[Cite as *State v. Heddleston*, 2001-Ohio-3391.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NOS. 98 CO 29
	)	98 CO 37
PLAINTIFF-APPELLEE	)	98 CO 46
	)	
VS.	)	O P I N I O N
	)	
DAVID A. HEDDLESTON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas, Columbiana County, Ohio Case Nos. 87 CR 141, 88 CR 57 & 88 CR 136
JUDGMENT:	
Appeal No. 98 CO 29	Dismissed.
Appeal No. 98 CO 37	Dismissed.
Appeal No. 98 CO 46	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Atty. Robert Herron Prosecuting Attorney Atty. Douglas A. King Assistant Prosecuting Attorney Columbiana County Courthouse 105 South Market Street Lisbon, Ohio 44432
For Defendant-Appellant:	Mr. David A. Heddleston, Pro se No. A344-048 London Correctional Institution P.O. Box 69 London, Ohio 43140

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Gene DeGenaro

Dated: September 24, 2001

WAITE, J.

{¶1} These appeals arise from three separate judgment entries emanating from the Columbiana County Court of Common Pleas as part of criminal proceedings against David A. Heddleston, Jr. ("Appellant"). The appeals have a common underlying factual basis. For purposes of judicial economy, the issues raised in the three appeals will all be dealt with in this single opinion.

{¶2} In November, 1987, the Columbiana County Grand Jury indicted Appellant for illegal possession of a firearm in a liquor establishment, receiving stolen property and felonious assault. The indictment arose from a shooting incident that occurred on November 13, 1987, outside of the Town Tavern in East Liverpool, Ohio. Police arrested Appellant inside the tavern and found him with a loaded .25 caliber pistol and a large sum of money that was later identified as cash stolen from a restaurant.

{¶3} Appellant was served with the indictment on December 3, 1987, and was transported to the Columbiana County Jail the same day. On December 21, 1987, Appellant was released on a $15,000.00 recognizance bond. Appellant failed to appear for trial on April 4, 1988, and he was subsequently indicted for failure to appear. Appellant remained at large until 1997.

{¶4} On February 1, 1989, the State of Ohio filed a motion to release the .25 caliber pistol to its owner, Raymond Yanni, and to substitute photographs as evidence. On February 3, 1989, the trial court granted that motion.

{¶5} In August, 1997, Appellant was arrested on the outstanding bench warrant. On November 13, 1997, Appellant entered into a felony plea agreement, pleading guilty to one count of illegal possession of a firearm in a liquor establishment in violation of R.C. §2923.121, an unclassified felony; one count of receiving stolen property in violation of R.C. §2913.51(A), a fourth degree felony; and one count of aggravated assault in violation of R.C. §2903.12(A), a fourth degree felony, with a physical harm specification. The charges were outlined in a prosecutor's information. Appellant had previously waived his right to indictment by a grand jury. All additional charges against Appellant were dropped. Upon Appellant's waiver of a presentence investigation, the trial court immediately proceeded to sentencing.

{¶6} In the trial court's November 13, 1997, Judgment Entry, Appellant was sentenced to one year of actual incarceration for illegal possession of a firearm in a liquor permit premises, six months of actual incarceration for receiving stolen property and an indefinite term of eighteen months to five years of incarceration for aggravated assault with a physical harm

specification. All sentences were ordered to be served concurrently. The court granted Appellant credit for eighty days served in the county jail toward his sentence, plus credit for any additional time between November 13, 1997, and the day of conveyance to a state correctional institution.

{¶7} On November 19, 1997, Appellant filed a motion to release personal property, requesting the return of all property seized from Appellant upon his arrest in 1987. The trial court denied that motion by journal entry filed on January 9, 1998. The journal entry stated that Appellant's counsel and counsel for the State were present at the hearing on the motion, and that the State presented testimony while Appellant presented no evidence. The trial court found that currency held by the State was the fruit of Appellant's crime and ordered it to be returned to the victim of the crime. The court also ordered that any contraband held in the matter be destroyed. Appellant did not appeal that decision.

{¶8} On January 23, 1998, Appellant filed a Motion for Modification of Sentence and a Motion for Correction of Jail Time Credit. On April 3, 1998, the trial court filed a judgment entry denying Appellant's motions. Appellant filed a notice of appeal on May 1, 1998, which was designated as Appeal No. 98 CO 29.

{¶9} On April 16, 1998, Appellant filed a second motion for return of personal property, stating that the State was in

possession of Appellant's cash totaling $1,175.00. On May 8, 1998, the trial court filed a judgment entry denying Appellant's motion. The trial court stated that the matter was moot as the trial court disposed of the property by its Judgment Entry filed on January 9, 1998. On May 18, 1998, Appellant filed a notice of appeal of the May 8, 1998, Judgment Entry. This appeal was designated as Appeal No. 98 CO 37.

{¶10} On May 7, 1998, Appellant filed a motion to withdraw his guilty pleas and an alternative petition to vacate or set aside the sentences, citing Crim.R. 32.1 and R.C. §2953.21 as the basis of the motions. With respect to his motion to withdraw his guilty plea, Appellant argued that the trial court failed to notify him that he was not eligible for probation and that he was denied effective assistance of counsel in that his counsel also failed to advise him that he was not eligible for probation.

{¶11} With respect to his petition for post conviction relief, Appellant argued that he was denied due process when his counsel advised him to plead guilty to an information that contained a physical harm specification that did not appear in the original indictment. Appellant claimed that the specification was therefore barred by the statute of limitations. Appellant also argued that he was erroneously sentenced pursuant to former sentencing guidelines and that he should have benefitted from the felony sentencing revisions of Am.Sub.S.B. 2. Appellant alleged

that he was denied effective assistance of counsel with respect to his sentencing argument. Finally, Appellant renewed his challenge to the validity of his guilty pleas and the attendant ineffective assistance of counsel argument.

{¶12} On May 12, 1998, the trial court notified Appellee of Appellant's motions and ordered Appellee to respond and to file proposed findings of fact and conclusions of law. On May 22, 1998, Appellant filed a notice of intent to file a responsive pleading to any dispositive motion. On June 8, 1999, Appellee filed its response in the form of proposed findings of fact and conclusions of law. On June 10, 1998, the trial court filed a judgment entry adopting Appellee's proposed findings of fact and conclusions of law and overruling Appellant's motions.

{¶13} On June 22, 1998, Appellant filed his notice of appeal of the June 10, 1998 judgment entry. This appeal was designated as Appeal No. 98 CO 46.

APPEAL NO. 98 CO 29

{¶14} Appellant sets forth a single assignment of error in this appeal which asserts:

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED CONSTITUTIONAL ERROR BY REFUSING TO MAKE A FACTUAL DETERMINATION OF THE DAYS CREDIT THE APPELLANT WAS DUE TOWARD HIS SENTENCE FOR PRETRIAL INCARCERATION."

{¶16} Appellant argues that R.C. §2967.191 requires that all days of pretrial confinement spent in jail in lieu of bond

awaiting trial and all days after sentence awaiting transport to a state institution be deducted from Appellant's minimum and maximum sentence. Appellant also argues that a prior version of Crim.R. 32(D) required the trial court to forward a correct statement of the number of days of confinement credit to the penal institution where he was to be incarcerated. Appellant asserts that the November 13, 1997, sentencing entry granted him 80 days of jail time credit, even though he was entitled to 116 days of credit. Appellant specifically points to the time he spent in jail in lieu of bond from December 3, 1987, to December 21, 1987. Appellant contends that this error voids the November 13, 1997, judgment. Although Appellant is correct that he should be granted credit for the 18 days he spent in jail in lieu of bond in 1987, this Court cannot grant the relief he requests.

{¶17} Appellant did not file a direct appeal of the November 13, 1997 Judgment Entry, nor did he fashion his May 1, 1998, Notice of Appeal as a Motion for Delayed Appeal pursuant to App.R. 5(A). The appeal under review is solely an appeal of the April 3, 1998, decision denying Appellant's Motion for Modification of Sentence.

{¶18} The denial of a motion to vacate and modify a sentence is not a final appealable order if the only effect of the ruling would be to extend the time for filing a direct appeal of the original sentencing order. *State v. Shinkle* (1986), 27 Ohio

App.3d 54, paragraph one of syllabus; see R.C. §2505.02(B)(1) through (5).

{¶19} A criminal appeal must be filed within thirty days of the entry of the judgment or order being appealed. App.R. 4(A). The record reveals that Appellant filed this appeal almost six months after the time for appealing the November 13, 1997, judgment had expired. The record is also clear that the November 13, 1997, judgment is the entry which contains the alleged erroneous calculation of jail time credit.

{¶20} A court of appeals may only review final orders as defined by statute. *State ex rel. Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 149; R.C. §2953.02. Generally, the order imposing the sentence constitutes the final appealable order in a criminal case. *State v. Hunt* (1976), 47 Ohio St.2d 170, 174. Appellate courts may review other lower court decisions in criminal cases if the decisions qualify as final orders as defined in R.C. §2505.02. *State v. Crago* (1990), 53 Ohio St.3d 243, 244-245.

{¶21} The only provisions of R.C. §2505.02(B) which could possibly be relevant to the April 3, 1998, entry are sections (1) and (2). To qualify as a final appealable order under R.C. §2505.02(B)(1) or (2), the order must affect a substantial right:

{¶22} "(B) An order is a final order that may be reviewed, affirmed , modified, or reversed, with or without retrial, when it is one of the following:

{¶23} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a

judgment;

{¶24} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;"

{¶25} The April 3, 1998, decision did not affect Appellant's substantial rights because it did not change any aspect of Appellant's November 13, 1997, conviction or sentence.

{¶26} Appellant's substantial right to have jail time credit removed from his sentence was affected by the November 13, 1997, Judgment Entry which initially imposed the sentence and credited Appellant for 80 days of time served. It was from this judgment entry that Appellant should have filed his appeal of the alleged jail time credit error.

{¶27} Additionally, even if the April 3, 1998, decision qualified as a final appealable order, the alleged error would be harmless. Appellant argues that the Ohio Adult Parole Authority ("APA") cannot deviate from the jail time credit calculation as stated in the sentencing entry, and that it does not have the authority to correct errors in that calculation. Appellant cites *Corder v. Ohio Dept. of Rehab. And Corr.* (1991), 68 Ohio App. 3d 567, in support, which states: "there is simply no statutory provision conferring a right upon the APA to ignore the trial court's determination of the number of days and to substitute its own in complying with the mandate of R.C. 2967.191." *Id.* at 573. We believe *Corder* can be distinguished from the case at bar, and

that the APA and the Ohio Department of Rehabilitation and Correction ("ODRC") are authorized and required to grant more jail time credit than the sentencing entry under certain circumstances.

{¶28} The current version of R.C. §2967.191, effective March 17, 1998, states:

> **{¶29}** "The *department of rehabilitation and correction shall reduce the stated prison term of a prisoner* or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner *by the total number of days that the prisoner was confined* for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement *in lieu of bail while awaiting trial*, * * *." (Emphasis added.)

{¶30} Prior versions of the statute stated that the APA, rather than the ODRC, must carry out the mandate of the statute. The Ohio Supreme Court has consistently held that the duty, under R.C. §2967.191, to grant pretrial confinement time credit rests with the APA rather than the trial court. *State ex rel. Jones v. O'Connor* (1999), 84 Ohio St.3d 426, 427; *State ex rel. Harrell v. Hamilton Cty. Court of Common Pleas* (1979), 58 Ohio St.2d 193. Under previous versions of R.C. §2967.191, a prisoner was required to file a writ of mandamus against the APA, not the trial court, to get proper credit for pretrial confinement. *Harrell* at 193; see also *State ex rel. Gooden v. Martin* (1990), 67 Ohio App.3d 685, 687. The 1998 changes to R.C. §2967.191 now appear to require a prisoner to file a mandamus action against the ODRC if

there is an error in crediting the full amount of pretrial confinement.

{¶31} *Corder* involved a situation in which a clerk of the APA decided to reduce a prisoner's confinement credit below the amount stated in the sentencing entry. The clerk refused to grant credit for time served in a halfway house that was not approved by the ODRC. The defendant filed of writ of mandamus against the APA in order to receive the full confinement credit stated in the sentencing entry. *Id.* at 568-569. The Hamilton County Court of Common Pleas granted the writ, and the decision was upheld on appeal. *Id.* at 574.

{¶32} *Corder* undoubtedly stands for the proposition that the APA is not free to disregard the factual findings of the trial court as to whether a criminal defendant was or was not confined, and cannot *reduce* confinement credit that is clearly and unambiguously stated in a sentencing order. *Id.* at 574. The case at bar, though, involves an allegation that Appellant is owed more confinement credit than is reflected in the sentencing entry. R.C. §2967.191 specifically mandates that the ODRC reduce a prisoner's sentence for the time spent in confinement in lieu of bail. Even if a sentencing entry fails to account for all of the appropriate days of confinement credit as defined by R.C. §2967.191, the ODRC has a continuing duty to grant additional credit for previous confinement if the facts and circumstances

warrant it.

{¶33} The APA and the ODRC are state agencies and it is presumed that they will follow the law, including the mandates of R.C. §2967.191. There is nothing in the record indicating otherwise. Any obvious omissions of confinement credit in the sentencing entry can be corrected, and we presume will be corrected, by the ODRC and the APA. Therefore we cannot perceive how Appellant has been prejudiced by the obvious error in the sentencing entry.

{¶34} For all the foregoing reasons, we must dismiss Appeal No. 98 CO 29.

APPEAL NO. 98 CO 37

{¶35} Appellant raises three assignments of error which will be jointly addressed:

{¶36} "THE COMMON PLEAS COURT OF COLUMBIANA COUNTY EXCEEDED THE STATUTORY LIMITS PLACED UPON IT BY THE STATE LEGISLATURE AND COMMITTED PLAIN ERROR PREJUDICIAL TO APPELLANT, DAVID A. HEDDLESTON JR., BY ENTERING A VOID JUDGMENT, AND ILLEGALLY TAKING APPELLANTS PERSONAL PROPERTY AND MAKING A RULING THAT THE STATE OF OHIO MAY DESTROY WHATEVER ITEMS OF APPELLANT'S PERSONAL PROPERTY THEY MAY FEEL LIKE DESTROYING IN VIOLATION OF APPELLANTS FEDERAL AND STATE CONSTITUTIONAL RIGHTS. THE STATE OF OHIO CANNOT USE THIS ARBITRARY, ILLEGAL AND VOID JUDGMENT FILED JANUARY 9, 1998 TO COVER UP ILLEGAL ACTIONS THE STATE HAS TAKEN. THIS JUDGMENT ENTRY IS VOID, IT HAS NO LEGAL AUTHORITY, IT HAS NO BINDING EFFECT WHATSOEVER, IT IS UNENFORCEABLE, IT OFFERS NO PROTECTION TO THOSE WHO WOULD SEEK TO ENFORCE IT AND IT MAY BE COLLATERALLY ATTACKED IN ANY SUBSEQUENT PROCEEDING."

{¶37} "THE TRIAL COURT ABUSED IT'S DISCRETION COMMITTING PLAIN ERROR, PREJUDICIAL TO APPELLANT, HEREIN, BY MAKING RULINGS OF FORFEITURE AND RESTITUTION 58 DAYS AFTER SENTENCING OF APPELLANT

AND OUTSIDE THE PRESENCE OF APPELLANT. THIS RULING FILED JANUARY 9, 1998 HAS PLACED APPELLANT IN DOUBLE JEOPARDY IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS AND HAS VIOLATED APPELLANTS RIGHT TO DUE PROCESS."

{¶38} "THE TRIAL COURT ABUSED IT'S DISCRETION COMMITTING PLAIN ERROR, PREJUDICIAL TO APPELLANT, HEREIN, BY ORDERING APPELLANT TO MAKE RESTITUTION FOR LOSSES NOT DIRECTLY INCURRED FROM THE CHARGES APPELLANT PLED GUILTY TO AND WAS SENTENCED ON."

{¶39} Contrary to his notice of appeal, Appellant is actually challenging the trial court's entry filed on January 9, 1998, rather than the entry filed on May 8, 1998. Appellant treats the latter entry as an order of restitution and forfeiture. Appellant essentially challenges the trial court's authority to order restitution because the property in question exceeded the actual damage or loss caused by the offense for which he was convicted. Appellee responds that, according to R.C. §2929.11(A), a police department must promptly return property to the victim of a crime taken in the course of an investigation. Appellee also points out that the trial court did not order restitution or forfeiture. We do not address the merits of these arguments because this appeal also must be dismissed.

{¶40} This appeal is dismissed for two reasons. First, because Appellant is actually appealing the January 9, 1998, Judgment Entry, his notice of appeal filed on May 18, 1998, is untimely. App.R. 4(A). The timely filing of a notice of appeal is a jurisdictional requirement for a valid appeal. *Transamerica Ins.*

Co. v. Nolan (1995), 72 Ohio St.3d 320, syllabus.

{¶41} The second reason for dismissing this appeal is that the May 8, 1998, entry is not a final appealable order. The May order merely stated that Appellant's motion was moot because the court had previously ordered, on January 9, 1998, that the property be returned to the victims. As stated in our analysis of the previous assignment of error, a court of appeals may only review final judgments and orders as defined by R.C. §2505.02(B) or other relevant statutes. The only sections of R.C. §2505.02(B) which might apply to the May 8, 1998, judgment entry are (1) or (2):

{¶42} "(B) An order is a final order that may be reviewed, affirmed , modified, or reversed, with or without retrial, when it is one of the following:

{¶43} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶44} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;"

{¶45} This order affected no right of Appellant, and certainly not a substantial right. The only effect of the order was to dismiss Appellant's motion. The May 8, 1998, judgment was not determinative of the action as the property had been previously disposed of on January 9, 1998.

{¶46} For the foregoing reasons, we dismiss Appeal No. 98 CO 37.

APPEAL NO. 98 CO 46

{¶47} This appeal challenges the denial of Appellant's May 7, 1998, motion to withdraw his guilty plea and Appellant's petition to vacate or set aside his sentence. Numerous courts of appeal are in agreement that a postsentence motion to withdraw a guilty plea, based on allegations of constitutional violations, must be filed prior to the expiration of the time for direct appeal or else the motion will be treated as a petition for postconviction relief pursuant to R.C. §2953.21. *State v. Hill* (1998), 129 Ohio App.3d 658, 661; *State v. Phelps* (Sept. 26, 2000), Franklin App. No. 00AP-109, unreported; *State v. Mollick* (July 19, 2000), Lorain App. No. 99CA007315, unreported; *State v. Chupp* (July 3, 2000), Holmes App. No. 99 CA 12, unreported; *State v. Stires* (Sept. 30, 1999), Franklin App. No. 99AP-80, unreported.

{¶48} Appellant's motion was filed on May 7, 1998, almost six months after the time for filing a direct appeal of his November 13, 1997, conviction and sentence had expired. Therefore, the motion will be treated in its entirety as a petition for postconviction relief.

{¶49} The standard to apply in determining the merits of a postconviction petition is well settled in the law. As noted in *State v. Davis* (1999), 133 Ohio App.3d 511, 515:

{¶50} "It is well settled that a petition for

postconviction relief brought pursuant to R.C. 2953.21 will be granted only where the denial or infringement of constitutional rights is so substantial as to render the judgment void or voidable. *State v. Walden* (1984), 19 Ohio App.3d 141, 146, 19 OBR 230, 235-236, 483 N.E.2d 859, 865-866. Under the doctrine of *res judicata*, a final judgment of conviction bars a defendant who had counsel from litigating in any proceeding, except an appeal from that judgment, any defense or claim of lack of due process that was raised or could have been raised at trial or on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d, paragraph nine of the syllabus. Absent a showing of an abuse of discretion, a reviewing court will not overrule a trial court's findings on a petition for postconviction relief that are supported by competent and credible evidence. *State v. Mitchell* (1988), 53 Ohio App.3d 117, 119, 559 N.E.2d 1370. 'Abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 172-173, 404 N.E.2d 144, 148-149; *State v. Keenan* (1998), 81 Ohio St.3d 133, 137, 689 N.E.2d 929, 937."

{¶51} Appellant presents five assignments of error in this appeal. His first assignment of error alleges:

{¶52} **"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND DENIED HIM DUE PROCESS OF LAW WHEN IT FAILED TO PERMIT THE APPELLANT TO FILE A RESPONSE TO THE STATE'S MEMORANDUM OPPOSING THE MOTION TO WITHDRAW GUILTY PLEAS AND PETITION TO VACATE OR SET ASIDE SENTENCE."**

{¶53} Appellant argues that, pursuant to R.C. §2953.21(D), within twenty days of the establishment of issues in a petition for postconviction relief, either party may move for summary judgment. Appellant contends that by ruling on his motion two days after Appellee's response, the trial court denied him the opportunity to file a motion for summary judgment. In support,

Appellant cites *State v. Pless* (1993), 91 Ohio App.3d 197, in which a trial court's judgment was reversed because a petitioner was not afforded the opportunity to file a motion for summary judgment.

{¶54} Appellee responds that Appellant has mischaracterized Appellee's response as a motion for summary judgment. Appellee states that under R.C. §2953.21, a trial court may dismiss a petition for postconviction relief if it determines that there are no substantive grounds for relief as long as findings of fact and conclusions of law are filed. Appellee asserts that the trial court complied with the applicable statute. Also, Appellee argues that *Pless, supra,* is distinguishable from the present case because there was a motion for summary judgment filed in *Pless* while no such motion was filed in the instant case.

{¶55} This assignment of error lacks merit. As Appellee notes, Appellant does misconstrue the trial court's action as having granted a motion for summary judgment. Rather, the record clearly reflects that Appellee filed a motion to dismiss Appellant's petition on June 8, 1998. Two days later, the trial court summarily denied Appellant's petition. (J.E. 6/10/98).

{¶56} Postconviction relief proceedings are governed, in general, by the Rules of Civil Procedure. *State v. Nichols* (1984), 11 Ohio St.3d 40, 42-43; *Pless, supra,* at 198. Because

postconviction proceedings are statutorily created, specific requirements set out by statute take priority where they conflict with the Civil Rules. *State v. Lawson* (1995), 103 Ohio App.3d 307, 313.

{¶57} Neither the statute nor the Civil Rules impose a requirement on the trial court to delay the dismissal of a postconviction relief petition so that the petitioner may file a response to a motion to dismiss. The statute specifically allows the trial court to dismiss the petition without a hearing if the petition, along with the files and records of the case, show that the petitioner is not entitled to relief. R.C. §2953.21(C), (E). Because the statute sets forth its own procedure for dismissing the petition, the dismissal rules described in Civ.R. 12(B) do not apply. *Lawson, supra,* at 313.

{¶58} Appellant's first assignment of error is without merit.

{¶59} Appellant's second assignment of error asserts:

{¶60} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY FAILING TO GRANT APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA ON THE GROUNDS OF MANIFEST INJUSTICE WHERE THE RECORD DISCLOSES THAT THE TRIAL COURT FAILED TO ADVISE THE APPELLANT AT THE TIME OF SENTENCING THAT HE WAS NOT ELIGIBLE FOR PROBATION IN REFERENCE TO COUNTS TWO AND THREE OF THE BILL OF INFORMATION."

{¶61} Appellant argues that a criminal defendant should be permitted to withdraw a guilty plea after the imposition of

sentence when he can demonstrate that the guilty plea was not knowingly and intelligently made either as a matter of law or as the result of ineffective assistance of counsel. *State v. Blatnik* (1984), 17 Ohio App.3d 201. Appellant argues that his plea was not made in a knowing and intelligent fashion because the trial court failed to inform him that he was not eligible for probation on two of the counts to which he pleaded guilty. Appellant claims to have been misled by both the trial court and his attorney to believe that those two counts were probationable.

{¶62} Appellee responds that it is within the trial court's discretion to grant a motion to withdraw a guilty plea after the imposition of sentence. *State v. Xie* (1992), 62 Ohio St.3d 521. Appellee points out that the record reflects that Appellant was aware that none of his offenses were probationable. Appellee also argues that Appellant waived a presentence investigation even though the trial court advised him that he would not be eligible for probation without a presentence investigation.

{¶63} Initially, we note that many of the errors alleged by Appellant in his petition for postconviction relief and in the following assignments of error concern matters which could have been raised on direct appeal and therefore may not be considered in a postconviction relief proceeding. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph seven of syllabus. The voluntary nature

of Appellant's plea could have been litigated before sentencing or in a direct appeal, and therefore Appellant is barred from raising the issue in an appeal of a post-conviction relief proceeding. The Ohio Supreme Court has specifically held that a defendant who pleads guilty pursuant to a plea bargain cannot challenge, in postconviction proceedings, whether the trial court properly informed him that he was ineligible for probation, if the issue was not raised in a direct appeal. ***State v. Ishmail*** **(1981), 67 Ohio St.2d 16, 18.**

{¶64} Therefore, Appellant's assignment of error is without merit.

{¶65} Appellant's third assignment of error asserts:

{¶66} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT CONCLUDED THAT THE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH THE TRIAL COURT'S FAILURE TO COMPLY WITH CRIMINAL RULE 11(C)(2)(a)."

{¶67} Appellant essentially argues that he received ineffective assistance of counsel as his trial counsel failed to inform him that two of the offenses contained in the prosecutor's information were not probationable. Appellant concludes that he should have been granted postconviction relief on this issue.

{¶68} Appellee responds by stating that the record clearly establishes Appellant was advised of all the consequences of his guilty plea. Appellee states that Appellant was provided with

judicial advice to which he, with counsel's assistance, gave written responses to the court. Appellee asserts that the trial court specifically advised Appellant that without a presentence investigation, Appellant would not be eligible for probation on any of the charges and that it was Appellant's decision to waive presentence investigation and to proceed directly to sentencing.

{¶69} A guilty plea waives the right to claim that one was prejudiced by constitutionally ineffective assistance of counsel except to the extent that such ineffective assistance made the plea less than knowing and voluntary. *State v. Barnett* (1991), 73 Ohio App.3d 244, 248. To prevail under a postconviction relief ineffective assistance of counsel claim after pleading guilty, a defendant not only must show that his trial counsel's performance was professionally unreasonable, but also must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. *Hill v. Lockhart* (1985), 474 U.S. 52; *State v. Cole* (1982), 2 Ohio St.3d 112, 114; see also *Strickland v. Washington* (1984), 466 U.S. 668, 687-688.

{¶70} Noticeably absent from the record is a transcript of the plea and sentencing hearing which could have supported or undermined Appellant's argument. Without the aid of such transcript, we cannot determine whether Appellant's attorney advised him concerning his eligibility for probation. The trial

court concluded that Appellant had been advised both that he could not receive probation for count one and that he was ineligible for probation on counts two and three because he waived a presentence investigation. (6/10/98 J.E., p. 4). Without a transcript of the relevant proceeding, we must presume the trial court's findings are correct. *Columbus v. Link* (1998), 127 Ohio App.3d 122, 127.

{¶71} Appellant did support his motion for postconviction relief with an affidavit in which he stated that he was not advised by his counsel that he was ineligible for probation on all counts and that probation was a legal impossibility.

{¶72} In determining the credibility of an affidavit in support of a motion for postconviction relief, a trial court should consider all relevant factors. *State v. Calhoun* (1999),

{¶73} 86 Ohio St.3d 279, 285. Among those factors are: (1) whether the judge reviewing the postconviction 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. *Id.* 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.*

{¶74} In the present matter, the same judge presided over Appellant's guilty pleas and his postconviction motion. Appellant, the only affiant, had a clear interest in succeeding. Moreover, Appellant's assertion is in conflict with the trial record. As discussed earlier, the record, including the judicial advice to defendant and Appellant's written response, indicates that Appellant's guilty pleas were voluntary and intelligent. It should be noted again that Appellant has failed to request or provide a transcript of the sentencing hearing which may have aided his argument here. Regardless, the trial judge presided over all relevant hearings and was in a position to determine the credibility of Appellant's allegation in his motion. The trial court was clearly within its discretion in rejecting Appellant's allegation of ineffective assistance of counsel. Appellant's third assignment of error is, thus, without merit.

{¶75} Appellant's fourth assignment of error asserts:

{¶76} "THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO RESENTENCING UNDER SENATE BILL 2."

{¶77} Appellant argues that the trial court erred in sentencing him to an indefinite prison term as Ohio's sentencing guidelines

had been revised sixteen months prior to his sentencing. Appellant asserts that he should have been sentenced under the revised sentencing guidelines.

{¶78} Appellee responds that this Court has already determined that the revised sentencing guidelines only apply to crimes committed on or after the effective date of the amendment, July 1, 1996. *State v. Rush* (1997), Columbiana App. No. 96-CO-53, unreported; see also *State ex rel. Lemmon v. Ohio Adult Parole Auth.* (1997), 78 Ohio St.3d 186, 188. Appellee is correct in its argument. Appellant's crime was committed in 1987, well before the 1996 revisions to Ohio's felony sentencing statutes.

{¶79} Appellant also asserts that he was denied effective assistance of counsel due to his counsel's failure to raise the alleged sentencing error mentioned above. Because we must conclude that the trial court used the correct sentencing statute, Appellant's counsel did not commit error in failing to object and, hence, there is no basis for Appellant's claim of ineffective assistance of counsel. *Strickland, supra,* at 687-688. Appellant's fourth assignment of error is without merit.

{¶80} Appellant's fifth and final assignment of error asserts:

{¶81} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DENIED HIS MOTION TO WITHDRAW GUILTY PLEAS, AND PETITION TO VACATE OR SET ASIDE SENTENCE WITHOUT A HEARING."

{¶82} Appellant states that he was entitled to a hearing on his motion to withdraw guilty pleas as he alleged sufficient facts to require that his plea be withdrawn. Appellant also argues that his petition for postconviction relief stated substantive grounds for relief and that he was therefore entitled to an evidentiary hearing, citing *State v. Williams* (1966), 8 Ohio App.2d 135, in support.

{¶83} Appellant's argument that the trial court erred in not granting a hearing on his motion to withdraw his guilty pleas lacks merit. Generally, a hearing on such a motion is only required, "if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn." *State v. Hamed* (1989), 63 Ohio App.3d 5, 7.

{¶84} Since we are treating Appellant's motion as a postconviction relief petition, we must determine if an evidentiary hearing was required as part of postconviction relief proceedings. It is well known that, "[a] criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282.

{¶85} Before granting an evidentiary hearing on the petition, the trial court must determine whether there are substantive grounds for relief, "* * * i.e., whether there are grounds to

believe 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.'"

Calhoun **at 282-283, quoting R.C. §2953.21(A)(1). The trial court has discretion to determine whether to hold a hearing.** ***Calhoun*** **at 284.**

{¶86} As already mentioned, here the same judge presided over Appellant's guilty pleas and his postconviction motion. Appellant presented only his own self-serving affidavit in support of his petition. Appellant's assertions are also in conflict with the trial record. Appellant failed to request or provide a transcript of the trial court proceedings to support his assertions. The same trial judge who presided over all relevant hearings was also in a position to determine the credibility of Appellant's allegations in his petition. The trial court was clearly within its discretion in not granting Appellant an evidentiary hearing.

{¶87} For all the foregoing reasons, we dismiss Appeal No. 98 CO 29 and Appeal No. 98 CO 37 because they do not present us with final appealable orders and because they are untimely attempts to appeal prior judgment entries. We overrule all of Appellant's assignments of error in Appeal No. 98 CO 46, and affirm the June 10, 1998, decision in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.