

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-L-116
THOMAS POWELL,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 06 CR 000868.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul R. LaPlante, Lake County Public Defender, and *Charles R. Grieshammer*, Chief Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Thomas Powell appeals from a judgment of the Lake County Court of Common Pleas denying his petition for postconviction relief. For the following reasons, we affirm.

{¶2} Mr. Powell was charged with felonious assault in connection with his involvement in a bar fight. At trial, the state presented several witnesses. One eyewitness testified that she saw Mr. Powell strike the victim with a thick beer glass at

the back of the victim's head, causing a two-inch laceration requiring eight sutures. The defense's theory at trial was that Mr. Powell never threw any object at the victim, claiming his injury was instead caused by a third person using a pool stick. The jury found Mr. Powell guilty of felonious assault.

{¶3} On September 11, 2007, Mr. Powell, who had been represented by counsel from the public defender's office, filed a motion for a new trial through a different counsel from that office. He attached to that motion affidavits from the victim's treating physician at the hospital and a pathologist. The affidavits stated Mr. Bennett's injury could have been caused by a pool stick, a beer bottle, or some other object. His counsel for the motion for a new trial stated the defense did not present this medical evidence because Mr. Powell's trial counsel assumed the jagged edges of the injury depicted in the photographs of the victim taken at the hospital must have been caused by a sharp object, and therefore did not attempt to obtain medical testimony. Also attached to his petition was an affidavit from a juror stating that had the jury heard the testimony that "the damage to the wound was consistent with a pool stick," he would not have voted guilty.¹

{¶4} The trial court denied Mr. Powell's motion for a new trial on September 27, 2007. On October 16, 2007, he was sentenced to two years in prison. On November 7, 2007, Mr. Powell, through the public defender's office, filed a direct appeal in *State v. Powell*, 11th Dist. Case No. 2007-L-187, 2009-Ohio-____.² On January 25, 2008, the

1. Regarding the juror's affidavit, we note that "under Ohio's aliunde rule the jurors were not competent to testify concerning their mental processes during the trial and to the effect that the experts' testimony would have had on their decision." *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, fn. 3, citing *State v. McKnight*, 4th Dist. No. 07CA665, 2008-Ohio-2435, ¶48-52, citing *State v. Hessler* (2000), 90 Ohio St.3d 108, 124.

2. See this court's opinion in that case for a detailed description of the facts in this criminal matter.

public defender's office withdrew from his direct appeal, citing a conflict of interest created by a potential ineffective assistance of counsel claim. This court granted that request and appointed private counsel to represent Mr. Powell in his direct appeal.

{¶5} While his direct appeal was pending in this court, Mr. Powell, through the same attorney from the public defender's office who had represented him for his motion for a new trial, filed a petition for postconviction relief on May 15, 2008. He attached to the petition the same affidavits that were attached to his motion for a new trial, adding only an additional affidavit from his trial counsel. In that affidavit, his trial counsel stated that neither he nor his co-counsel "spoke to any medical personnel named in the medical report provided to [him] in discovery" and that "[n]either of them consulted with an expert to assist [them] with the issues regarding the type of weapon used to cause the injuries to Mr. Bennett."

{¶6} In his petition for postconviction relief, Mr. Powell claimed his trial counsel was ineffective because he (1) failed to properly investigate the case by not talking to the medical witnesses or hiring an expert to assist him with the medical evidence; (2) failed to present available testimony from the medical witnesses or expert witnesses; (3) failed to object to improper questions of the state and allowed the state to "introduce expert testimony through non-expert witnesses," and (4) failed to object to improper remarks by the prosecutor attacking the credibility of the defendant's only witness.

{¶7} On June 28, 2008, the trial court denied his petition, holding the petition was barred by res judicata. The court noted that Mr. Powell had possession of the affidavits at the time he filed his direct appeal and could have raised the ineffective assistance counsel claim on appeal.

{¶8} Mr. Powell now appeals from the trial court's denial of his petition, assigning the following error for our review:

{¶9} "The trial court erred to the prejudice of the defendant-appellant when it denied his motion for postconviction relief and thereby violated his right to due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution."

{¶10} In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard. *State v. Allen* (Sept. 23, 1994), 11th Dist. No. 93-L-123, 1994 Ohio App. LEXIS 4274, *3.

{¶11} "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." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶12} In particular, the doctrine of res judicata precludes a defendant from raising, in a petition for postconviction relief, an ineffective assistance of counsel claim. *State v. Delmonico*, 11th Dist. No. 2004-A-0033, 2005-Ohio-2882, ¶14, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113. We recognize, however, a claim is not barred by operation of res judicata to the extent "a petitioner sets forth competent, relevant, and material evidence dehors the record." *Delmonico* at ¶14, citing *State v. Burgess*, 11th Dist. No. 2003-L-069, 2004-Ohio-4395, ¶11.

{¶13} Here, the evidence dehors the record Mr. Powell claims to demonstrate his trial counsel's ineffective assistance consists of several affidavits attached to his petition. However, these affidavits, with the exception of one from his trial counsel, were in his possession at the time he filed his direct appeal, and, in fact, were part of the trial record as they were the same affidavits attached to his motion for a new trial. As to his trial counsel's affidavit stating he did not consult with an expert regarding the cause of Mr. Bennett's injury, that information was apparent from the record – the memorandum supporting his motion for a new trial stated that his trial counsel mistakenly assumed that the jagged edges of the victim's head wound must have been caused by broken glass and therefore did not find it necessary to obtain medical testimony.

{¶14} Therefore, Mr. Powell could have raised the ineffective assistance of counsel claim on his direct appeal, and indeed, he *did*. His complaints of ineffective assistance of counsel in his petition for postconviction relief are identical to those raised in his direct appeal. Consequently, his petition is barred by the doctrine of res judicata.

{¶15} Even if his ineffective assistance of counsel claim were not barred, as we have concluded in his direct appeal, his counsel's decision not to obtain medical testimony may have been a legitimate decision in light of the appearance of the wound; indeed, the expert opinion stated in the affidavits as to the cause of the injury was inconclusive. Therefore, even if his counsel did present the expert testimony, the outcome of the trial would not have been different, given that the totality of the other evidence presented by the state weighs in favor of a finding of guilt.

{¶16} Mr. Powell's petition for postconviction relief is barred by res judicata and we overrule his assignment of error.

{¶17} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶18} I respectfully dissent and would grant appellant's motion for postconviction relief. The attorney of record submitted evidence in affidavit form substantiating, outside of the original record, why his representation was ineffective. He also had evidence to demonstrate prejudice to appellant in the form of a juror testimonial.

{¶19} The case is unique in that rarely, if ever, does an office or attorney have the integrity to admit and document its breach of duty to a client. This is to be commended.

{¶20} In this case, appellant set forth competent and relevant material evidence dehors the record. *Delmonico*, supra, at ¶14, citing *Burgess*, supra, at ¶11.

{¶21} The record also includes an affidavit by a juror indicating that the other evidence, if presented, would have altered his verdict. Ineffective assistance of counsel, as admitted by counsel and supported by juror affidavit, clearly satisfies the two prong analysis in *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶22} For better or worse, we are considering both the direct appeal in Case No. 2007-L-187 and that for postconviction relief simultaneously, but separately, each requiring its own individual evaluation.

{¶23} We cannot turn a blind eye to the evidence presented. It is clear from counsel's own affidavit and that of the juror, in this extraordinary case, that appellant's right to counsel, effective counsel, has been compromised. In this instance, due to his attorney's ineffective assistance, the results of the trial have been rendered inherently unreliable.

{¶24} For this reason, I humbly dissent.