

[Cite as *State v. Mackey*, 2015-Ohio-899.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-68
	:	
v.	:	T.C. NO. 97CR318
	:	
ROBERT L. MACKEY	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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**OPINION**

Rendered on the 13th day of March, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Robert L. Mackey appeals from an April 30, 2014, decision of the Clark County Court of Common Pleas, Criminal Division, denying his petition to vacate or set aside judgment. Mackey filed a timely notice of appeal with this Court on May 29, 2014.

{¶ 2} On September 4, 1998, Mackey was convicted of one count of trafficking in drugs with a schoolyard specification, two counts of possession of drugs, one count of having a weapon while under disability, and one count of possession of criminal tools. Clark Cty. C.P. No. 1997 CR 0318. The trial court sentenced Mackey to twenty-eight years in prison, to be served consecutively to a ten year sentence he was currently serving in a separate case, for an aggregate term of thirty-eight years in prison. Mackey's appointed appellate counsel filed a timely notice of appeal with this Court in Clark Cty. App. Case No. 1998 CA 0081. However, the appeal was ultimately dismissed for failure to prosecute. Mackey filed a motion to reopen his appeal, calling into question the failure of his appointed counsel to file an appellate brief on his behalf, which we denied.

{¶ 3} On March 12, 2014, Mackey filed an untimely petition for post-conviction relief (PCR) requesting that his conviction in the instant case be set aside. Specifically, Mackey argued that he was unavoidably prevented from securing affidavits from two witnesses who testified against him at trial. In the affidavits which Mackey attached to his petition for PCR, the two witnesses, Cairo Buggs and Heather Peterson, recanted their testimony incriminating him. The State filed a motion to dismiss Mackey's petition on March 21, 2014. The trial court filed an entry dismissing Mackey's petition on April 9, 2014. The entry was subsequently vacated on April 18, 2014, and the case was assigned to another judge, who dismissed Mackey's petition in an entry issued on April 30, 2014. In its entry, the trial court noted that both Buggs and Peterson had prior convictions for trafficking in drugs.

{¶ 4} It is from this judgment that Mackey now appeals.

{¶ 5} Mackey's sole assignment of error is as follows:

{¶ 6} "THE TRIAL COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING AND FAILING TO SUSTAIN DEFENDANT'S MOTION TO SET ASIDE AND VACATE THE SENTENCE."

{¶ 7} In his sole assignment, Mackey contends that the trial court erred when it dismissed his petition to vacate or set aside his judgment of conviction without holding an evidentiary hearing. In support of his petition, Mackey attached the affidavits of Buggs and Peterson, who now recant the incriminating testimony they offered against him at trial. Mackey also attached his own affidavit to his petition, wherein he argues that he was "unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief." Mackey asserts that he and his family were unable for many years to locate and gather information from Buggs and Peterson who were both drug abusers and were in and out of jail.

{¶ 8} Post-conviction relief is governed by R.C. 2953.21. The statute provides, in pertinent part, that:

Any person who has been convicted of a criminal offense \* \* \* 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, \* \* \* 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.

R.C. 2953.21(A)(1)(a).

{¶ 9} “A post[-]conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Stefen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). See also *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶48. To prevail on a petition for post-conviction relief, the defendant must establish a violation of his constitutional rights which renders the judgment of conviction void or voidable. R.C. 2953.21.

{¶ 10} The post-conviction relief statutes do “not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required.” *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). Rather, in addressing a petition for post-conviction relief, a trial court plays a gatekeeping role as to whether a defendant will receive a hearing. *Gondor* at ¶51. A trial court may dismiss a petition for post-conviction relief without 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, 714 N.E. 2d 905 (1999), paragraph two of the syllabus; *Gondor* at ¶51.

{¶ 11} We review the trial court’s denial of Mackey’s petition for an abuse of discretion. *Gondor* at ¶52. As the Supreme Court of Ohio determined:

“Abuse of discretion” has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are

unconscionable or arbitrary.

A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

*AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 12} The Ohio Supreme Court has held that “in reviewing a petition for post-conviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact.” *State v. Calhoun*, 86 Ohio St.3d 279, 284, 714 N.E.2d 905 (1999). “The trial court may, under appropriate circumstances in post-conviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant.” *Id.*

{¶ 13} In evaluating the credibility of affidavits in post-conviction proceedings, a court should consider all relevant factors, including “(1) whether the judge reviewing the post-conviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.” *Id.* at 285. “Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court.” *Id.*

**{¶ 14}** The record discloses that the transcript from Mackey’s trial was filed as part of his direct appeal in this Court on November 3, 1998. Under R.C. 2953.21(A)(2), Mackey’s petition would have to have been filed no later than one-hundred-eighty days after November 3, 1998, which would have been or about May 2, 1999. Accordingly, by filing the petition which is the subject of this appeal in March, 2014, Mackey was clearly outside the one-hundred-eighty day time limit imposed by R.C. 2953.21(A)(2).

**{¶ 15}** R.C. 2953.23(A) provides in pertinent part:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court *may not* entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an

earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted \* \* \*.

{¶ 16} As previously discussed, Mackey submitted the affidavits of himself, Buggs, and Peterson. For his part, Mackey claims that he was unavoidably prevented from obtaining Buggs and Peterson's sworn statements because they were both heavily abusing drugs, and Buggs was serving a sentence in federal prison. Mackey also averred that Buggs and Peterson would simply not talk to him out of fear of the police. Mackey stated that Peterson would not recant her incriminating testimony because she had been threatened by authorities that her children would be taken away from her. Mackey's counsel was able to eventually contact Buggs while he was incarcerated and was able to procure a written statement in which Buggs recanted his testimony, but he was unable to get the document notarized while in prison. Mackey asserts that as soon as Buggs was released from prison, he came to Mackey's counsel's office and had his affidavit notarized. Lastly, Mackey avers that he and his family were simply unable to obtain the exculpatory testimony in Buggs' and Peterson's affidavits until they freely and voluntarily provided it.

{¶ 17} Pursuant to R.C. 2953.23(A)(1)(a), we find that Mackey's affidavit established that he was entitled to a hearing in order to establish that he was "unavoidably prevented" from the discovery that Buggs and Peterson recanted their

incriminating trial testimony against him. Accordingly, the trial court erred when it overruled Mackey's petition for post-conviction relief without a hearing.

**{¶ 18}** Mackey's sole assignment of error is sustained.

**{¶ 19}** Mackey's sole assignment of error having been sustained, the judgment of the trial court is reversed, and this matter is remanded to the trial court for a hearing in order to determine whether he was "unavoidably prevented" from the discovery that two of the State's main witnesses at trial recanted their incriminating trial testimony against him.

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FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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