

[Cite as *State v. Wright*, 2010-Ohio-1512.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:		
Plaintiff-Appellee	:	23301, 23462,	: C.A. CASE NO.
			23597
v.		NO. 1992CR1719	: T.C.
DWAINE WRIGHT	:	(Criminal appeal from	
Defendant-Appellant	:	Common Pleas Court)	

**OPINION**

Rendered on the 2<sup>nd</sup> day of April, 2010.

CARLEY J. INGRAM, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

DWAINE WRIGHT, #43808-061, U.S.P. Hazelton, P. O. Box 2000, Bruceton Mills, WV 26525  
Defendant-Appellant

FROELICH, J.

{¶ 1} Dwaine Wright appeals, pro se, from three judgments of the Montgomery County

Court of Common Pleas, which, in essence, denied his requests for post-conviction relief and to withdraw a guilty plea that he entered over sixteen years earlier. We consolidated these appeals. For the reasons that follow, the judgments of the trial court will be affirmed.

{¶ 2} In July 1992, Wright was indicted for aggravated burglary. In September 1992, Wright's counsel filed a motion seeking a competency determination. No specific findings on the issue of competency are contained in the record, but the matter proceeded and, in January 1993, Wright pled guilty to the lesser offense of burglary. He was sentenced to prison for eighteen months. Wright did not appeal from his conviction, and he served the entire sentence.

{¶ 3} On January 16, 2009, Wright filed a "Petition for Writ of Coram Nobis or an Ohio State Alternative Remedy," arguing that he was denied the effective assistance of counsel when he entered his plea, that he was not advised of his rights, and that he did not understand his plea. The trial court stated that it was "unfamiliar with the nature of the petition" filed by Wright but, after some research, interpreted the petition as a claim that the trial court had erred in its earlier proceedings. Thus, the trial court concluded that the petition "could more properly be characterized as a petition for post-conviction relief or, alternatively, a motion to withdraw a guilty plea." After a discussion of both theories of relief, the trial court denied the petition. Specifically, the trial court concluded that the petition for post-conviction relief was untimely pursuant to R.C. 2953.21(A)(2), because it was filed more than 180 days after his conviction and because Wright had not alleged any facts which would permit the untimely filing of the petition. In addressing the motion to withdraw his guilty plea, the trial court concluded that Wright had not demonstrated a manifest injustice, as required by Crim.R. 32.1 for the withdrawal of a plea after sentencing.

{¶ 4} Wright filed a notice of appeal from the trial court's denial of his petition (Case No. 23301), raising several arguments. After he appealed from the denial of his petition, he filed in the

trial court a Second and Successive Post-Conviction Petition on May 11, 2009, and a Nunc Pro Tunc Motion to Withdraw Guilty Plea on May 26, 2009. These filings raised the same issues as his original Petition for Writ of Coram Nobis. The trial court separately overruled the petition for post-conviction relief and denied the motion to withdraw guilty plea.<sup>1</sup> Wright also appealed from these decisions (Case Nos. 23462 and 23597). We consolidated these appeals, and our resolution of the issues raised in Case No. 23301 will resolve the issues presented in all three appeals.

{¶ 5} As a preliminary matter, we conclude that the trial court acted reasonably in treating Wright’s Petition for a Writ of Coram Nobis as a petition for post-conviction relief or, in the alternative, a motion to withdraw his guilty plea. The phrase “coram nobis” is “obsolescent if not obsolete in most jurisdictions.” Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press 1987) 155. It is “the name of a writ of error directed to a court for review of its own judgments and predicated on alleged errors of fact.” *Id.* The purpose behind Ohio’s post-conviction relief statutes is similar; they “permit trial courts to consider factual information that may come to light after a defendant’s trial, [but] not \*\*\* to advance new legal theories using the same underlying facts.” *State v. Williamitis*, Montgomery App. No. 21321, 2006-Ohio-2904, at ¶18. Thus, the trial court acted reasonably in construing Wright’s petition as a petition for post-conviction relief. Further, because Wright alleged that a “manifest injustice” had occurred, the trial court reasonably construed his petition, in the alternative, as a motion to withdraw his guilty plea pursuant to Crim.R. 32.1.

{¶ 6} On appeal, Wright reiterates the arguments he made in the trial court, namely that he

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<sup>1</sup>Although the trial court ruled on Wright’s subsequent petition and motion, it lacked jurisdiction to do so, because the issues raised therein were the subject of the appeal in Case No. 23301. *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94; *In re Delaney* (May 22, 1998), Montgomery App. No. 16746.

was denied the effective assistance of counsel because trial counsel did not investigate his competence, that he did not understand his plea, and that his plea was not knowingly and intelligently made.

{¶ 7} Wright's petition for post-conviction relief clearly was not filed within the 180-day time limitation set forth in R.C. 2953.21(A)(2). The trial court lacks jurisdiction to consider an untimely petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, at ¶7. Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if he was unavoidably prevented from discovering the facts upon which he relies to present his claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to his situation. *Id.* If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶ 8} Wright's petition was supported by his own affidavit, in which he asserted that he was advised to plea guilty; that his IQ at the time of the plea was under 68; that he was "not capable of submitting a knowing, intelligent, or voluntary plea due to his incompetence;" that he "blindly followed" the advice of defense counsel because he did not understand the charge or the proceedings; that he "does not recall" defense counsel or the court "advising [him] of the facts in relation of the crime, or, the nature of the matter" before he pled guilty and the court accepted his plea; and that he had been unable to gain access to the plea colloquy and sentencing transcripts. Wright did not submit any other documentation of his claims with the initial petition. The trial court concluded that Wright had "not alleged any facts in the Petition or his Affidavit which would support an untimely petition" for post-conviction relief.

{¶ 9} The record of this case demonstrates that the issue of Wright’s competency was raised prior to his plea and that a mental examination was ordered by the trial court. Although the result of the examination is not contained in the record, the fact that an examination was requested refutes Wright’s argument that trial counsel was ineffective in failing to raise the issue of his competence, which allegedly precluded Wright from entering a voluntary, knowing, and intelligent waiver. Moreover, the competency issue was apparent before the plea was entered, and we see no reason why Wright was unavoidably prevented from raising this claim of ineffective assistance of counsel in a timely manner.

{¶ 10} Even if we assume, for the sake of argument, that there were irregularities in the trial court proceedings regarding Wright’s competence or his plea, he has failed to demonstrate that he was unavoidably prevented from raising these issues in a timely manner. Accordingly, the trial court lacked jurisdiction to consider the substance of his argument. R.C. 2953.23(A)(1)(a). The trial court correctly overruled the petition for post-conviction relief.

{¶ 11} Wright also contends that the trial court violated his rights by accepting his plea, that the plea was taken in violation of Crim.R. 11 and *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, and that a “manifest injustice” resulted. As the trial court observed, a motion to withdraw a guilty plea pursuant to Crim.R. 32.1 is not governed by the time restrictions imposed on post-conviction proceedings in R.C. 2953.21, and the two remedies are not mutually exclusive. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶14.

{¶ 12} Crim.R. 32.1 states: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” The burden of establishing the existence of a manifest injustice is on the party seeking to withdraw the

plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 264.

{¶ 13} “Although Crim.R. 32.1 does not contain a time limit for filing a post-sentence motion to withdraw a plea, a trial court may take into consideration the passage of time between entry of a plea and a defendant’s attempt to withdraw it. *Smith*, [supra]; *State v. Bush*, [supra], ¶14. ‘The more time that passes between the defendant’s plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time.’ *State v. Francis*, 104 Ohio St.3d 490, 497, \*\*\* 2004-Ohio-6894, ¶40.” *Xenia v. Jones*, Greene App. No. 07-CA-104, 2008-Ohio-4733, at ¶9.

{¶ 14} In ruling on the motion to withdraw the guilty plea, the trial court noted that Wright’s defense counsel had since died, the judge who accepted the plea had retired, the court reporter who had possessed the notes of the proceedings had left the court and retired, that no stenographic record of the plea procedure remained, and that no appellate record had been created because there was no appeal. The court concluded that Wright could not be permitted to “benefit from his unexplained delay in pursuing the relief requested in the Petition, when the State could not contradict any testimony that he might offer.” Because of the unreasonable length of the delay, the trial court overruled the motion to withdraw the plea.

{¶ 15} Notwithstanding this finding, the court went on to address the merits of Wright’s argument for withdrawing the plea. With respect to Wright’s competency, the trial court found that there was no evidence to overcome the presumption that Wright was competent to stand trial or to enter a plea. The court noted that trial counsel did request that the court inquire into Wright’s

competence and that a report was requested from the Forensic Psychiatry Center of Western Ohio. The trial court presumed that, before accepting his plea, the court found Wright competent, “there being no evidence in the record to the contrary.” The court considered two psychological evaluations that were filed with Wright’s Second and Successive Post-Conviction Petition, but it observed that these reports were created more than seven years after the plea and were not necessarily relevant to his competence at the time of the plea. It also noted that neither report appeared to relate to Wright’s competency; “instead both appear to relate to some mental disability for which [he] was seeking some type of disability benefits.” The court concluded that this evidence failed to establish a manifest injustice warranting the withdrawal of his plea.

{¶ 16} The trial court further concluded that Wright had failed to establish that trial counsel was ineffective with respect to his plea or his competence; Wright failed to establish that counsel’s performance was deficient or that, but for any of counsel’s errors, the outcome of the trial would have been different.

{¶ 17} We agree with the trial court’s conclusion that Wright failed to demonstrate a manifest injustice or extraordinary circumstances that warranted the withdrawal of his plea more than sixteen years after it was entered.

{¶ 18} Wright’s “Issues Presented” in Case No. 23301 are overruled.

{¶ 19} As we mentioned above, our resolution of the issues in Case No. 23301 also disposes of the issues raised in Case Nos. 23462 and 23597. The judgments in all three cases will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

Carley J. Ingram  
Dwaine Wright  
Hon. Mary Katherine Huffman

Case Name: *State of Ohio v. Dwaine Wright*  
Case No.: Montgomery App. Nos. 23301, 23462, 23597  
Panel: Donovan, Brogan, Froelich  
Author: Jeffrey E. Froelich