

[Cite as *State v. Shabazz*, 2010-Ohio-5789.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94738

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMIL ABDUL SHABAZZ

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495551

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

RELEASED AND JOURNALIZED: November 24, 2010

FOR APPELLANT

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Jamil A. Shabazz (“Shabazz”), appeals the trial court’s denial of his petition for postconviction relief. We find no merit to the appeal and affirm.

{¶ 2} In November 2007, following a jury trial, Shabazz was convicted of murder, with a three-year firearm specification, notice of prior conviction and repeat violent offender specifications. The trial court sentenced him to 15 years to life on the murder charge and three years on the firearm specification, to run

consecutively to the 15-year murder sentence. We upheld his conviction on direct appeal in *State v. Abdul*, Cuyahoga App. No. 90789, 2009-Ohio-225, appeal not allowed, *State v. Abdul Shabazz*, 122 Ohio St.3d 1412, 2009-Ohio-6300, 907 N.E.2d 1195.¹

{¶ 3} In May 2009, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, Shabazz filed an application to reopen this court's judgment in his first appeal, which this court denied. While the appeal was pending, Shabazz, pro se, filed a petition for postconviction relief.

The State filed a brief in opposition to the petition for postconviction relief and a motion for summary judgment, which the trial court granted. Shabazz now appeals, raising seven assignments of error.

{¶ 4} Postconviction relief proceedings under R.C. 2953.21 et seq. are treated as special civil proceedings used to collaterally attack a criminal conviction. *State v. Nichols* (1984), 11 Ohio St.3d 40, 42, 463 N.E.2d 375. To obtain postconviction relief, a petitioner must establish that he suffered an infringement or deprivation of his constitutional rights. R.C. 2953.21(A)(1); *State v. Calhoun* (1999), 86 Ohio St.3d 279, 283, 714 N.E.2d 905.

{¶ 5} Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates that he

¹This court referred to Shabazz as Jamil Shabazz Abdul in his prior appeal. His correspondence with this court reflects his name is Jamil A. Shabazz.

suffered a violation of his constitutional rights. *Calhoun* at 282-283. In determining whether substantive grounds for relief exist, the trial court must examine the petition, any supporting affidavits, any documentary evidence, and all the files and records from the case. R.C. 2953.21(C). Moreover, before a hearing is warranted, the petitioner must demonstrate that the claimed “errors resulted in prejudice.” *Calhoun* at 283.

Res Judicata

{¶ 6} Five of Shabazz’s assignments of error are not reviewable because they are barred by res judicata. Res judicata bars any claim for postconviction relief that the petitioner raised or could have raised on direct appeal. *State v. Lentz* (1994), 70 Ohio St.3d 527, 639 N.E.2d 784, syllabus; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph nine of the syllabus. To overcome res judicata, a petitioner must present cogent, material evidence found outside the record on appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 115, 443 N.E.2d 169. Furthermore, this evidence must have been unavailable to the petitioner at the time of trial or his direct appeal. *State v. Lewis* (Dec. 3, 1998), Cuyahoga App. No. 73736 (noting that while the petitioner attached evidence *dehors* the record in support of his claims for relief, he made no claim that the evidence was unavailable to him at the time of his direct appeal).

{¶ 7} In the first assignment of error, Shabazz argues his conviction should have been vacated because one of the State’s key witnesses perjured himself

during the murder trial. Specifically, Shabazz claims that William Green's testimony was inconsistent with the coroner's testimony and with his own prior statement to the police. Shabazz claims, without offering any evidence outside the record, that these inconsistencies indicate Green must have been lying. In the seventh assignment of error, Shabazz argues there were other evidentiary inconsistencies during the trial as well.

{¶ 8} In the third and fifth assignments of error, Shabazz claims he was denied the effective assistance of counsel because his trial counsel failed to subpoena key witnesses for trial and failed to reveal the extensive criminal record of one of the State's key witnesses, William Green. In the sixth assignment of error, Shabazz claims the trial court erred by failing to afford him a preliminary hearing. Shabazz cites to trial testimony and other evidence in the record in support of these arguments but offers no new information regarding any of his claims. Thus, these arguments could have been raised on direct appeal without resort to evidence outside the record. They are, therefore, barred by res judicata. *Lentz* at syllabus.

{¶ 9} Accordingly, the first, third, fifth, sixth, and seventh assignments of error are overruled.

Procedural Deadlines

{¶ 10} The second and fourth assignments of error concern the trial court's procedural deadlines. In the second assignment of error, Shabazz argues the

court should have granted his petition as unopposed because the State failed to file a timely response. In the fourth assignment of error, Shabazz argues the trial court erred by refusing to allow him to file a reply brief to the State's objections and proposed findings of fact and conclusions of law. Because these two assignments of error involve the same analysis, we discuss them together.

{¶ 11} The record reflects that the State sought and obtained an extension of time to respond to Shabazz's petition but filed its response outside that time period. Nevertheless, the trial court may accept a filing that is beyond the filing deadline. R.C. 2953.21(D); *State v. Bonnell* (Aug. 27, 1998), Cuyahoga App. Nos. 69835 and 73177 (holding that time specified in R.C. 2953.21 for a response to a postconviction petition is directory rather than mandatory). Moreover, Shabazz has not demonstrated that he was prejudiced by the State's late filing of its opposition to his petition. Without a showing of prejudice, the court could properly consider the State's response. See *State v. Williams* (Nov. 24, 1993), Cuyahoga App. No. 64151.

{¶ 12} With respect to Shabazz's claim that the trial court should have considered his reply brief before ruling on his petition for postconviction relief, R.C. 2953.21 governs postconviction relief and contains no provision for filing reply briefs. Therefore, the trial court did not err in ruling on his petition for postconviction relief based on his petition and the State's response in opposition.

{¶ 13} Accordingly, the second and fourth assignments of error are 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR