

[Cite as *State v. Gilbert*, 2010-Ohio-6157.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94252

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAURICE GILBERT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-487765

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

RELEASED AND JOURNALIZED: December 16, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Laurice Gilbert (“Gilbert”), appeals the trial court’s granting of summary judgment to plaintiff-appellee, state of Ohio (“the State”) on Gilbert’s petition for postconviction relief. Finding no merit to the appeal, we affirm.

{¶ 2} In 2006, Gilbert was charged with two counts of aggravated murder, two counts of aggravated robbery and firearm specifications with each charge. The case proceeded to a jury trial, and Gilbert was found guilty on all counts.

The trial court sentenced Gilbert to concurrent sentences of 30 years-to-life imprisonment on each of the aggravated murder counts, and eight years imprisonment on each of the aggravated robbery counts. The court also imposed three-year terms for the firearm specifications that merged and were to run consecutive to the base counts. Gilbert received a total aggregate sentence of 33 years-to-life.

{¶ 3} Gilbert appealed his conviction, and we affirmed in part and reversed in part, finding that his conviction for aggravated robbery in violation of R.C. 2911.01(A)(3) and the specifications related to it needed to be reversed due to a defective indictment. *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463,

{¶ 4} appeal allowed by 122 Ohio St.3d 1454, 2009-Ohio-3131, 908 N.E.2d 945. We also merged the two aggravated murder convictions. *Id.*

{¶ 5} Gilbert appealed to the Ohio Supreme Court, which accepted the appeal and affirmed our court's decision. *State v. Gilbert*, 124 Ohio St.3d 119, 2009-Ohio-6543, 919 N.E.2d 737.

{¶ 6} During the pendency of that appeal, Gilbert filed a motion with the trial court to vacate or set aside his sentence, claiming that he had been afforded ineffective assistance of trial counsel. The state moved for summary judgment, which the trial court granted.

{¶ 7} Gilbert now appeals, pro se, and assigns the following error for our review:

"1. Where appellant presented sufficient evidence that counsel was ineffective for failing to use available witnesses to support appellant's actual

innocence defense, the trial court erred by denying appellant's petition for postconviction relief."

{¶ 8} "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 Gilbert to file a petition asking the trial court to vacate or set aside the judgment of conviction or sentence. Gilbert, 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).

{¶ 9} In the case at bar, Gilbert argued in his petition for postconviction relief that his counsel was ineffective for failing to call alibi witnesses. The trial court found that the doctrine of res judicata barred Gilbert from raising the issue of ineffective assistance of counsel in his postconviction petition.

{¶ 10} It is well settled that the doctrine of res judicata applies in postconviction relief proceedings. *State v. Blalock*, Cuyahoga App. No. 94198, 2010-Ohio-4494. "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 the trial, which resulted in that judgment or conviction, or on an appeal from that judgment.” *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶ 11} In postconviction relief proceedings, the doctrine of res judicata also prohibits a court of appeals from considering issues that were raised at trial or reviewed on direct appeal from the court’s judgment. *State v. Apanovitch* (1991), 70 Ohio App.3d 758, 591 N.E.2d 1374.

{¶ 12} In his postconviction petition, Gilbert argued that his trial counsel was ineffective for not having two alibi witnesses testify. But in *Gilbert I*, Gilbert raised as his thirteenth assignment of error that he was afforded ineffective assistance of counsel. Although his reasons for now asserting his trial counsel was ineffective are different than in *Gilbert I*, Gilbert is unable to show any new evidence dehors the record. In fact, Gilbert admits in his postconviction petition that he was aware prior to trial that the witnesses existed and were willing to testify.

{¶ 13} Therefore, we find that the lower court acted properly when it found that Gilbert is barred from again raising an ineffective assistance of counsel claim. Accordingly, the trial court correctly granted the state’s motion for summary judgment.

{¶ 14} Gilbert’s sole assignment of error is overruled.

{¶ 15} Accordingly, judgment is 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 issue out of this court directing the Cuyahoga County Court of Common Pleas 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

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR

