

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CLIFTON J. PANEZICH,

Petitioner-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 18 MA 0085**

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CR 505

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Percy Squires, Percy Squire Co., LLC, 341 South Third Street, Suite 10, Columbus, Ohio, 43215, for Defendant-Appellant.

Dated: June 30, 2020

Robb, J.

{¶1} Petitioner-Appellant appeals the decision of Mahoning County Common Pleas Court overruling his petition for post-conviction relief. The issue in this appeal is whether the trial court abused its discretion in denying the petition. For the reasons expressed below, the decision of the trial court is affirmed.

Statement of Facts and Case

{¶2} Appellant pled guilty and was convicted of aggravated theft, telecommunications fraud, three counts of forgery, identity fraud, money laundering, and engaging in a pattern of corrupt activity. Appellant appealed the convictions asserting his guilty plea was coerced and the plea was derived through prosecutorial misconduct. He asserted the prosecutor asked for excessive bail to coerce Appellant to pleading guilty. He also claimed the prosecutor used probation violations against his mother and that the prosecutor indicated Appellant's mother would be released from incarceration for her part in the scheme if he pled guilty. He also raised allegations of coercion regarding the grand jury proceedings and his request for a *Kastigar* hearing. Appellant contended prosecutorial misconduct tainted the entire process because the prosecutor repeatedly disclosed his proffered testimony. This court found no merit with any of Appellant's arguments and affirmed his convictions. *State v. Panezich*, 7th Dist. No. 17 MA 0087, 2018-Ohio-2812.

{¶3} Following our decision, Appellant filed a petition for post-conviction relief. 7/23/18 Post-conviction Relief Petition. He sought to have his sentence vacated, requested limited discovery, and asked to be released on bail during the pendency of the post-conviction relief proceedings. 7/23/18 Post-conviction Relief Petition. In this petition, he asserted prior Prosecuting Attorney Desmond employed deceptive and reprehensible methods to obtain the indictment and coerced his guilty plea. 7/23/18 Post-conviction Relief Petition. He pointed to alleged reasons for Attorney Desmond's termination of employment with the Mahoning County Prosecutor's Office as a basis for asserting prosecutorial misconduct. 7/23/18 Post-conviction Relief Petition. Appellant

asserted the allegations supporting termination were claims of engaging in communications with adverse parties, knowingly making himself a witness to a lawsuit, uttering false claims of ethical violations and making false and misleading allegations against fellow employees of the prosecutor's office, failing to communicate his belief that an employee engaged in misconduct to a supervisor, and using assets of the Mahoning County Prosecutor's Office to conduct research to assist adverse parties. 7/23/18 Postconviction Relief Petition. Appellant asserted that he needed to be allowed discovery to find out what exactly Attorney Desmond told the grand jury and what other information he used to support the indictment. 7/23/18 Postconviction Relief Petition. He also asserted prosecutorial misconduct in the repeated disclosure of his protected proffer and asserted he should have been allowed a *Kastigar* hearing. 7/23/18 Postconviction Relief Petition.

{¶14} In response to the motion, the state filed a motion for judgment on the pleadings. 7/25/18 Motion. The state asserted Appellant failed to present competent, credible evidence dehors the record of a constitutional violation under R.C. 2953.21. The state does not focus on Attorney Desmond, but rather points out that many of the arguments asserted were already raised in the direct appeal, including prosecutorial misconduct, coercive plea, and failure to have a *Kastigar* hearing.

{¶15} Without holding a hearing, the trial court overruled the petition indicating Appellant failed to meet his burden. 8/3/18 J.E. The court concluded that the majority of the exhibits attached were part of the record and those that were not were not sufficient to support a constitutional violation. 8/3/18 J.E. The court also concluded there was no evidence dehors the record that the plea was coerced and certain arguments were barred by res judicata. 8/3/18 J.E.

{¶16} Appellant timely appealed that decision.

Appellate Review of Postconviction Relief Petition

{¶17} The postconviction relief process is a civil collateral attack on a criminal judgment, in which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting the issues is not contained in the record of the petitioner's criminal conviction. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). "[C]ourts are not required to hold a hearing in every postconviction case." *State ex rel. Madsen v. Foley Jones*, 106 Ohio St.3d 178,

2005-Ohio-4381, 833 N.E.2d 291, ¶ 10. Before granting a hearing on a petition for postconviction relief, “the court shall determine whether there are substantive grounds for relief.” R.C. 2953.21(D). “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 * * *.” *Id.*

{¶8} Where a criminal defendant has filed a direct appeal of the conviction, a petition for post-conviction relief pursuant to R.C. 2953.21(A) must generally be filed “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.” R.C. 2953.21(A)(2). The petition in this case is timely.

{¶9} An appellate court reviews a trial court’s judgment denying a petition for post-conviction relief for an abuse of discretion. *Calhoun*, 86 Ohio St.3d 279, 281. A trial court abuses its discretion when its judgment is unreasonable, arbitrary, or unconscionable. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 46. “[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *Id.* at ¶ 45, quoting *State v. Gondor*, 112 Ohio St.3d 77, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

First, Second, and Third Assignments of Error

“Whether the trial court abused its discretion in failing to grant Appellant’s petition for post-conviction relief when there was credible evidence dehors the record to support a finding of constitutional violation.”

“Whether the trial court abused its discretion in failing to grant Appellant’s petition for post-conviction relief when there was credible evidence dehors the record to support a finding of prosecutorial misconduct, resulting in Appellant’s coercion to plead guilty.”

“Whether the trial court abused its discretion by finding that Appellant did not overcome the res judicata bar with evidence dehors the record.”

{¶10} The first three assignments of error are addressed together. In these assignments of error, Appellant asserts that the actions of Attorney Desmond that allegedly led to his termination shows Attorney Desmond committed serial misconduct.

Appellant asserts had he known of Attorney Desmond's actions he would not have accepted the plea agreement. Appellant argues there was prosecutorial misconduct by continually offering his proffered testimony. He contends there was prosecutorial misconduct in this case and other cases. He further asserts he was denied the right to the grand jury transcripts, a *Kastigar* hearing, and his plea was coerced.

{¶11} The state counters asserting the majority of the attachments to the post-conviction petition were contained in the record. The only three items that were outside the record concerned Rose Panezich, Appellant's mother. The state contends this evidence does not constitute a constitutional violation. The state argues the assertion that Appellant was entitled to grand jury transcripts is barred by *res judicata*. As to Attorney Desmond and the Mahoning County Prosecutor's Office, that information and allegations are outside the record and no evidence of these were submitted to the trial court to support the petition.

{¶12} The state's arguments are persuasive. Other than the three attachments to the petition that concerned Rose Panezich, the other evidence was a part of the record and was considered by this court in the direct appeal. Consequently, the items that are part of the record do not provide a basis for granting the post-conviction petition.

{¶13} As to the attachments that relate to Rose Panezich, Appellant claims these documents demonstrate that there was prosecutorial misconduct to coerce a plea. He contends they are evidence that she was threatened with a probation violation if she did not cooperate and testify truthfully before the grand jury and that her possible incarceration was used to get him to enter a plea. While the attachments were not considered by this court during the direct appeal, the arguments were. We explained:

Next, Appellant asserts that in order to get him to plead guilty the prosecuting attorney alleged Appellant's mother, Rose Panezich, was guilty of a probation violation, the trial court found her guilty of probation violation, and she remained incarcerated until Appellant pled guilty. In the filings before the trial court, Appellant contended his mother was subpoenaed to testify at the grand jury proceedings. Before she could testify the prosecutor told her she would not be put on the stand because he believed she would

lie and he was going to tell her probation officer she violated her probation. She was then incarcerated.

The record in this case does indicate Rose Panezich was charged in connection with the criminal enterprise alleged against Appellant and she entered a plea agreement. The record before us, however, does not confirm Appellant's version of events; the record is devoid of any indication whether Rose Panezich testified before the grand jury and what the terms of her plea agreement were. Part of Rose Panezich's plea agreement and a condition of her probation may have been to cooperate with the state against any and all co-defendants and accomplices, which would include Appellant. This is a common condition set forth in plea agreements and probation. If she did not cooperate at the grand jury proceedings or if she did not cooperate at the interview with the prosecutor in preparation for the grand jury proceedings, then there would be a basis for a probation violation.

Furthermore, part of Appellant's argument is that it was coercive to indicate his mother would not be released from incarceration unless he pled guilty. The state's indication that it would support her release if he pled guilty does not amount to coercion if there is no evidence showing Appellant was incompetent or incapable of making his own decision. *State v. Slater*, 8th Dist. No. 101358, 2014–Ohio–5552, ¶ 13 (familial pressure to enter plea does not equate to coercion in the absence of evidence that the defendant is incapable of making his own decision); *State v. Parham*, 11th Dist. No. 2011-P-0017, 2012-Ohio-2833, ¶ 26 (familial pressure does not result in a coerced plea). Appellate courts have found that a plea is not coerced when a defendant pleads guilty in exchange for the dismissal of charges against his family members. *State v. Kesterson*, 2d Dist. No. 95 CA 39, 1996 WL 280753 (May 24, 1996) (holding that, although the defendant “may have been given a choice between cooperating with the authorities or seeing his wife arrested,” this did not raise an issue as to whether his plea was

voluntary); *State v. Vild*, 8th Dist. No. 69574, 1996 WL 492273 (Aug. 29, 1996) (no coercion was found where appellant's plea was made in exchange for the dismissal of charges against his family members).

State v. Panezich, 7th Dist. Mahoning No. 17 MA 0087, 2018-Ohio-2812, ¶ 30-32.

{¶14} The attachments to the petition do not alter that analysis because they do not add any new information.

{¶15} Next, the allegations that he was denied the right to the grand jury transcripts, a *Kastigar* hearing, and his plea was coerced are barred by res judicata. “Although a defendant may challenge his conviction and sentence by either a direct appeal or a petition for postconviction relief, any claims raised in a postconviction relief petition will be barred by res judicata where the claim was or could have been raised on direct appeal.” *State v. Schwieterman*, 3d Dist. Mercer No. 10-09-12, 2010-Ohio-102, ¶ 23, citing *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.3d 158 (1997). Res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.3d 824, ¶ 18.

{¶16} All of those issues were raised in the direct appeal and addressed. We explained:

Appellant's sixth and seventh alleged acts of coercion concern the grand jury proceedings and his motion for a *Kastigar* hearing. The sixth allegation asserts the prosecuting attorney unlawfully presented testimony to the grand jury that was obtained through Appellant's proffer. The seventh allegation asserts the trial court induced him to plead guilty by failing to act on Appellant's request for a *Kastigar* hearing or to grant him access to the grand jury proceedings.

Appellant moved for inspection of the grand jury proceedings. 11/7/16 Motion. The trial court denied the request. 11/9/16 JE. Appellant did not appeal that ruling. The assertion that Appellant was coerced into pleading

guilty because the prosecuting attorney used his statements made to the FBI under proffered protection is dependent on those statements being used. Without a transcript there is no basis to determine whether his factual presupposition is correct. Furthermore, the trial court made no statements in its judgment entry denying the request for grand jury transcripts that could have reasonably led Appellant to believe he could not get a fair trial because the judge either suggested that trial would be futile or that he would be biased against him. *Davis*, 2014-Ohio-5371 at ¶ 34. The judgment entry merely denied the request.

Although Appellant did not appeal the denial of the grand jury transcripts, that ruling most likely would have been upheld if it was appealed. The Ohio Supreme Court has stated grand jury proceedings are secret, and thus, a defendant has no right to inspect grand jury transcripts either before or during trial unless the “ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.” *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus. A defendant establishes a particularized need for grand jury transcripts when the circumstances reveal a probability that “the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness’ trial testimony.” *Id.* at paragraph three of the syllabus. This determination is a fact question left to the sound discretion of the trial court. *Id.* at paragraphs one and three of the syllabus. Accordingly, “[a] decision denying the release of the grand jury transcript will not be reversed absent an abuse of discretion.” *State v. Coley*, 93 Ohio St.3d 253, 261, 754 N.E.2d 1129 (2001). An abuse of discretion is conduct that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). “A review under the abuse-of-discretion standard is a deferential review.” *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

There is nothing in the record indicting Appellant could demonstrate a particularized need for the disclosure that outweighs the need for secrecy. Appellant was not able to demonstrate the failure to disclose the testimony deprived him of a fair adjudication of the allegations. If Appellant had not withdrawn his request for a *Kastigar* hearing and pled guilty, the issue of whether Appellant statements were protected from being used in state court could have been decided. * * *

The *Kastigar* hearing could have ensured he had a fair adjudication of the allegations against him. Thus, there was no particularized need for the grand jury transcripts and no indication the grand jury proceedings were used to coerce him into pleading guilty.

Furthermore, it is important to note that although Appellant claims the trial court failed to act on his *Kastigar* request, the record disputes that allegation. A trial court judgment entry indicates Appellant withdrew his suppression motion. 12/16/16 J.E. The only suppression motion filed was titled, “Motion for a *Kastigar* Hearing and to Suppress all Evidence Derived in Violation of *Kastigar*.” 12/7/16 Motion. Therefore, it cannot be claimed the trial court's disregard of the hearing request is evidence of coercion because the request was withdrawn, not disregarded.

Panezich, 7th Dist. Mahoning No. 17 MA 0087, 2018-Ohio-2812, ¶ 33-38.

{¶17} Furthermore, we explained that even if the issue regarding the *Kastigar* hearing was not waived by withdrawing the request, it was waived by entering a guilty plea. *Id.* at ¶ 57.

{¶18} Therefore, the issues were raised and are barred by res judicata. Appellant does not provide any new information to render the doctrine of res judicata inapplicable.

{¶19} Lastly, as to the allegations regarding Attorney Desmond, those allegations lack any support. The reasons and basis for Attorney Desmond's termination from the

Mahoning County Prosecutor's Office are a matter outside the record, but Appellant offered no evidence other than bare allegations regarding the termination to support his claim that he is entitled to post-conviction relief. Therefore, Appellant has not met his burden regarding this matter.

{¶20} For those reasons, the first three assignments of error lack merit.

Fourth Assignment of Error

"Whether the trial court abused its discretion by refusing to permit post-conviction discovery or grant a hearing when there was evidence that the prosecutor was engaged in a pattern of abusing the rights of defendants, the bail system, and the Grand Jury."

{¶21} Appellant argues he should be permitted post-conviction discovery, specifically that he should be entitled to the grand jury transcripts. He also asserts he is entitled to a hearing.

{¶22} As to a hearing, the law is clear that a "criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing." *Calhoun*, 86 Ohio St.3d 279, 282. A hearing will only be granted if the trial court determines 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." R.C. 2953.21(A)(1). See also *Calhoun*, 86 Ohio St.3d at 282-283.

{¶23} As to discovery, we have previously explained that the Ohio Supreme Court has held "there is no requirement of civil discovery in postconviction proceedings." *State v. Adams*, 7th Dist. Mahoning No. 18 MA 0116, 2019-Ohio-4090, ¶ 64 quoting *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 718 N.E.2d 426 (1999). Furthermore, as explained above, Appellant requested the grand jury transcripts, the request was denied, and he did not appeal that decision. The issue of whether he was entitled to grand jury transcripts could have been raised, but was not.

{¶24} For those reasons, the fourth assignment of error lacks merit.

Fifth Assignment of Error

"Whether the trial court abused its discretion by refusing to release Mr. Panezich on bail pending disposition of the petition for post-conviction relief when the factors in favor of release on bail were overwhelmingly met in this case."

{¶25} Appellant argues the trial court erred in denying him the right to bail while the post-conviction relief petition was pending.

{¶26} A defendant does not have a right to bond after conviction. “Prior to conviction, an accused is afforded the benefit of the presumption of innocence, the burden being upon the state to prove his guilt. After conviction such presumption no longer exists; the accused has been found guilty, and the burden is then upon the convicted felon to prove such conviction erroneous.” *Coleman v. McGettrick*, 2 Ohio St.2d 177, 180, 207 N.E.2d 552 (1965). Therefore, “the decision of a court denying bail should be disturbed only if there is a ‘patent abuse of discretion.’” *Jurek v. McFaul*, 39 Ohio St.3d 42, 43, 528 N.E.2d 1260 (1988), quoting *Coleman*. Concerning bail pending appeal after conviction, it is within the sound discretion of the court whether to grant bail. *Coleman* at 279.

{¶27} Although the above cited cases are not about bail pending post-conviction relief petition, the reasoning is persuasive. The trial court acted within its discretion to deny bail following his conviction and during the pendency of the post-conviction relief petition. This assignment of error is meritless.

Conclusion

{¶28} For the reasons stated above all five assignments of error lack merit. The trial court’s decision overruling the petition is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.