

[Cite as *State v. Berry*, 2010-Ohio-3722.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93592

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER BERRY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466432

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 12, 2010

FOR APPELLANT

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ON RECONSIDERATION¹

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Christopher Berry appeals the trial court's denial of his petition for postconviction relief. He sets forth seven assigned errors for our review.²

Facts

¹The original announcement of decision, *State v. Berry*, Cuyahoga App. No. 93592, 2010-Ohio-3417, released July 22, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

²See appendix.

{¶ 2} The Cuyahoga County Grand Jury indicted Berry for three-counts: aggravated murder, kidnapping, and tampering with evidence. The aggravated murder and kidnapping counts had a notice of prior conviction and a repeat violent offender specification.

{¶ 3} The charges arose from the murder of a woman whose body was discovered in the Cleveland Metroparks. The jury found Berry guilty of the lesser-included offense of murder, kidnapping, and tampering with evidence. The trial court sentenced Berry to a total of 21 years in prison.

{¶ 4} Berry directly appealed to this court, and we affirmed his conviction, but vacated his sentence and remanded for resentencing. *State v. Berry*, Cuyahoga App. No. 87493, 2007-Ohio-278. The trial court resentenced Berry to 21 years in prison. Thereafter, Berry filed an appeal from the resentencing; this court affirmed the sentence. *State v. Berry*, Cuyahoga App. No. 90094, 2008-Ohio-3142.

{¶ 5} While the first appeal was pending, Berry filed a petition for postconviction relief that was not ruled upon at the time of the second notice of appeal. After this court issued its opinion in the second appeal, Berry filed a motion to amend or supplement his petition for postconviction relief alleging his appellate attorney and attorney that filed the first petition were involved in a conspiracy to prevent him from presenting an effective defense at trial, on appeal, and in his petition for postconviction relief. The trial

court denied the original petition and the amended petition in a 12-page opinion.

Amended Petition for Postconviction Relief

{¶ 6} In his first assigned error, Berry argues that the trial court failed to consider his amended petition for postconviction relief.

{¶ 7} The trial court's findings of fact and conclusions of law show that the trial court did in fact consider Berry's amended petition. The court stated that:

“This matter comes before the court on defendant Christopher Berry’s various pending post trial and post sentencing motions. The substantive motions are Defendant’s Petition for Postconviction Relief and his *Amended/Supplemental Petition for Postconviction Relief.*

* * *

Findings of Fact at 1. (Emphasis added.)

{¶ 8} The court went on to state:

“Upon careful consideration of defendant’s *petitions*, the entire record, and the State’s briefs in opposition, the court determines that the defendant’s petition for postconviction relief and his *amended/supplemental petition for postconviction relief*: R.C. 2953.21 should be

denied without a hearing.” Findings of Fact at 1. (Emphasis added.)

{¶ 9} Also, although the court stated that Berry’s failure to ask leave of the court to file the amended/supplemental petition could provide a basis for it to be stricken, the court went on to consider the arguments Berry raised in the additional petition. Thus, the findings of fact and conclusions of law clearly indicates that Berry’s amended/supplemental petition for postconviction relief was considered by the trial court. Accordingly, Berry’s first assigned error is overruled.

Failure to Provide Transcripts

{¶ 10} In his second assigned error, Berry argues the trial court’s failure to provide him with a transcript for his petition for postconviction relief deprived him of due process and equal protection of law.

{¶ 11} It is well established that an indigent prisoner is entitled to have only one copy of the transcript of proceedings prepared at the state’s expense.

State ex rel. Murr v. Thierry (1987), 34 Ohio St.3d 45, 517 N.E.2d 226; *State ex rel. Ralston v. Hill* (1981), 65 Ohio St.2d 58, 417 N.E.2d 1380. A review of the record demonstrates that Berry previously received a copy of the trial court proceedings at the state’s expense for purposes of his direct appeal and appeal from his resentencing. Berry was not entitled to receive a second copy of the transcript at the state’s expense. *State ex rel. Call v. Zimmers*, 85

Ohio St.3d 367, 368, 1999-Ohio-386, 708 N.E.2d 711; *State ex rel. Grove v. Nadel* (1998), 81 Ohio St.3d 325, 326, 1998-Ohio-624, 691 N.E.2d 275. Accordingly, Berry's second assigned error is overruled.

Incomplete Record

{¶ 12} In his third assigned error, Berry argues the record on appeal is incomplete because he never received notice from the clerk's office that it fulfilled his request for the transcripts from his prior appeals to be included in the record.

{¶ 13} Because the resolution of Berry's errors did not require review of the transcripts, no prejudicial error occurred by the clerk's office's alleged failure to include the transcripts in the record. Accordingly, Berry's third assigned error is overruled.

Ineffective Assistance of Counsel

{¶ 14} We will address Berry's fourth and fifth assigned errors together because they both involve Berry's claim that counsel was ineffective. In his fourth assigned error, Berry contends his counsel was ineffective for failing to contest all four of the search warrants. The record indicates counsel only contested one of the search warrants. In his fifth assigned error, Berry contends counsel was ineffective for failing to obtain an expert.

{¶ 15} It is well established that any claim for postconviction relief that was or could have been raised on direct appeal is barred from consideration

by the doctrine of res judicata. *State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857, 811 N.E.2d 561, ¶17, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Res judicata, however, does not bar claims for postconviction relief when the petitioner presents evidence outside the record that was not in existence and was not available to the petitioner in time to support a direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169.

{¶ 16} Res judicata is applicable to claims of ineffective assistance of counsel. If appellate counsel is different from trial counsel, and if the “issue could fairly have been determined without resort to evidence dehors the record,” then a claim of ineffective assistance of trial counsel must be raised on direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, syllabus.

{¶ 17} Here, Berry argues the search warrants indicated police corruption because the search warrants were not executed immediately. This issue does not require any evidence dehors the record. The search warrants were admitted into evidence and, according to Berry, testimony at trial revealed the date of the searches. Additionally, he had different counsel on appeal than he did at trial. Therefore, res judicata bars us from considering his ineffective assistance of counsel claims as to the search warrants.

{¶ 18} Likewise, Berry's claim that his counsel was ineffective for failing to obtain an expert to demonstrate that the search of the motor vehicle was done improperly, is barred by *res judicata*. The argument does not require the use of outside evidence to be resolved. This issue could have been raised on direct appeal.

{¶ 19} Inexplicably, under his fourth assigned error, Berry also argues that the trial court made a multitude of errors in its findings of fact and conclusions of law. We conclude the errors in the findings of fact and conclusions of law were inconsequential. Although in the first paragraph, the word "Smith's" appears, it is unrelated to the remainder of the sentence and appears to be a typographical error. We also find no error in the trial court's statement that it was not required to have a transcript prepared, as none of the errors raised by Berry necessitated the review of a transcript. Moreover, a transcript was already prepared for Berry's direct appeal.

{¶ 20} Berry also disagrees with the trial court's depicting actions by his counsel as trial strategy; however, how an attorney questions a witness, or whether he decides to call a witness to testify, do constitute trial strategy. *State v. Hunt* (1984), 20 Ohio App.3d 310, 312, 486 N.E.2d 108. This court will not second-guess what could be considered to be a matter of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128.

{¶ 21} Finally, although Berry adamantly contends his attorneys were part of a conspiracy to convict him and that evidence was planted by police, we agree with the trial court that the only evidence of his conspiracy claim is his own self-serving statements. Self-serving statements are insufficient to rebut evidence in the record; thus, such statements do not support relief. *State v. Kapper* (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823. Accordingly, Berry's fourth and fifth assigned errors are overruled.

Failure to Conduct an Evidentiary Hearing

{¶ 22} In his sixth assigned error, Berry argues the trial court erred by denying his petition without first conducting an evidentiary hearing.

{¶ 23} Trial court may summarily dismiss a postconviction petition without a hearing where the petitioner fails to present supporting evidentiary documents sufficient to demonstrate the existence of operative facts supporting the petitioner's entitlement to relief. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, at syllabus; *State v. Williams*, 162 Ohio App.3d 55, 2005-Ohio-3366, 832 N.E.2d 783, at ¶23. Here, Berry failed to attach evidence demonstrating operative facts entitling him to relief. Thus, the trial court did not err by not conducting a hearing prior to denying the petition. Accordingly, Berry's sixth assigned error is overruled.

Prosecutorial Misconduct

{¶ 24} In his seventh assigned error, Berry argues that the prosecutor engaged in misconduct by using jailhouse informants to convict him.

{¶ 25} Again, this assigned error could have been raised on direct appeal, thus, res judicata prevents our review of the issue. Accordingly, Berry's seventh assigned error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR

Appendix

“I. The trial court erred when it forgot that Berry asked for leave of court to amend/supplement a petition for postconviction relief.”

“II. Appellant was denied due process and equal protection of the law under the 14th Amendment of the United States Constitution when he, being indigent, was denied access to trial transcripts in order to fairly litigate his case on appeal.”

“III. Appellant was denied due process and equal protection of the law under the 14th Amendment to the U.S. Constitution when the complete record was not filed on appeal.”

“IV. Petitioner was denied the effective assistance of trial counsel in violation of the VI and XIV Amendments to the U.S. Constitution when counsel failed to file a motion to suppress all of the search warrants and only argued one search warrant during the suppression hearing held before trial.”

“V. Petitioner was denied the effective assistance of trial counsel when counsel failed to obtain a defense expert and a private investigator to examine the questionable blood evidence in this case in support of a ‘police fabrication of evidence’ defense violating the petitioner’s right to compulsory process, due process, and a fair trial in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.”

“VI. The trial court erred when it dismissed Berry’s petition for postconviction relief without holding a full evidentiary hearing.”

“VII. Petitioner was denied the effective assistance of trial counsel when counsel failed to alert the trial court of prosecutorial misconduct when the state actively recruited jail house informants to build a case.”