

[Cite as *State v. Bankston*, 2010-Ohio-4496.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94364

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANGELIQUE BANKSTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-508144 and CR-515725

BEFORE: McMonagle, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: September 23, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Angelique Bankston, appeals from the trial court's judgment denying her petition for postconviction relief. We affirm.

I

{¶ 2} In Case No. CR-508144, Bankston was charged with two counts of passing bad checks and one count of theft. The case was tried before a jury and Bankston was found guilty of the charges as indicted. In Case No. CR-515725, Bankston was charged with one count each of vandalism and

falsification; she pleaded guilty. Bankston was sentenced simultaneously on the two cases.

{¶ 3} Bankston filed motions for judicial release, wherein she stated that she was remorseful for the crimes she committed and accepted responsibility for her actions. She also stated that she had made restitution in both cases. Her requests for judicial release were denied. Bankston also filed a motion to withdraw her plea in Case No. CR-515725, which was denied.

{¶ 4} Bankston filed petitions for postconviction relief in both cases (along with three supplemental petitions for each case), which were denied without a hearing; the trial court issued findings of fact and conclusions of law.

II

{¶ 5} We summarize the facts of the two cases mainly from this court's opinion on Bankston's direct appeal. See *State v. Bankston*, Cuyahoga App. No. 92777, 2010-Ohio-1576.

A. Case No. CR-508144: Passing Bad Checks and Theft

{¶ 6} The charges in this case resulted from purchases and returns made by Bankston at Nordstrom department store. Bankston was captured on closed circuit camera returning goods for a cash refund. The amount of

the refund raised suspicion and further investigation. A loss prevention specialist for the store reviewed Bankston's prior purchases at the store and discovered that she had previously purchased merchandise by check, then returned the merchandise the following day, requesting a cash refund.

{¶ 7} The specialist testified that on January 10, 2007, Bankston purchased merchandise in the amount of \$258, using a check listing a Cleveland address and drawn on a First Merit Bank account. Bankston returned those goods the following day, requesting and receiving a cash refund.

{¶ 8} On January 31, 2007,¹ Bankston purchased \$548.25 worth of merchandise, using a check listing a Cleveland Heights address and drawn on a Charter One Bank account. Bankston returned those goods the following day, again requesting and receiving a cash refund.

{¶ 9} The loss prevention specialist was alerted because Bankston's checks had different addresses. After calling Charter One Bank, the specialist learned that Bankston had insufficient funds in her account to cover the draft. Meanwhile, the check written on the First Merit Bank account had been returned for insufficient funds.

{¶ 10} The specialist sent a letter by certified mail to Bankston at both addresses, informing her that the checks had been returned for insufficient

¹Bankston dated the check "1/1/07."

funds and demanding payment of \$866.25 (which included service fees). The letter stated that payment should be made within ten days or the matter would be turned over to the prosecutor's office. One letter was returned with a signed receipt; the other was returned as undeliverable.

{¶ 11} Bankston did not respond within ten days, so the matter was referred for prosecution. Sometime after charges were filed against her, Bankston appeared at the department store and spoke with the loss prevention specialist. The specialist told her that charges had been filed and she should speak with the police. Bankston told the specialist that there may have been fraud on her account. Bankston returned to the store two months later and paid the \$866.25 in cash.

{¶ 12} A paralegal for First Merit Bank testified that Bankston did not have any credit available on her home equity line of credit, on which the checking account was drawn, when she made the January 10, 2007 purchase.

A fraud investigator for Charter One Bank testified that on February 1, 2007, Bankston had a negative balance of \$214.53 in her checking account.

B. Case No. CR-515725: Vandalism and Falsification

{¶ 13} The vandalism count resulted from Bankston breaking out the window of a police car while being detained in it on suspicion of credit card fraud at a Home Depot store. When first approached by the police, Bankston

identified herself as “Monique P. Starks,” giving rise to the falsification charge.

{¶ 14} Bankston filed a motion to withdraw her guilty plea, in which she contended that she was “misidentified” as a suspect and “left in a police cruiser for an extended period of time with no ventilation on a hot summer day.” She sought to withdraw her plea to assert the defense of necessity.

III.

{¶ 15} A petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Easley*, Franklin App. No. 09AP-10, 2009-Ohio-3879, ¶19, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. It is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record. *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441, 751 N.E.2d 481.

{¶ 16} R.C. 2953.21 affords a prisoner postconviction relief “only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to

litigate his or her conviction. *State v. Hessler*, Franklin App. No. 01 AP-1011, 2002-Ohio-3321, ¶32; *Murphy*, supra.

{¶ 17} A hearing is not automatically required on every petition. *State v. Stedman*, Cuyahoga App. No. 83531, 2004-Ohio-3298, ¶24. The pivotal question is whether, upon consideration of the petition, all the files and records pertaining to the underlying proceedings, and any supporting evidence, the petitioner has set forth “sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, paragraph two of the syllabus. If the petition, files, and records show that the petitioner is not entitled to relief, the court may dismiss the petition without an evidentiary hearing. R.C. 2953.21(C).

{¶ 18} To be entitled to a hearing on a petition for postconviction relief alleging ineffective assistance of counsel, the petitioner must submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus. See, also, *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169, (“Where ineffective assistance of counsel is alleged in a petition for postconviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense

attorney's essential duties to his client but also that said violation was prejudicial to the defendant.”)

IV.

A. Case No. CR-508144: Passing Bad Checks and Theft

{¶ 19} In her postconviction petition relating to her convictions for passing bad checks and theft, Bankston claimed that her counsel failed to adequately investigate: (1) whether there was fraud on her account; (2) the videotape from Nordstrom, which Bankston contended demonstrated that she was “not the person who made the purchases at Nordstrom’s with the checks which were the subject of the passing bad checks counts of the indictment”; and (3) the clerks who were on duty at Nordstrom at the time the purchases or returns were made. In regard to the last allegation, Bankston claimed that “[c]ounsel failed to verify that when purchases are made by checks that notation is noted on the sales receipt and if a person returns the following day to claim a cash refund the cash refund would be refused because the sales receipt would show that the transaction was paid with a check and the check had not cleared.”

{¶ 20} In support of her original postconviction motion, which apparently was the only one considered by the trial court, Bankston filed (1) her own affidavit averring that the statements in her petition were true; (2) copies of Nordstrom receipts dated 2009; (3) memoranda from First Merit

Bank that Bankston contended demonstrated that there was a fraud notification on her account and that the checks were not in her handwriting; (4) letters from Charter One Bank confirming no activity on her account from January 31, 2007 through February 6, 2007; and (5) four affidavits from Michael A. Lewis, a private investigator.

{¶ 21} Bankston contended that the receipts showed how a customer paid for merchandise (e.g., check, credit card) and that if she had made a purchase by check, she would not have been allowed to get a cash refund the following day. As noted by the trial court, the receipts were dated 2009, but the crimes occurred in 2007. Notwithstanding the discrepancy in dates, the loss prevention specialist from Nordstrom testified that it was the store's policy that a cash refund for a purchase by check required seven to ten business days and the sales associates who processed the returns did not adhere to the policy (thus suggesting that even if Bankston's 2007 receipts showed purchases paid for by check, she was able to get a cash refund the following day).

{¶ 22} In regard to the memoranda from First Merit Bank, the trial court found that they did not "contain any statements whatsoever regarding fraud or handwriting." Our review demonstrates the same.

{¶ 23} In regard to the investigator's affidavits, the trial court noted that none of them "bear a notary stamp, a notary seal, or a legible or printed name

of the notary.” Upon review, the affidavits do have a notary seal,² but do not contain a legible or printed name of the notary or the expiration date of the notary’s commission. Nevertheless, upon review, the affidavits do not set forth “sufficient operative facts to establish substantive grounds for relief.” *Calhoun*, supra, paragraph two of the syllabus.³

{¶ 24} Likewise, the letter from Charter One Bank stating that there was no activity on Bankston’s account from January 31, 2007 through February 6, 2007, did not set forth “sufficient operative facts to establish substantive grounds for relief.” *Id.* At trial, the loss prevention specialist from Nordstrom testified that although one of the transactions occurred on January 31, 2007, the check was dated for January 1, 2007. Given that discrepancy, the letter was insufficient to set forth substantive grounds for relief.

{¶ 25} In light of the above, the trial court’s finding, as it related to Case No. CR-508144, that Bankston’s original petition failed to set forth “sufficient operative facts to establish substantive grounds for relief,” was not error.

²The seal is evident on the original affidavits. It is not evident on copies of the affidavits that are also in the record.

³Collectively, the affidavits contained the investigator’s descriptions of his post-trial interviews with Nordstrom employees. According to the investigator, the employees provided contradictory statements about the store’s check-scanning abilities. The investigator also averred that employees in the men’s shoe department did not recognize Bankston as a customer in 2007.

{¶ 26} In regard to the three supplemental petitions, this court has held that the trial court is required to consider an untimely or successive motion for postconviction relief where “(1) the petitioner was unavoidably prevented from discovering the facts on which the petition is predicated, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner and that petition asserts a claim based on that new right.” *State v. Wells*, Cuyahoga App. No. 90753, 2009-Ohio-223, ¶16.

{¶ 27} In her first supplement, filed September 10, 2009, Bankston averred in an affidavit that she was not aware until September 1 that motions for judicial release, wherein she stated that she was remorseful for the crimes she committed and accepted responsibility for her actions, had been filed on her behalf. She also averred that trial counsel had never contacted an employee of Charter One Bank, although he told her he had, and referenced a notarized letter from that employee; the letter was not attached as an exhibit.

{¶ 28} In her second supplement, Bankston averred in an affidavit that there was fraud on her account and she paid Nordstrom only on her attorney’s advice. In her final supplement, Bankston submitted a September 1, 2009, notarized letter from the Charter One Bank employee whom she contended her trial attorney told her he had spoken to. In the letter, the

employee stated that he never had any contact with Bankston's attorney and was never subpoenaed to appear in court for any proceeding relating to Bankston. Bankston also submitted a February 2007 letter from that same Charter One employee wherein he stated that Bankston had "fraud" on her account since January 29, 2007, and the bank was in the process of investigating.

{¶ 29} In all of these filings, Bankston failed to demonstrate that she was unavoidably prevented from discovering these alleged facts. The trial court therefore did not have to consider them and, thus, Bankston failed to substantiate her claims of fraud on her account and mistaken identity.

{¶ 30} The final claim as relates to this case involved counsel's alleged failure to view the Nordstrom security videotape. The record shows, however, that the videotape could not be located. See *Bankston*, supra at ¶23.⁴ Thus, there was nothing for counsel to view.

{¶ 31} In light of the above, the trial court properly denied Bankston's postconviction petition as it related to Case No. CR-508144.

B. Case No. CR-515725: Vandalism and Falsification

{¶ 32} With respect to this case, the trial court considered, at least, the original petition and the first supplement. The documentation therein

⁴The loss prevention specialist testified that she turned the tape over to the police, but the police did not have it or any evidence of ever having received it. *Bankston* at id.

consisted of the affidavits of three people who were, on the same day and around the same time as Bankston, detained at the Home Depot store on shoplifting or credit card fraud suspicion. One affiant averred that after Bankston broke out the window of the police cruiser, he heard one of the police officers say that he forgot Bankston had been in the car. Another affiant averred that after Bankston was removed from the police cruiser he saw her hyperventilating and heard her saying that she was having a hard time breathing. The last affiant averred that he heard one officer tell another officer not to put Bankston in the car because it was too hot. He also averred that he saw Bankston when she was removed from the police cruiser and that she was “soaking wet and appeared to be having an asthma attack.”

{¶ 33} Bankston raised an ineffective assistance of counsel claim based upon counsel’s alleged failure to advise her of the defense of necessity on direct appeal. *Bankston*, supra at ¶48. Res judicata will operate as a bar to any claim that was raised or could have been raised on direct appeal. See, e.g., *State v. Lentz* (1994), 70 Ohio St.3d 527, 639 N.E.2d 784; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, syllabus. As the court explained in *Perry*:

{¶ 34} “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 that 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.”

{¶ 35} In the direct appeal, this court noted that at the hearing on her motion to withdraw her plea, of which Bankston was provided advance notice, she did not offer any testimony or evidence, despite her contention that she could provide at least three witnesses who could testify to the circumstances under which she had been detained. Bankston provided that documentation in her postconviction filings, but because it could have been raised by Bankston during the trial court proceedings and was raised in her direct appeal, it is barred here.

{¶ 36} Finally, the second and third supplemental petitions in this case included two more affidavits from Bankston. The first recounts her version of the events leading up to her breaking out the window. The second “clarifies” that she made restitution to the police department because of the court’s recommendation at the change of plea hearing. Neither affidavit sets forth sufficient operative facts demonstrating that counsel was ineffective and Bankston was prejudiced.

{¶ 37} In light of the above, the trial court properly denied Bankston’s postconviction petition as it related to Case No. CR-515725.

{¶ 38} Bankston's sole assignment of error is overruled and the trial court's judgment is affirmed.

It is ordered that appellee recover from appellant 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.

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

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR