

[Cite as *State v. Wilson*, 2016-Ohio-8548.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

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|----------------------|---|---------------------|
| STATE OF OHIO |) | |
| |) | |
| PLAINTIFF-APPELLEE |) | |
| |) | CASE NO. 15 BE 0074 |
| VS. |) | |
| |) | OPINION |
| MARSHAY LABRE WILSON |) | |
| |) | |
| DEFENDANT-APPELLANT |) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Belmont County, Ohio
Case No. 14 CR 284

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee Attorney Daniel P. Fry
Belmont County Prosecutor
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For Defendant-Appellant Marshay Wilson, Pro-se
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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 23, 2016

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DeGENARO, J.

{¶1} Defendant-Appellant, Marshay Labre Wilson, appeals the trial court's judgment denying his motion for post-conviction relief. Because Wilson's arguments are meritless the judgment of the trial court is affirmed.

{¶2} On December 3, 2014, Wilson was indicted for two counts of drug trafficking, both with forfeiture specifications, and one count of tampering with evidence. On March 31, 2015, Wilson entered into a plea agreement; the State dismissed one count of drug trafficking and Wilson pled to the remaining charges. A provision within the agreement stated: "State and Mr. Wilson agree to an eight (8) year sentence. Defendant to be given credit for jail since 9/25/14. State to dismiss Ct. I." Wilson waived a Pre-Sentence Investigation and was sentenced the same day to eight years on the remaining drug trafficking count and three years on the tampering count to be served concurrently with credit for time served. Wilson did not file a direct appeal.

{¶3} At the same time, Wilson had pending federal charges and was sentenced on April 15, 2015, to 60 months of incarceration.

{¶4} On June 8, 2015, Wilson filed a document entitled "Motion for Declaration of a Concurrent Sentence" asking the trial judge to run his state time concurrent with the federal sentence. This motion was denied on July 1, 2015. No appeal was taken.

{¶5} On October 22, 2015, Wilson, pro se, filed a "Petition to Vacate Judgment of Conviction Pursuant to O.R.C. 2953.21." As grounds, Wilson stated that his constitutional rights were violated, that he was pressured into a plea deal, that the trial judge inappropriately participated in the plea negotiations, and that his attorney was ineffective. The trial court denied Wilson's petition on October 23, 2015. Wilson filed a timely notice of appeal.

{¶6} In his first of three assignments of error, Wilson asserts:

The court failed to follow procedure in issuing its decision on Appellant's properly filed petition for relief under § 2953.21.

{¶7} Under R.C. 2953.21 relief from a judgment or sentence is available for a person convicted of a criminal offense who shows 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[.]"

{¶8} "A trial court may dismiss a postconviction petition on the basis of the doctrine of res judicata." *State v. Dillingham*, 12th Dist. Nos. CA2012–02–037 and CA2012–02–042, 2012–Ohio–5841, ¶ 9 (internal citations omitted). "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), syllabus.

{¶9} An exception to the res judicata bar exists when the petitioner presents competent, relevant, and material evidence outside the record that was not in existence and available to the petitioner in time to support the direct appeal. *State v. Bayless*, 12th Dist. Nos. CA2013–10–020 and CA2013–10–021, 2014–Ohio–2475, ¶ 10. For a defendant to avoid dismissal of the petition by operation of res judicata, the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court record, and it must not be evidence that existed or was available for use at the time of trial. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982).

{¶10} An appellate court reviews a trial court's denial of a petition for post-conviction relief under an abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58. "An abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *Downie v. Montgomery*, 7th Dist. No. 12 CO 43, 2013–Ohio–5552, ¶ 50.

{¶11} In support of his petition, Wilson did not argue or present any

competent, relevant, and material evidence outside the trial court record. Aside from his argument regarding ineffective assistance of trial counsel, which we will address below, Wilson summarily argues that he was coerced into a plea, that the trial judge acted improperly, and that his suppression should have been granted due to racial profiling. All of these arguments should have been raised on direct appeal. As such, the trial court properly denied Wilson's petition for post-conviction relief and his first assignment of error is meritless.

{¶12} In his second of three assignments of error, Wilson asserts:

Appellant contends that the Trial Court violated his Fifth and Sixth Amendment Rights by improperly participating in the Plea Bargaining Process. Before his PLEA, and after the Appellant had been dressed out for TRIAL, the Trial Court approached the defense and spoke personally to the Appellant.

{¶13} First, pursuant to the doctrine of res judicata, Wilson should have raised this issue on direct appeal. Second, by entering a plea of guilty, the defendant is not only stating that he committed the acts described in the indictment; he is admitting guilt of a substantive crime. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Thus, when a defendant enters a plea of guilty as a part of a plea bargain he waives all appealable errors, unless those errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991); *State v. Barnett*, 73 Ohio App.3d 244, 249, 596 N.E.2d 1101 (2d Dist.1991).

{¶14} Wilson entered a plea of guilty and neither in his petition or appellate brief does he argue that his plea was less than knowing and voluntary. Accordingly, Wilson's second assignment of error is meritless.

{¶15} In his final of three assignments of error, Wilson asserts:

Ineffective Assistance of Counsel to NOT APPEAL the Trial Court's

DENIAL of his Fourth Amendment Right against unreasonable searches violated Appellant's Sixth Amendment.

{¶16} A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014–Ohio–3415, ¶ 11 (internal citations omitted). Where a defendant has entered a guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *Williams* at ¶ 11 (internal citations omitted).

{¶17} Wilson has not expressly alleged at the trial level or on appeal that his plea was less than knowing, intelligent and voluntary.

{¶18} Under R.C. 2953.21(C) "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary 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, 1999-Ohio-102, 714 N.E.2d 905, paragraph two of the syllabus.

{¶19} Wilson attached a document to his petition that was not notarized and stated it was his "account of events." Neither the trial court nor this Court are required to review this document that purports to be an affidavit, however, within it Wilson indicates the basis of his ineffective assistance claim is that his attorney recommended he take a plea and that he did not get the concurrent sentence that he wanted.

{¶20} An attorney's advice to take a plea deal is not ineffective assistance of counsel. *State v. Jones*, 7th Dist. No. 06MA17, 2008-Ohio-3352, ¶ 9. The trial judge was explicit in the fact that he would not run this state sentence concurrent to Wilson's federal sentence, and Wilson was expressly advised that he had thirty days

to appeal the trial court's decision. He failed to do so and as such the matter is res judicata.

{¶21} Wilson also argues that his attorney was ineffective for failing to appeal the denial of suppression. Not only is this issue res judicata, Wilson has failed to attach the transcript from the suppression hearing. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Accordingly, Wilson's third assignment of error is meritless.

{¶22} For these reasons, the trial court properly denied Wilson's motion for post-conviction relief, and the judgment is affirmed.

Donofrio, P. J., concurs.

Waite, J., concurs.