

[Cite as *State v. Barb*, 2010-Ohio-5239.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94054

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANNY BARB

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500671-A

BEFORE: Boyle, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 28, 2010

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶ 1} Appellant, Danny Barb, appeals the denial of his petition for postconviction relief, arguing that he was denied a fair trial before an impartial jury and that he received ineffective assistance of counsel. We affirm.

Procedural History and Facts

{¶ 2} Barb was charged with one count of domestic violence and one count of felonious assault. The felonious assault charge carried a notice of prior

conviction and a repeat violent offender specification. The charges arose out of Barb's alleged involvement in an argument with L.S. while the two were in a van parked in a neighbor's driveway. L.S. testified that Barb struck her several times, then retrieved a hammer from his tool belt on the floor of the van. L.S.'s son, Richard Finley, approached the van. Barb allegedly got out of the van and struck Finley in the head with the hammer.

{¶ 3} At the conclusion of trial, the jury found Barb not guilty of domestic violence but guilty of felonious assault. As for the specifications attached to the felonious assault count, which were bifurcated and tried to the court, Barb was found to have a prior conviction for burglary and to be a repeat violent offender. The court subsequently sentenced him to eight years in prison.

{¶ 4} This court upheld Barb's conviction and sentence in his direct appeal, and the Ohio Supreme Court declined to accept jurisdiction for further review. See *State v. Barb*, 8th Dist. No. 90768, 2008-Ohio-5877, and *State v. Barb*, 121 Ohio St.3d 1428, 2009-Ohio-1296, 903 N.E.2d 326.

{¶ 5} While his appeal was pending, Barb filed a petition for postconviction relief, asserting four grounds as to why his conviction should be vacated: (1) he was denied a fair trial because jurors from his prior cases served as jurors in the underlying case; (2) his trial counsel was ineffective in failing to request jury panel lists from previous trials to prove his claim; (3) his trial counsel was ineffective in failing to call a key witness, namely, John Adams, who would have rebutted the

state's evidence supporting the felonious assault charge; and (4) his trial counsel was ineffective and the trial court committed plain error by not instructing the jury on the lesser-included offense of aggravated assault. In support of his petition, Barb attached his own affidavit, the affidavit of his brother, and a Cleveland Police Department incident report.

{¶ 6} The state opposed Barb's petition, arguing that Barb failed to present any credible evidence to warrant an evidentiary hearing, that his claims lacked merit, and that the doctrine of res judicata barred some of his claims. The state also submitted proposed findings of fact and conclusions of law. The trial court subsequently denied Barb's petition and adopted the state's findings of fact and conclusions of law. From this decision, Barb appeals, raising six assignments of error.

Law and Analysis

{¶ 7} A postconviction proceeding is not an appeal of a criminal conviction, but a collateral civil attack on a criminal judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. And postconviction review is a narrow remedy because res judicata bars any claim that was or could have been raised at trial or on direct appeal. *Id.*, citing *State v. Duling* (1970), 21 Ohio St.2d 13, 254 N.E.2d 670; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

{¶ 8} To prevail on a postconviction claim, the petitioner must demonstrate a denial or infringement of his or her rights in the proceedings resulting in his or

her conviction that rendered the conviction void or voidable under the Ohio Constitution or the United States Constitution. *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, 813 N.E.2d 50, ¶7, citing R.C. 2953.21(A)(1). The petitioner bears the initial burden of demonstrating, through the petition and any supporting affidavits and the files and records of the case, “substantive grounds for relief.” *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, paragraph two of the syllabus. If the petitioner fails to meet this burden, the court may dismiss the petition without an evidentiary hearing. R.C. 2953.21(C).

{¶ 9} In regard to a petition for postconviction relief, which asserts ineffective assistance of counsel, the petitioner’s burden specifically requires the submission of 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. A petitioner cannot rely upon general conclusory allegations that his or her trial counsel rendered ineffective assistance; instead, the petitioner must demonstrate that there is evidence outside the record to support an ineffective assistance of counsel claim. *Id.* Otherwise, the petition may be dismissed on the grounds of res judicata. *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.

{¶ 10} We review a trial court’s denial of a petition for postconviction relief under an abuse of discretion standard. *State v. Williams*, 165 Ohio App.3d 594,

2006-Ohio-617, 847 N.E.2d 495, ¶20.

{¶ 11} With these principles in mind, we turn to Barb’s assignments of error.

Impartial Jury and Jury Lists

{¶ 12} In his first assignment of error, Barb argues that he “was denied his right to a fair trial before an impartial jury and his right against self-incrimination in violation of the U.S. and Ohio constitutions.” He raises the same argument that he raised in his petition, i.e., that many of the jurors who served in the underlying case had previously served as jurors in his other criminal cases. To the extent that the trial court found that Barb failed to attach any credible evidence to support this argument, thereby affording no credence to his self-serving affidavit, he contends that the trial court refused to provide him with the jury lists, which would have proven his claim. He likewise argues in his second assignment of error that his trial counsel was ineffective for failing to obtain these jury lists to substantiate his claim that these same jurors should have been excluded from the instant case.

{¶ 13} But the record reveals that the state submitted the jury lists under seal and requested the trial court to conduct an in-camera review. The trial court conducted an in-camera review and determined that “no juror in Barb’s previous trials served as jurors in this case.” Our review of the record supports this conclusion. Accordingly, Barb’s first assignment of error has no merit and is overruled.

{¶ 14} Additionally, having found that there is no merit to Barb's claim that there were jurors from his earlier criminal trials that served on this case, we likewise cannot say that the trial court abused its discretion in summarily disregarding his claim that his trial counsel was ineffective for failing to obtain the jury lists. The second assignment of error is overruled.

Eyewitness Testimony

{¶ 15} In his third assignment of error, Barb argues that the trial court erred in not finding any merit to his claim that his trial counsel was ineffective in failing to call a purported key eyewitness at trial, John Adams (a.k.a. John Adams). Barb contends that Adams would have rebutted Finley's testimony by testifying that Barb did not assault Finley, that Barb did not have a hammer in his possession, and that Finley actually assaulted him and Barb.

{¶ 16} The record reveals, however, that Barb did not attach an affidavit from Adams in support of this argument. Instead, Barb attached an affidavit of his brother and relied on his own affidavit. The trial court afforded little evidentiary value to these affidavits, which under the circumstances, we cannot say constitutes an abuse of discretion. As explained by the Second District:

{¶ 17} "Although due deference should be given to submitted affidavits, a trial court has some discretion to judge their credibility when deciding if the affidavits should be accepted as true statements of fact. [*Calhoun*, 86 Ohio St.3d at 284.] In judging the credibility of an affidavit, the trial court should consider

relevant factors such as: '(1) whether the judge reviewing the postconviction relief 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 * * *, and (5) whether the affidavits contradict evidence proffered by the defense at trial.' [Id. at 285.] '[O]ne 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." *State v. Brown*, 2d Dist. No. 19776, 2003-Ohio-5738, ¶19.

{¶ 18} Here, nearly all of these factors support the trial court's decision to afford the affidavits little, if any, evidentiary value. See, also, *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823; *State v. Ismail* (1981), 67 Ohio St.2d 16, 423 N.E.2d 1068 (petitioner's own self-serving declarations would be insufficient to entitle him to postconviction relief). Barb's argument that Adams would have rebutted the state's case is merely speculative. And Barb failed to present sufficient evidence outside of the record to rebut the witnesses who testified at trial. Accordingly, Barb's argument fails based on his failure to produce sufficient operative facts demonstrating substantive grounds for relief on this particular allegation of ineffectiveness. See *State v. Zuber* (June 26, 1998), 11th Dist. No. 97-L-061 (rejecting petitioner's claim of ineffective assistance of counsel based on alleged failure to call certain eyewitnesses when petitioner

failed to attach eyewitnesses' affidavits and relied solely on own self-serving affidavit and affidavit of a relative).

{¶ 19} Moreover, as for the partial police incident report that Barb attached in support of this claim, the report identifies a highly intoxicated male who stated that Barb did not start the fight and that Finley struck Barb. Barb claims that this individual is Adams. But the police's follow-up report indicates that this same individual was again highly intoxicated upon follow-up questioning (two days later) and that this individual did not see what happened at the beginning of the fight. And according to the state, Adams's testimony, at best, would merely be duplicative of the testimony offered by another defense witness who testified in Barb's behalf at trial. Under such circumstances, we cannot say that Barb's trial counsel was ineffective in refusing to call a witness who was highly intoxicated at the time of the incident and whose testimony would only be duplicative of another defense witness.

{¶ 20} The third assignment of error is overruled.

Lesser-Included Offense Instruction

{¶ 21} Barb argues in his fourth assignment of error that he was denied effective assistance of counsel because his trial counsel failed to request a lesser-included offense instruction to felonious assault based on the evidence presented at trial. He further argues that the trial court's failure to give such an instruction constitutes plain error. Barb's argument lacks merit because it is

barred under the doctrine of res judicata.

{¶ 22} If appellate counsel is different than trial counsel, as is true in this case, then the issue of ineffective assistance of trial counsel must be raised on direct appeal when the grounds for the ineffectiveness is not based on “new, competent, relevant and material evidence dehors the record.” *State v. Cowan*, 151 Ohio App.3d 228, 2002-Ohio-7271, 783 N.E.2d 955, ¶15; see, also *Perry*, 10 Ohio St.2d 175, paragraph nine of the syllabus. Failure to raise the issue of ineffective assistance of trial counsel in the direct appeal renders the issue res judicata for purposes of postconviction relief. *Cole*, supra, at syllabus. Indeed, it is well settled that claims that trial counsel should have sought a lesser-included offense instruction could have been raised at trial or on appeal and, therefore, are barred by the doctrine of res judicata in a postconviction relief proceeding. *State v. Williams*, 7th Dist. No. 07MA57, 2008-Ohio-1187; *State v. Tenace*, 6th Dist. No. L-05-1041, 2006-Ohio-1226, ¶32.

{¶ 23} Moreover, we note that failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189, certiorari denied (1980), 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102.

{¶ 24} The fourth assignment of error is overruled.

Choice of Counsel

{¶ 25} In his fifth assignment of error, Barb broadly states that he “was denied assistance of trial counsel, and assistance of appellant counsel.” The grounds for this assignment of error, however, are not entirely clear. He argues that he was denied “the opportunity to waive any conflict of interest claim” with respect to his counsel. Aside from failing to comply with App.R. 16, Barb raises this argument for the first time on appeal; he did not raise it below in his petition for postconviction relief. Accordingly, we summarily overrule this assignment of error because Barb has waived it. See *State v. McKee* (Oct. 1, 1997), 9th Dist. No. 96CA006599 (failure to raise issue in petition for postconviction relief results in a waiver of the right to assert the issue on appeal).

Evidentiary Hearing

{¶ 26} In his final assignment of error, Barb argues that the trial court erred by denying his petition without conducting an evidentiary hearing. But as already discussed above, Barb failed to satisfy his burden and present supporting evidentiary documents sufficient to demonstrate the existence of operative facts supporting an entitlement to relief. Consequently, the trial court acted within its authority by dismissing Barb’s postconviction petition without a hearing. *Jackson*, 64 Ohio St.2d 107, at syllabus; *State v. Williams*, 162 Ohio App.3d 55, 2005-Ohio-3366, 832 N.E.2d 783, ¶23.

{¶ 27} The sixth assignment of error is overruled.

Judgment 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR