defendant-Appellant.

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S.C. No. 2006-2199

C.A. No. CL2006-1128

STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

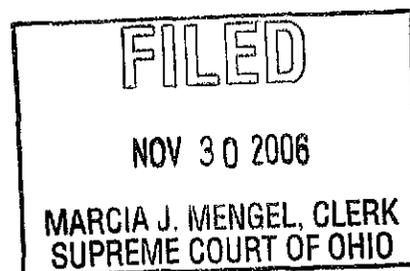
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ON BEHALF OF PLAINTIFF-APPELLEE

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ON BEHALF OF DEFENDANT-APPELLANT



EXPLANATION OF WHY THIS CASE IS NEITHER A CASE OF PUBLIC OR GREAT GENERAL INTEREST, NOT INVOLVES ANY SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED.

Appellant contends that the trial court below erred in failing to grant his post-conviction petition, and erred in failing to grant him an evidentiary hearing on his claims. However, Appellant has not asserted the denial of any substantial constitutional right. Rather Appellant is merely contesting factual findings made by the trial court and the appellate court below. A review of the record clearly shows that Appellant's petition was not timely filed. As such there is nothing to be gained by acceptance of jurisdiction to this Court. If this Court were to accept jurisdiction, it would involve solely a review of factual findings. Since this Court could undoubtedly make use of its limited time and judicial resources more productively, it should decline review. Moreover, review should be denied for all the reasons set forth in the memorandum below.

STATEMENT OF THE CASE/FACTS

On June 4, 2003, Appellant was indicted on one count of possession of cocaine, in violation of R.C. 2925.11(A) & (C)(4)(a), a fifth degree felony, and one count of failure to comply with signal of a police officer, in violation of R.C.2921.331(B) & (C)(5)(a)(ii), a third degree felony.

On July 2, 2003, Appellant voluntarily entered pleas of guilty to both offenses. The trial court found Appellant guilty of both offenses and sentenced Appellant to serve four years of community control with various conditions and stipulations. If Appellant violated the terms of his community control, Appellant was to serve a maximum sentence of 12 months as to count one of the indictment and 5 years as to count two.

On January 20, 2004, Appellant was charged with having violated the terms of his community control. A capias was issued per the Lucas County Adult Probation Department. On May 15, 2004, Appellant's community control was revoked and Appellant was ordered to serve 11 months as to count one of the indictment and 4 years as to count two, with both sentences to be served concurrently to each other¹.

Since that time, Appellant has filed a number of unsuccessful post-conviction petitions and motions seeking modification of sentence². The motion which is the

¹The trial court erroneously ordered the sentences to be served concurrently to each other. However, R.C. 2921.331(D) requires that the sentence be served consecutively to any other prison term imposed.

² While appellant asserts that he has been denied transcripts of the proceedings (see Appellant's Memorandum in Support of Jurisdiction at p. 2) the State notes that Appellant apparently has copies of the transcripts, as evidenced by the fact that he attached a copy of his plea entry hearing to his merit brief filed in the appellate court on July 12, 2006.

subject of this appeal was filed in the trial court on January 17, 2006³. Appellant filed his notice of appeal with the Sixth District Court of Appeals on April 12, 2006.

INTRODUCTION:

I. Purpose and Scope of Post-Conviction Relief:

Appellant filed a post-conviction proceeding pursuant to R.C. 2953.21, et seq. The purpose of such a proceeding is stated in section (A) of 2953.21, which provides as follows:

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims 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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

³ Appellant's brief argues that the motion filed was intended to be a post-conviction petition. See Appellant's brief at p. 3.

This provision allows a criminal defendant to attack his conviction where he has a claim that there was a serious, prejudicial violation of a right secured to him by the State or federal constitution. The purpose of a post-conviction action is to allow a defendant to raise an existing issue which, for some reason, could not be raised on appeal. The purpose of a post-conviction action is to raise issues, not to search for them. To get relief a petitioner must plead facts; the pleading of mere speculation, or unsubstantiated allegations or legal conclusions, does not entitle a petitioner to relief. *State v. Perry* (1967), 10 Ohio St. 2d 175, 226 N.E. 2d 104. Broad allegations of a violation of a constitutional right, unaccompanied by facts showing the violation and resultant prejudice, do not entitle a petitioner to a hearing or relief. *State v. Jackson* (1980), 64 Ohio St. 2d 107, 413 N.E. 2d 819; *State v. Pankey* (1981), 68 Ohio St. 2d 58, 428 N.E. 2d 413. In a post-conviction action the defendant must plead and demonstrate actual facts which show a constitutional violation and resultant prejudice. *State v. Cole* (1982), 2 Ohio St. 3d 112, 443 N.E. 2d 169.

II. The Record

The record to be used in considering a post-conviction action and determining if an evidentiary hearing is required is well defined. R.C. 2953.21(C) provides as follows:

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's

journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

The record before the court thus includes the existing court record, including the trial transcript, as well as the documentation attached to the pleadings and the motions for summary judgment. *State v. Jackson* (1980), 64 Ohio St. 2d 107, 413 N.E. 2d 819; *State v. Milanovich* (1975), 42 Ohio St. 2d 46, 325 N.E.2d 540. In determining whether to grant a hearing or to grant summary judgment in the present case, this Court must consider the entire record of the case before it, as well as the documents attached to the various pleadings.

III. Necessity for a Hearing

An evidentiary hearing is not mandated in every post-conviction action. R.C. 2953.21(D) provides as follows:

(D) Within ten days after the docketing of the petition, or within any further time as the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to such judgment shall appear on the face of the record.

This provision indicates that a hearing need be held only where the issues cannot be resolved from the existing records and the evidentiary material filed with the pleadings.

Where there are no material facts in dispute, or where all factual disputes can be resolved from the existing record, no evidentiary hearing is required, or even needed.

Thus, even if there is a fact in dispute, no hearing is required unless the determination of that fact is essential to the outcome of the case. Where a fact in dispute does not concern a central issue, and would not affect the outcome, it need not be resolved. See, *United States v. Cronin* (1984), 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657.

Simply because a defendant desires to argue about a fact does not mean that such a fact is of any significance. The importance of any particular fact, and the necessity of an evidentiary hearing to resolve a factual dispute, must be determined based upon the entire record.

IV. Burden of Proof

In a post-conviction action the initial burden of proof is on the defendant. He has the burden to submit evidentiary documents which contain enough facts to demonstrate the denial of a constitutional right and resultant prejudice to the defendant. *State v. Jackson, supra*; *State v. Pankey* (1981), 68 Ohio St. 2d 58, 428 N.E. 2d 413; *State v. Ledger* (1984), 17 Ohio App. 3d 94, 477 N.E. 2d 643. It is not enough for the defendant to make speculative or conclusory allegations. Post-conviction evidentiary hearings are not to be lightly granted merely because an allegation of a denial of a constitutional right has been made.

FIRST PROPOSITION OF LAW: Appellant's Motion to Withdraw Plea was not timely filed, was properly denied, and as a result Appellant was not entitled to an evidentiary hearing.

Crim.R. 32.1 provides:

A motion to withdraw a plea of guilty or no contest may be made **only before** sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. (Emphasis added).

The Appellant's motion was filed on February 27, 2006, approximately three years after conviction. As such, the motion was not timely filed. Further, the Appellant's motion fails to state articulable grounds alleging manifest injustice. The fact that Appellant waited three years after conviction and after serving sentence in order to file his motion, serves to show that there is no manifest injustice.⁴ "An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R.32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph three of the syllabus.

⁴ This is particularly so since the assertion in Appellant's motion that he has "new evidence" to show that his vehicular flight from police never exceed 35 mph is legally irrelevant. Speed of flight is not an element that the State must prove in regard to a charge of "Failure to Comply" under Ohio Rev. Code §2921.331 (West 2006). In addition to venue, the State must merely prove that Appellant operated a motor vehicle so as to willfully elude or flee from a police officer, after receiving a visible or audible signal from the officer to stop the vehicle, and that the Appellant created a substantial risk of physical harm to persons or property. *Id.* The State submits that in this case it met its burden of proof. Appellant in his "Response to State's Memorandum Contra" filed Jan. 17, 2006, admits that during the pursuit he ran red lights and stop signs. See Appellant's "Response" at p. 5. It goes without saying that running stop signs and red lights creates a substantial risk of physical harm to persons and property. As a result, Appellant's claim that the speed of his vehicle never exceed 35 mph is legally irrelevant, does not establish manifest injustice and must be disregarded.

Further, Appellant's motion asserted that he was denied evidence that his flight never exceeded 35 mph. However, the claim is without merit and did not prejudice the outcome of the case. Even if Appellant's flight from police never exceeded 35 mph, this fact would have been known to Appellant at the time of trial, regardless of whether or not a copy of the Vehicle Pursuit Form was provided as part of the discovery process, since it is undisputed that Appellant did all the driving. Appellant can and should be presumed to know the speed of his own travel and should be expected to timely assert such a claim at the time of trial and consequently on direct appeal.

In this case, any factual dispute asserted by Appellant can be resolved solely by reference to the record. Where there are no material facts in dispute, or where all factual disputes can be resolved from the existing record, no evidentiary hearing is required, or even needed. Thus, even if there is a fact in dispute, no hearing is required unless the determination of that fact is essential to the outcome of the case. Where a fact in dispute does not concern a central issue, and would not affect the outcome, it need not be resolved. See, *United States v. Cronin* (1984), 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657. Where the Appellant's petition fails to establish his entitlement to relief, Appellant is not entitled to an evidentiary hearing. *State v. Carpenter* (1996), 116 Ohio App.3d 292, 295, 688 N.E.2d 14.

Simply because a defendant desires to argue about a fact does not mean that such a fact is of any significance. The importance of any particular fact, and the necessity of an evidentiary hearing to resolve a factual dispute, must be determined based upon the entire record.

Based on the above, Appellant's claims regarding alleged evidentiary problems, the alleged denial of defense evidence at the time of his plea entry, and the claim that he was entitled to an evidentiary hearing, are all without merit.

Second Proposition of Law: Appellant's Lengthy Delay Precluded a Finding of Prejudice/Manifest Injustice.

It is well-settled that for an Appellant to withdraw a guilty plea or plea of no contest, prejudice/manifest injustice must be proven. The lengthy delay by the Appellant prior to pursuing this relief should preclude any finding of prejudice or manifest injustice. Both the delay since 2003 and the Appellant's delay since being incarcerated belie any contention that he was prejudiced or in any way suffered manifest injustice.

In a similar case, *State v. Nero* (1990), 56 Ohio St. 3d 106, a petitioner claimed that he would not have entered a guilty plea if he had been told that the offense was not probationable. This Court found that the petitioner failed to establish prejudice as a consequence of an alleged violation of Crim.R. 11. Finding that the petitioner knew he would not receive probation and therefore was not prejudiced by the trial court's technical failure, the Court relied in part on the fact that the petitioner had "spent nine years in prison before making the argument that he would not have pled guilty if he had known he could not receive probation." *Id.* at 108. Therefore, Appellant's three year

delay prior to filing his motion precludes any finding of prejudice and/or manifest injustice⁵.

Third Proposition of Law: Appellant's motion did not set forth any valid grounds alleging manifest injustice as required under Crim.R. 32.1.

Appellant's claims that his pleas should be withdrawn because of alleged evidentiary inconsistencies, alleged ineffective assistance of counsel and the alleged denial of evidence crucial to the defense, are without merit. As a result, the State asserts that the Appellant has failed to allege any grounds constituting manifest injustice as required under Crim.R. 32.1. As previously stated above, this is particularly so since Appellant's assertion that he has "new evidence" to show that his vehicular flight from police never exceed 35 mph is legally irrelevant. Speed of flight is not an element that the State must prove in regard to a charge of "Failure to Comply" under Ohio Rev. Code §2921.331 (West 2006). In addition to venue, the State must merely prove that Appellant operated a motor vehicle so as to willfully elude or flee from a police officer, after receiving a visible or audible signal from the officer to stop the vehicle. *Id.* The State submits that in this case it met its burden of proof. As a result, Appellant's claim that the speed of his vehicle never exceed 35 mph is legally irrelevant, and does not establish manifest injustice. His claim must therefore be denied.

⁵ The fact that Appellant continues to file motions and post-conviction petitions does not negate the fact that it took him 3 years in which to assert the instant claims in his "Omnibus motion."

Finally, Appellant's claims were known or should have been known to him and/or defense counsel at the time of sentencing and as such could have been raised at the time of trial and/or on a direct appeal.

Crim.R. 32.1 requires that a defendant, seeking to withdraw a plea after sentencing must first make a showing of manifest injustice. The State asserts that to the extent that such claims could have been raised either at the time of trial or on direct appeal and were not, no manifest injustice has been proven.

Fourth Proposition of Law: Appellant's Motion to Withdraw Plea was properly barred by the Doctrine of Res Judicata.

The State further alleges that Appellant's motion was properly barred by the doctrine of res judicata⁶. While Appellant's claims are the proper subject matter for a motion to withdraw plea pursuant to Crim.R. 32.1, the claims are nevertheless barred by the doctrine of res judicata because the claims could have been considered at the time of trial and on direct appeal. *State v. Reynolds*, Putnam App. No. 12-01-11, 2002-Ohio-2823, discretionary appeal not allowed, 96 Ohio St.3d 1524, 775 N.E.2d 864, 2002-Ohio-5099. The State further asserts that even if Appellant's flight from police never exceeded 35 mph, this fact would have been known to Appellant at the time of trial, regardless of whether or not a copy of the Vehicle Pursuit Form was provided as

⁶ The doctrine of res judicata bars further litigation of issues in criminal cases that were raised previously, or could have been raised previously, in an appeal. *State v. Brown*, Cuyahoga App. No. 86017. 2005-Ohio-6023 at ¶8, citing *State v. Leek* (June 21, 2000), Cuyahoga App. No. 74338, and *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. The doctrine also stands to prevent repeated attacks on a final judgment. *Perry*, 226 N.E.2d at 104.

part of the discovery process, since it is undisputed that Appellant did all the driving. Appellant can and should be presumed to know the speed of his own travel and can be expected to assert such a claim at the time of trial and consequently on direct appeal.

Appellate courts have previously applied the doctrine of res judicata to other cases involving motions to withdraw pleas. See *State v. Jeffries* (Jul 30, 1999), Lucas App. No. L-98-1316; *State v. Wymer* (June 27, 1997), Wood App. No. WD-97-014. The doctrine of res judicata is therefore applicable to cases such as this, involving post-sentence motions to withdraw pleas, filed after the time for direct appeal and post-conviction relief. *Reynolds, supra*. As a result, and to the extent that Appellant failed to raise his claims at trial and on direct appeal, they are now barred by res judicata.

Fifth Proposition of Law: Appellant was not denied the effective assistance of counsel nor has he proven such a claim.

In order to prove that his Sixth Amendment right to effective assistance of counsel was violated, a defendant must show that his counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. The defendant must demonstrate that his defense was prejudiced by counsel's actions, or omissions to such an extent that there is a reasonable probability that, but for counsel's errors, a different result would have occurred. *Strickland, supra* at p. 691-696; *Bradley, supra* at para. 2 syllabus. This requires a showing that counsel's errors were so serious as to deprive the defendant of

a fair trial, a trial whose result is reliable. *State v. Post* (1987), 32 Ohio St. 3d 380, 388, 513 N.E.2d 754.

Additionally, judicial scrutiny of counsel is highly deferential. *Post, supra* at p. 38. Further, in Ohio a properly licensed attorney is presumed competent and the burden is on the Petitioner to show counsel's ineffectiveness. *State v. Hamblin* (1988), 37 Ohio St. 3d 153.

In the case at bar, Appellant's motion failed to prove that counsel was ineffective. The record and the transcript of Appellant's plea entry will belie any claim that Appellant was not fully advised of the "elements required to prove the charge against him," or that counsel failed to investigate the case. In fact, the record will indicate that on July 2, 2003, Appellant voluntarily entered pleas of guilty to both offenses.

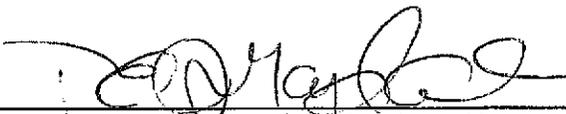
A plea of guilty waives any claim of ineffective assistance of counsel, unless it can be shown that counsel's deficient performance caused the waiver of the defendant's trial rights, and that the plea was less than knowing and voluntary. *State v. Hatton* (May 26, 2006), Second Dist. App. No. 21153, 2006-Ohio-2670 at ¶6; *State v. Gonzalez* (Dec. 23, 2005), Sixth Dist. App. No. L-05-1061, 2005-Ohio-6845 at ¶9. As a result, Appellant's claim that he was denied the effective assistance of counsel, is without merit.

CONCLUSION

Based upon the foregoing facts and case law presented, the State of Ohio respectfully requests this Court to deny Appellant jurisdiction at this time.

Respectfully submitted,

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LUCAS COUNTY, OHIO

By: 
Brenda J. Majdalani (0041509)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 29th day of November, 2006, to John B. Stevens, #469-725, N.C.C.I., 670 Marion-Williamsport Rd. E., P.O. Box 1812, Marion, Ohio 43301-1812.


Brenda J. Majdalani (0041509)
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