

[Cite as *State v. Jones*, 2017-Ohio-7326.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105405

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON JONES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586116-B

BEFORE: S. Gallagher, J., McCormack, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 24, 2017

ATTORNEY FOR APPELLANT

Paul A. Mancino, Jr.
Mancino, Mancino & Mancino
75 Public Square Building, Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Amy Venesile
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Brandon Jones appeals the denial of his petition for postconviction relief, claiming that the trial court erred in adopting the proposed findings of fact and conclusions of law submitted by the state or by denying Jones’s motion without an evidentiary hearing. We affirm.

{¶2} Jones unsuccessfully appealed his convictions for aggravated murder, murder, two counts of felonious assault, improperly handling firearms in a motor vehicle, and having weapons while under disability in *State v. Jones*, 8th Dist. Cuyahoga No. 102318, 2015-Ohio-4694. In the course of that appeal, Jones argued that his trial counsel was ineffective for failing to present an alibi witness who would have “confirmed” that Jones was not where every other witness and the victim claimed Jones to be. *Id.* at ¶ 5-22. The ineffective-assistance claim was disregarded at the time because it relied on facts outside the record. *Id.* Jones followed the unsuccessful appeal with a petition for postconviction relief to introduce the missing evidence, attaching several affidavits substantiating the alibi and trial counsel’s failure to call the witness at trial.

{¶3} The trial court denied the petition in a judgment entry adopted from the proposed findings of facts and conclusions of law filed by the state. Jones did not submit any objections to the proposed journal entry, nor did he submit any counter proposals. Importantly, the trial court concluded, in light of the overwhelming evidence identifying Jones as the attacker at the scene of the crime, that any alibi witness giving contrary

testimony may have actually undermined the defense's cause. According to the trial court, even if the alleged alibi witness had been known before trial, counsel's performance did not fall below a competent standard in light of the overwhelming evidence identifying Jones as the attacker. Jones's petition was denied without an evidentiary hearing.

{¶4} Under R.C. 2953.21(A)(1)(a), an offender convicted of a criminal offense and who claims that there was a constitutional violation that rendered the judgment void or voidable may file a petition asking the court to set aside the judgment or grant other appropriate relief. When the petition is timely filed, the trial court considers the petition and determines whether there are substantive grounds for relief. R.C. 2953.21(C). "Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending." R.C. 2953.21(E).

{¶5} "The word 'hearing' as used in R.C. 2953.21(E) does not mean" an evidentiary one. *State v. Hostacky*, 8th Dist. Cuyahoga No. 103014, 2016-Ohio-397, ¶ 4. "It is well established that 'courts are not required to hold a hearing in every postconviction case.'" *Id.*, quoting *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, 833 N.E.2d 291, ¶ 10. The trial court must first review the evidence to determine if there are substantive grounds for relief. *Id.*, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 51. "Where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not

demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief,” the petition may be dismissed without a hearing. *Id.*, citing *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, paragraph two of the syllabus; *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 22. The trial court’s decision to grant or deny a petition for postconviction relief is reviewed for an abuse of discretion. *Id.*, citing *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 45.

{¶6} A person claiming ineffective assistance of counsel bears the burden of establishing two elements: (1) that trial counsel’s performance fell below objective standards for reasonably effective representation, and (2) that counsel’s deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶7} The trial court considered Jones’s evidence credible — inasmuch as Jones had a witness who claimed he was not at the scene of the crime as the other witnesses and the victim claimed. Even accepting the evidence as true, the trial court concluded that Jones failed to present a colorable claim for ineffective assistance of counsel. Before an evidentiary hearing is necessary, the court must review the petition to determine whether it alleges substantive grounds for relief based on the documentary evidence presented in support. R.C. 2953.21(C); *State v. Calhoun*, 86 Ohio St.3d 279, 280, 1999-Ohio-102, 714 N.E.2d 905, paragraph two of the syllabus. Thus, Jones’s right to a hearing is dependent on whether he alleged substantive grounds for relief in the petition.

{¶8} Even if we followed the trial court’s lead and accepted Jones’s evidence that the alibi witness was knowingly ignored for trial by Jones’s trial counsel, for the sake of argument, the decision to call a witness can be considered a matter of trial strategy. *State v. Vargas*, 8th Dist. Cuyahoga No. 97376, 2012-Ohio-2767, ¶ 14, citing *State v. Gooden*, 8th Dist. Cuyahoga No. 88174, 2007-Ohio-2371, ¶ 38. In *Hostacky*, 8th Dist. Cuyahoga No. 103014, 2016-Ohio-397, for example, the defendant advanced a similar argument — that trial counsel’s performance fell below the standard for reasonably effective representation because counsel failed to call a witness to corroborate the defendant’s story. *Id.* at ¶ 12. *Hostacky* found no error because under the trial strategy rubric, “trial counsel may well have concluded that the [witness’s] testimony would be so self-serving that it would undermine the defense.” *Id.* at ¶ 14. Thus, when considering whether trial counsel rendered a deficient performance, the evidence presented at trial must be considered and an attorney need not call every identified alibi or corroborating witness if such a witness so lacks in credibility as to risk undermining the defense.

{¶9} This case exemplifies that point. At trial, several eyewitnesses identified Jones as the attacker, including the victim. The alibi witness Jones would have called to testify at trial was his then significant other, who would have claimed that Jones was elsewhere at the time of the crimes. A reasonable attorney may have concluded, as in *Hostacky*, that the witness’s testimony was so self-serving that the jury could have concluded that the defense fabricated the story, thereby undermining the defense’s case in general. Further, cell phone records placed Jones in or around the area of the crime and

contradicted the alleged alibi witness's claim that she saw Jones making calls on his phone around the time of the crime. Jones ignored the impact the trial evidence had on the alleged alibi, but that impact must be considered in determining whether trial counsel's performance fell below the applicable standard. *Id.* at ¶ 14. The trial court did not abuse its discretion in concluding that Jones failed to allege substantive grounds for relief.

{¶10} Tellingly, Jones does not directly address the trial court's conclusion. Instead, Jones argues that the trial court erred as a matter of law by adopting the proposed findings of facts and conclusions of law presented by the state, citing *State v. Carter*, 8th Dist. Cuyahoga No. 104351, 2016-Ohio-8150. *Carter*, however, does not stand for the proposition that a trial court is absolutely precluded from adopting the proposed findings of fact and conclusions of law prepared by the opposing party.

{¶11} In *Carter*, the divided panel concluded that the trial court should have conducted an evidentiary hearing on a petition for postconviction relief, supported by self-serving affidavits, regardless of the trial court's conclusion that the affidavits were incredible. *Id.* at ¶ 6; *see contra State v. Hines*, 8th Dist. Cuyahoga No. 89848, 2008-Ohio-1927, ¶ 10, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 284, 1999-Ohio-102, 714 N.E.2d 905. In order to reverse the decision to deny an evidentiary hearing, the trial court's credibility findings contained in the court's findings of fact and conclusions of law had to be disregarded. *Carter* at ¶ 14 ("We are not convinced that the trial court conducted a review of the record sufficient to determine the credibility of Carter's

affidavit.”). To achieve that end, *Carter* held that the findings of fact and conclusions of law adopted by the trial court were insufficient because the journal entry contained uncorrected typographical errors from the proposed entry and the divided panel was “not satisfied that the trial court understood the basis of [the defendant’s] petition nor conducted an independent review of the record before denying [the defendant’s] petition without a hearing.” *Id.* at ¶ 17; *see contra Brooklyn v. Woods*, 8th Dist. Cuyahoga No. 105065, 2017-Ohio-2861, ¶ 19 (trial court’s statement that evidence was reviewed was sufficient to overcome any argument otherwise); *State v. Barb*, 8th Dist. Cuyahoga No. 94054, 2010-Ohio-5239, ¶ 17-18 (trial court has discretion to determine the credibility of self-serving affidavits attached to petitions for postconviction relief).

{¶12} Thus, according to *Carter*, the trial court’s conclusion, finding the self-serving affidavits incredible, can be disregarded if there are typographical errors in the proposed journal entry left uncorrected and the panel is not otherwise “convinced” that the trial court independently reviewed the record before adopting the proposed journal entry as its own. Whether *Carter* stands the test of time with this alternative standard of review is yet to be determined. *Id.* at ¶ 19-23 (S. Gallagher, J., dissenting).

{¶13} Nevertheless, *Carter* did not create a rule precluding a trial court from adopting proposed findings of facts and conclusions of law as Jones argues. The case is inapplicable to the current one. In this case, there are no identified typographical issues in the trial court’s final judgment such as the ones that eroded the divided panel’s confidence in *Carter*. More important, the trial court concluded that trial counsel’s

performance was not deficient even after entertaining the presumption that the alibi witness was known to counsel before trial — thus giving the affiants the benefit of the doubt on the credibility of their statements.

{¶14} The trial court did not abuse its discretion in concluding that Jones’s petition for postconviction relief failed to allege substantive grounds for relief. We must affirm.

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 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.

SEAN C. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR