[Cite as *State v. Bryan*, 2010-Ohio-2088.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93038

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

QUISI BRYAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-393660

BEFORE: Jones, J., Gallagher, A.J., and Cooney, J.

RELEASED: May 13, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy Young
State Public Defender

BY: Kathryn L. Sandford
Benjamin Zober
Assistant State Public Defenders
Office of Ohio Public Defender
250 East Broad Street
Suite 1400
Columbus, Ohio 43215-9311

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Quisi Bryan ("Bryan"), appeals the trial court's dismissal of his petition for postconviction relief. For the reasons set forth below, we affirm the judgment of the trial court.

{¶ 2} Bryan was convicted of aggravated murder of a law enforcement officer and other offenses associated with the death of Cleveland police officer Wayne Leon on June 25, 2000. Bryan was subsequently sentenced to death. His conviction and sentence were affirmed upon direct appeal to the Supreme Court of Ohio in *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433.

{¶ 3} The relevant facts were previously summarized by the Ohio Supreme Court as follows:

> "Early in 2000, Quisi Bryan, who was at the time married, began living together with Janie Winston, his 18-year-old girlfriend, at her Cleveland residence. Bryan supported himself by selling drugs and 'hitting licks,' i.e., robbing other drug dealers. He owned a revolver, carried a Glock .45 caliber semiautomatic handgun, and at all times, kept a shotgun hidden inside Winston's mattress. At that time, he told Winston that his parole officer was looking for him because he 'had got caught up with writing his name on some cashier's checks and-or traveler's checks.' He told Winston, though, 'I'm going to go in under my own terms.' In fact, Bryan had been indicted for theft and receiving stolen property, and arrest warrants had been issued alleging him to be a parole violator.
>
> "Around 11:00 or 11:30 p.m. on Saturday, June 24, 2000, Bryan told Winston that he was leaving the house to 'hit a lick.' She did not hear from him again until late the next morning. * * *
>
> "Around 11:00 a.m., on Sunday, June 25, 2000, while alone on routine patrol in his police cruiser, Officer Wayne Leon apparently noticed irregularities on the temporary license tag on Bryan's Pontiac Grand Prix.

Leon followed Bryan's car as it stopped at a Sunoco service station located at the corner of East 40th Street and Community College Avenue.

"Officer Leon and Bryan both exited their vehicles after stopping. Leon first inspected Bryan's temporary tag and noticed that it had been altered. He then obtained Bryan's driver's license to run a police check on him and on the vehicle.

"Officer Leon and Bryan stood next to the cruiser as Leon called the station using his police radio transmitter on his right shoulder. Leon's right hand was on the radio transmitter and his left hand was holding Bryan's driver's license. As Leon turned his head to talk over the radio, Bryan pulled his Glock handgun from his coat and shot Leon in the face. As Leon lay on the ground, Bryan retrieved his driver's license, returned to his car, and sped away. Officer Leon died from that gunshot. * * *

"While waiting at a traffic light next to the Sunoco station, Kenneth Niedhammer heard the gunshot and saw a police officer lying on the pavement. Niedhammer then saw a white Pontiac Grand Prix drive erratically from the Sunoco station. Niedhammer, who was driving a private security vehicle, pursued the Grand Prix. While in pursuit, Niedhammer activated the security vehicle's siren and flashing lights.

"On East 39th Street, Bryan stopped behind a vehicle driven by Cad Holly Matthews, who was waiting at a stop sign. Bryan exited his Grand Prix and started shooting at Niedhammer. One of Bryan's shots hit a spotlight on Niedhammer's vehicle, which was only six to eight inches from Niedhammer's head. A ricochet from another shot bruised Niedhammer's forearm. One of Bryan's shots also struck an upstairs bedroom window in Matthews's nearby home near where Matthews's granddaughter, her fiancé, and their eight-month-old son were sleeping. Niedhammer stopped, exited his vehicle, and returned fire.

"Following the exchange, Bryan sped away with Niedhammer in pursuit. After a few more blocks, Bryan stopped again, got out of his car, and again fired at Niedhammer. Niedhammer stopped his vehicle behind Bryan's car and fired two or three shots at Bryan. After a minute or so, Bryan returned to his car and drove away with Niedhammer in pursuit.

"Bryan eventually lost control of his vehicle and collided with several parked cars and a church van. Although dazed by the crash, Bryan grabbed his backpack and gun and ran away.

"After running a short distance from the crash scene, Bryan approached a group of men and asked whether he 'could pay somebody to drop him off because guys was after him.' For $30, Barry Philpot drove Bryan to a designated location and dropped him off. Bryan threw his Glock handgun into a nearby dumpster, went to his wife Elaine Bryan's home, and fled in her blue Dodge Spirit.

"Bryan then called Winston, told her 'that something happened' and that she should '[p]ack up some clothes.' He met Winston at a supermarket, and they drove to his father's home. Bryan obtained a handgun from his father's house and put it under the car seat. Bryan and Winston then drove to Columbus.

"While driving to Columbus, Bryan told Winston, 'I hope he don't die. * * * I shot a police officer in the face.' Bryan explained that a police officer had stopped him, 'they exchanged words, and [Bryan] pulled out his gun, put it to his head * * * and [as] the officer was reaching for his [gun] * * * [Bryan] shot him.' Bryan also said, 'I just can't go back under their terms. I'm going to go under mine. * * * [I]f this man dies, I will never see the day of light again or I will just get life in prison. Janie, I just can't go back.'

"In Columbus, Bryan drove to an ex-girlfriend's house and tried unsuccessfully to buy some crack cocaine. He then told Winston, 'Well, we going to catch a train to Pennsylvania. Then from Pennsylvania we going to fly to Florida. Then from there we going to try to leave the country.'

"While looking for a Columbus hotel, Bryan offered a stranger, Gerald Alfred, money to rent a hotel room for them. During the late afternoon on June 25, Bryan and Winston went into the hotel room with Bryan's backpack, which contained .45 caliber and .357 magnum cartridges, parts of a shotgun, two shotgun rounds, and gun-cleaning equipment. Winston placed the handgun that Bryan had obtained from his father's house underneath the bed in the hotel room.

"Bryan told Winston that Alfred was going to help him look for some crack. Bryan left the room and told Winston that he would be 'right back.' When Bryan did not return, Alfred drove Winston to the Greyhound station so that she could return to Cleveland. She put the handgun into Bryan's backpack and took it with her.

"By the time Bryan and Winston had arrived in Columbus, Cleveland police had already identified him as the main suspect in Leon's shooting by tracing the Pontiac's temporary license tag. From Elaine Bryan, they obtained a description of the Dodge Spirit that Bryan was driving, and they broadcast a

description of Bryan and the Dodge Spirit to police departments throughout Ohio and surrounding states.

“Later that same day, Columbus Police Sergeant Tyrone Hollis spotted the Dodge Spirit, stopped his cruiser behind it, and arrested Bryan. As Bryan was being escorted to the police cruiser, he said, ‘I didn’t shoot the cop. I was there.’ When he was in the cruiser, Bryan also blurted out, ‘I didn’t pull the trigger.’

“Police later learned that Alfred had rented a hotel room for Bryan and a young lady. After police located Alfred, he described Winston and said that she was at the Greyhound station. Police then arrested Winston and seized Bryan’s backpack.

“Around 3:00 a.m. on June 26, Cleveland Police Detective Michael O'Malley attempted to interview Bryan in Columbus. As Bryan was brought to the roll-call room, he said, ‘You probably think I’m some kind of animal.’ After O'Malley advised Bryan of his Miranda rights, Bryan said that he did not wish to talk about the incident. However, Bryan did say, I feel sorry for the officer and things aren’t like they seem.’

“Following Officer Leon’s murder, police investigators showed eyewitnesses a photo array to identify Leon’s assailant. Neither Geneva Marie Jefferson, who had witnessed the shooting at the Sunoco station, nor Niedhammer was able to identify Bryan from a photo array. Similarly, neither George Abou-Nader nor Donnell Wingfield, then Sunoco station employees, was able to identify Bryan when first shown his photograph. However, Jefferson later identified Bryan as the assailant when she saw his picture on television. Wingfield and Abou-Nader also later identified Bryan when shown updated photographs of him. On June 28, Niedhammer identified Bryan from an updated photograph in a second photo array.

“During the course of their investigation, police investigators recovered a .45 caliber shell casing at the Sunoco station. At the location of the second shooting, they also found five .45 caliber shell casings and a copper-colored jacket from a bullet. Police also removed a spent .45 caliber bullet embedded in a door of Matthews’s home.

“At trial, Cleveland Detective Thomas Lucey testified that the same Glock handgun fired the bullet recovered from Leon’s body and the bullet and copper jacket recovered from the second shooting scene. Each bullet had eight lands and grooves and a right-hand twist. Moreover, unique impressions left on each bullet were characteristic of the manufacturing process of Glock barrels.

"According to Detective Lucey, the same Glock handgun ejected the .45 caliber shell casings found at the Sunoco station and at the second shooting scene. This conclusion was based on four points of comparison: firing pin impressions, breech face markings, and extractor and ejector markings.

"Following Bryan's arrest, police found 'two unique gunshot residue particles' on Bryan's right hand. Gunshot residue was also found on the driver's door handle inside Bryan's Grand Prix and in the roof area behind the driver's side rear window.

"Julie Heinig, a forensic scientist, concluded that biological DNA material removed from an inhaler and two cigar butts found in the Grand Prix contained Bryan's DNA profile. In the case of the inhaler, the probability of finding another individual with the same DNA profile was more than one in a hundred trillion for Caucasians and more than one in a quadrillion for African-Americans.

"Dr. Stanley Seligman, a deputy coroner, testified that Leon died as the result of a single gunshot to the head and neck. In addition, the coroner recovered a .44 or .45 caliber, copper-jacketed bullet from Leon's body. Stippling on his face showed that Leon was shot from a distance of approximately two and one-half feet. Moreover, the bullet's trajectory was consistent with testimony that Leon's face was turned to the right when he was shot. * * *

"Bryan testified in his own behalf. He disclosed that he had been released on parole on November 2, 1998, for attempted robbery, that his parole was scheduled to end on December 2, 1999, and that he had married Elaine in September 1999.

"In November 1999, Bryan's parole officer had informed him that he was being investigated for receiving stolen property and could not be released from parole because of a pending indictment. Bryan did not return to visit his parole officer, explaining, 'I thought * * * I would be arrested.' To avoid arrest, Bryan left his wife and moved in with Winston.

"He further admitted that he supported himself by selling drugs and that he owned a .45 caliber Glock, a .357 caliber revolver, and a shotgun. Elaine purchased the Glock in her name because he was a convicted felon.

"According to Bryan, Officer Leon stopped him on June 25 for driving with altered license tags. After further inspecting the tags, Leon called them 'fictitious.' Leon then started talking into his radio mike, and Bryan was

> 'trying to think of a way to convince him to stop.' Bryan then pulled a handgun, 'pointed it at his mike,' and said, 'Don't do that.' Bryan testified that in response, Leon jumped back, pivoted, and his 'right hand came down towards his weapon.' Bryan then shot Leon.
>
> "Bryan further testified that after the shooting, he drove off at a high rate of speed. Bryan saw a security car following him and stopped behind Matthews's car at East 39th Street and Central. Bryan said that he had planned to leave his car and run away. However, he said, '[a]s soon as I opened the door and jumped out, I was fired on.' Bryan testified that he then fired four or five shots at Niedhammer, got back into his car, and sped away. Bryan denied that he had shot at Niedhammer two separate times.
>
> "After hitting the church van, Bryan left his vehicle, took his Glock handgun and backpack, and fled on foot. Bryan later threw the Glock into a dumpster.

{¶ 4} "Bryan denied that he intended to kill Officer Leon. Rather, he said, 'I just wanted to convince him * * * with the weapon not to call on the mike.' According to Bryan, he said that he 'pointed right at the mike' when he shot him. Bryan said that he was 'very remorseful' after shooting Leon, insisting 'There's not a day that goes by that I don't think about it.' During cross-examination, Bryan said that he had pulled the trigger as just 'a reflexive motion to [Leon's] jump.'" *Byran* at ¶8-40.

{¶ 5} In 2001, Bryan filed a petition for postconviction relief with the Cuyahoga County Court of Common Pleas. He amended the petition three times and also filed motions for funds to retain a neuropsychologist and for discovery. In November 2005, the trial court dismissed the petition and issued its Findings of Fact and Conclusions of Law. Bryan appealed to this court, and we dismissed the appeal for lack of a final appealable order, finding that the trial court failed to

rule on two grounds that Bryan had raised in his postconviction petition. *State v. Bryan*, Cuyahoga App. No. 87482, 2006-Ohio-5022.

{¶ 6} In 2008, Bryan filed renewed motions for funds to retain a neuropsychologist and for discovery. In February 2009, the trial court issued another Findings of Fact and Conclusions of Law, dismissing the postconviction petition on the final two grounds for relief. In May 2009, the trial court issued a consolidated Findings of Fact and Conclusions of Law. It is from this order that Bryan appeals, raising the following assignments of error for our review:

> "I. The trial court erred by dismissing appellant's postconviction petition where he presented sufficient operative facts and supporting exhibits to merit an evidentiary hearing and discovery in violation of his rights as guaranteed by the Fourteenth Amendment to the United States Constitution.
>
> "II. The trial court erred when without first affording him the opportunity to conduct discovery it denied appellant's postconviction petition in violation of his rights as guaranteed by the Fourteenth Amendment to the United States Constitution.
>
> "III. The trial court erred when it refused to grant appellant funds to retain a neuropsychologist in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> "IV. Considered together, the cumulative errors set forth in appellant's substantive grounds for relief merit reversal or remand for a proper postconviction process."

Postconviction Petition

{¶ 7} "A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927, ¶8, quoting *State v. Steffen*, 70 Ohio St.3d 399, 1994-Ohio-111, 639 N.E.2d 67. R.C. 2953.21(A)(1)(a) allows Bryan to file a

petition asking the trial court to vacate or set aside the judgment of conviction or sentence. Bryan, as petitioner, must state all grounds for relief on which he relies, and he waives all other grounds not so stated. R.C. 2953.21(A)(4). In determining whether substantive grounds for relief exist, the trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support of the petition. R.C. 2953.21(C). If the trial court finds no grounds for granting relief, it must make findings of fact and conclusions of law supporting its denial of relief. R.C. 2953.21(G).

{¶ 8} A trial court may rule on a postconviction petition without first holding a hearing. Proper grounds for dismissing a petition for postconviction relief without holding an evidentiary hearing include: "1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and 2) the operation of res judicata to bar the constitutional claims raised in the petition." *State v. Thomas*, Cuyahoga App. No. 87666, 2006-Ohio-6588, citing *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 1994-Ohio-532, 639 N.E.2d 784. "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

{¶ 9} A petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal. The evidence submitted in support of the petition "must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery." *State v. Lawson* (1995), 103 Ohio App.3d 307, 659 N.E.2d 362. The evidence submitted with the petition must be competent, relevant, and material and not merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 652 N.E.2d 205.

{¶ 10} We review the trial court's ruling on a postconviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶45.

{¶ 11} In this case, Bryan argues that since he presented evidence dehors the record in support of each of the 13 grounds for relief, his petition should not be barred by res judicata. "Generally, the introduction in an R.C. 2953.21 petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata." *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169.

Bryan's Postconviction Petition

{¶ 12} In his first assignment of error, Bryan argues the trial court erred by dismissing his postconviction petition where he presented sufficient evidence to merit an evidentiary hearing.

{¶ 13} In his postconviction petition, Bryan raised 13 grounds for relief, all which were premised on the argument that his trial counsel was ineffective. In grounds 1 and 11, Bryan argues that his counsel was ineffective during the trial phase. In grounds 2-10, 12, and 13, Bryan claims his counsel was ineffective during the sentencing phase of his capital proceeding.

{¶ 14} In order to establish a claim of ineffective assistance of counsel, Bryan must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

{¶ 15} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. *Strickland* at 689. The Court noted that it is very tempting for a defendant to question his lawyer's performance after conviction and that it would be too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Id. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

{¶ 16} We will discuss each claim set forth by Bryan, combining claims when they involve the same evidence and facts.

Claims of Ineffective Assistance of Counsel During Trial

Trigger Pull

{¶ 17} In his first claim, Bryan argues that counsel was ineffective for failing to secure a firearms expert that would have testified that the gun used in the shooting had a light trigger pull. To support his claim, Bryan attached to his postconviction petition an online printout from www.glock.com that listed the specifications of the Glock 21 handgun and an affidavit from Kenneth Eyster, a gun shop owner. Bryan claims that an expert could have testified that the trigger pull on the gun he used was only 5.5 pounds, which would have supported the defense theory that Bryan accidentally pulled the trigger when he shot Officer Leon. The expert's testimony, Bryan further argues, would have contradicted Detective Lacey's testimony that the gun had a 10-pound trigger pull.

{¶ 18} Bryan's testimony belies what he is now trying to claim. During cross-examination, Bryan admitted that he had pulled the trigger as just "a reflexive motion to [Leon's] jump," as opposed to accidentally pulling the trigger. Therefore, the trial court did not abuse its discretion in denying this ground for relief.

Reenactment of Shooting

{¶ 19} In his eleventh ground for relief, Bryan claims that his attorney's decision to reenact the shooting of Officer Leon prejudiced him. To support his claim, Bryan attached an affidavit from Brian Johnson, an actor, director, and instructor of trial advocacy. Johnson opined that defense counsel's reenactment was ineffective. To reach his conclusion, he studied the trial transcript and a newspaper photograph of the reenactment.

{¶ 20} Bryan argues that the flawed reenactment assisted the state in proving aggravating circumstances that led to his convictions. The trial court disagreed and concluded that the reenactment might have actually contributed to the jury acquitting Bryan on the aggravated murder with prior calculation and design count.

{¶ 21} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶101. A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132, 749 N.E.2d 226. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland* at 681. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Id.

{¶ 22} We do not find that defense counsel's decision to have Bryan reenact the shooting of Officer Leon during his direct examination amounts to ineffective assistance of counsel. Therefore, the trial court did not abuse its discretion in denying the petition on this ground.

Ineffective Assistance of Counsel During Sentencing

{¶ 23} In his remaining grounds for relief, Bryan argues that defense counsel was ineffective during the sentencing phase.

Expert Witnesses

{¶ 24} In his second, sixth, eighth, ninth, and tenth grounds for relief, Bryan argues that defense counsel failed to obtain and utilize proper experts to assist in the sentencing phase; specifically, a competent psychologist, a cultural expert, and a substance abuse expert. These omissions, Bryan argues, meant that defense counsel was unable to present relevant mitigating evidence. To support his claims, Bryan presented various affidavits stating that neurological testing should have been performed as it could have provided additional mitigation evidence to present to the jury. The trial court noted that counsel did secure the assistance of two investigators, a mitigation specialist, and a psychiatrist to assist in the preparation of trial and sentencing phases, and Bryan failed to show how the appointment of additional experts would have assisted in his defense.

{¶ 25} As the Ohio Supreme Court already noted: "Bryan argues ineffective assistance of counsel during the penalty phase because counsel failed to present 'viable' mitigating evidence. * * * Prior to the penalty-phase proceedings, the

defense counsel informed the trial court that the mitigation specialist prepared 'voluminous records relative to mitigation' and that the defense psychologist spent 15 to 30 hours interviewing Bryan. The defense counsel carefully reviewed this information, and after discussing the matter with Bryan, decided that 'it was in our client's best interest' not to introduce this evidence. The defense counsel made a strategic trial decision, which cannot be the basis for an ineffective assistance claim. See *State v. Mason*, 82 Ohio St.3d at 169, 1990-Ohio-370, 694 N.E.2d 932." *Bryan* at ¶72.

{¶ 26} "Finally, resolving this issue in Bryan's favor would require speculation. Nothing in the record before us indicates what testimony the defense experts would have presented as no proffer has been made." Id. at ¶191.

{¶ 27} Therefore, the court's dismissal of the petition on these grounds was not an abuse of discretion.

Mitigation Investigation

{¶ 28} In his third, seventh, twelfth, and thirteenth grounds for relief, Bryan argues that defense counsel was ineffective for failing to adequately interview witnesses and failing to obtain available records that would have assisted in the mitigation phase of sentencing.

{¶ 29} First, Bryan argues that he was involved in two car accidents that required neuropsychological evaluation and he grew up in a household filled with physical and emotional abuse. He supported these claims with affidavits from himself and his mother. Although a trial court should give affidavits filed in

support of a postconviction petition "due deference," it may also "judge their credibility in determining whether to accept the affidavits as true statements of fact." *Calhoun* at 284. In assessing the credibility of affidavit testimony, consideration should be given to all relevant factors. Id. Among those factors are: (1) whether the judge reviewing the 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. at 285.

{¶ 30} Further, a trial court may find an affidavit to be contradicted by testimony in the record given by the same witnesses or to be internally inconsistent, thereby weakening the credibility of that testimony. Id. Depending on the 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. Id.

{¶ 31} Here, the same judge who presided over the trial reviewed the postconviction petition. The record demonstrates that the trial court gave careful consideration to the arguments set forth in the petition, as demonstrated by in-depth findings of fact and conclusions of law. Further, the affiants were interested persons and an "affidavit from the petitioner is considered self-serving

and therefore it is reasonable to afford it less credibility." *State v. Haschenburger*, Mahoning App. No. 08-MA-223, 2009-Ohio-6527, ¶46.

{¶ 32} Bryan also argues that his attorney should have presented evidence that he was exposed to Black Panther philosophy, did not meet his father until he was 14 years old, and was exploring the Muslim faith. We do not find that the trial court abused its discretion in finding that this evidence was not of sufficient quality to undermine Bryan's guilt or make his mitigation hearing unreliable.

{¶ 33} Next, Bryan claims that his attorney failed to discuss his good prison record or call witnesses that would have testified that he was well-liked when he was in Community Re-Entry. Again, the evidence supporting these claims does not rise to the level of finding that his mitigation hearing was unreliable. The record shows that defense counsel interviewed the Community Re-Entry witnesses and chose not to have them testify. And, as the state points out, calling these witnesses to the stand would have permitted the state to introduce more evidence concerning Bryan's inability to integrate into society and be rehabilitated. Moreover, the Ohio Supreme Court has already ruled that trial counsel's selection of mitigation witnesses was within acceptable trial tactics. See supra.

{¶ 34} Bryan further argues that defense counsel failed to develop information regarding his substance abuse problems. Even though Bryan testified that he had abused drugs in the past and was under the influence the morning of the shootings, he also testified that he did not have a substance abuse

problem. Thus, counsel would have been hard-pressed to develop mitigation testimony to the contrary, and we will not fault counsel for failing to do so.

{¶ 35} Therefore, we do not find that the trial court abused its discretion in determining that Bryan's proposed grounds for relief did not warrant an evidentiary hearing.

Mother's Testimony

{¶ 36} In his fourth ground for relief, Bryan claims that counsel failed to adequately prepare his mother, Cassandra Bryan, for her testimony during the sentencing phase of the proceedings and that his mother should have been more prepared to testify regarding his social history and background. To support his claim, Bryan attaches an affidavit from social worker and mitigation specialist Dorian Hall and an affidavit from Cassandra Bryan. In his affidavit, Hall opined that defense counsel should have further developed Cassandra Bryan's testimony. The trial court found that Bryan failed to specifically articulate how additional preparation of his mother would have changed the outcome of the proceedings. We agree.

{¶ 37} We note that on direct appeal, Bryan argued that his counsel called Cassandra as a mitigation witness and that questioning her resulted in a damaging cross-examination of her. The Ohio Supreme Court found that "[t]he defense made a legitimate tactical decision to call Cassandra as a witness. His mother's testimony helped to humanize Bryan before the jury. Moreover, Bryan's argument that Cassandra's testimony was detrimental is doubtful. Indeed,

testimony that Bryan was brought up in a good home with strong values can be viewed in a favorable light. Such testimony might tend to show that Bryan's crimes were an aberration and that he has rehabilitation potential." *Bryan* at ¶194.

{¶ 38} We agree with the trial court that Bryan has failed to demonstrate how his defense was prejudiced as contemplated by *Strickland*, even with the additional information presented by Bryan in support of this ground for relief. Moreover, we are bound by the factual findings of the Ohio Supreme Court in *Bryan*. Therefore, we find that the trial court did not abuse its discretion in dismissing the petition based on this ground for relief.

Ability to Adjust to Prison Life

{¶ 39} In his fifth ground for relief, Bryan argues that defense counsel failed to present evidence concerning his ability to adjust to life in prison. The trial court found that given the facts and circumstances of the case, it was not likely that a jury would give much weight to Bryan's prison record and even if counsel had presented such evidence, Bryan was still found guilty of three aggravating circumstances: killing a police officer engaged in his duties, murder to escape accounting for another crime, and murder as part of a course of conduct involving the attempt to kill two or more persons. See R.C. 2929.04(A)(3), (5), and (6); see, also, *State v. Simko* (1994), 71 Ohio St.3d 483, 644 N.E.2d 345. There was also evidence that Bryan did not adjust well to prison life as he would continually break confinement and committed criminal acts while in prison.

{¶ 40} Therefore, we find no abuse of discretion in the trial court's rejection of Bryan's ineffective assistance of counsel.

{¶ 41} We further note that Bryan's claims may be barred by res judicata. As stated supra, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal. In his postconviction petition, the information that Bryan alleges in support of his claims was available to him at the time of trial, is merely cumulative, and could have been raised on direct appeal.

{¶ 42} After reviewing the trial court's decision, we cannot conclude that the trial court abused its discretion when it dismissed the petition without a hearing on Bryan's proposed grounds for relief.

{¶ 43} The first assignment of error is overruled.

Discovery

{¶ 44} In the second assignment of error, Bryan argues that the trial court erred when it did not afford him an opportunity to conduct discovery as to his postconviction petition.

{¶ 45} The long-standing rule in Ohio is that a convicted criminal defendant has no right to additional or new discovery, whether under Crim.R. 16 or any other rule, during postconviction relief proceedings. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 718 N.E.2d 426 (per curiam), certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1977, 146 L.Ed.2d 806; see, also, *State v. Taylor*, Cuyahoga App. No. 80271, 2002-Ohio-2742, ¶19

("Courts are not required to provide petitioners discovery in postconviction proceedings.") The trial court therefore did not err by denying Bryan's motion for discovery.

{¶ 46} The second assignment of error is overruled.

Appointment of Expert During Postconviction Proceedings

{¶ 47} In his third assignment of error, Bryan argues that the trial court should have granted him funds to retain a neuropsychologist for his postconviction proceedings.

{¶ 48} A petitioner in a postconviction proceeding only possesses the rights given him by statute. *State v. Stedman*, Cuyahoga App. No. 83531, 2004-Ohio-3298, ¶36, citing *State v. Moore* (1994), 99 Ohio App.3d 748, 751, 651 N.E.2d 1319. There is no statutory right for the appointment of an expert in a postconviction proceeding. *Stedman*. A narrow exception to this principle has developed, but this exception is not applicable here. See *State v. Hammond*, Franklin App. No. 08AP-176, 2008-Ohio-4459, citing *State v. Lorraine* (May 20, 2005), Trumbull App. No. 2003-T-0159, 2005-Ohio-2529 (applying exception to indigent capital defendant raising a claim under *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d. 335).

{¶ 49} Therefore, the trial court did not err in denying his motion. The third assignment of error is overruled.

Cumulative Errors

{¶ 50} In the fourth assignment of error, Bryan argues that the cumulative effect of the errors asserted in the 13 grounds for relief deprived him of his constitutional right to a fair hearing.

{¶ 51} The Ohio Supreme Court has recognized the cumulative error doctrine. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus. According to this doctrine, "errors during trial, singularly, may not rise to the level of prejudicial error, [but] a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." Id. at 196-97. "[E]ven to consider whether 'cumulative' error is present, [the court] would first have to find that multiple errors were committed in this case." *State v. Madrigal*, 87 Ohio St.3d 378, 2000-Ohio-448, 721 N.E.2d 52. After our review of the grounds for relief, and having found no error in the 13 grounds raised by Bryan, the doctrine of cumulative error is inapplicable.

{¶ 52} Therefore, the fourth assignment of error is overruled.

{¶ 53} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS
IN JUDGMENT ONLY