[Cite as *State v. Blanton*, 2020-Ohio-7018.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case Nos. 19CA1096
	:	19CA1097
vs.	:	
	:	
DENNY W. BLANTON, JR.,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Dennis C. Belli, Belli Law Office, Columbus, Ohio, for Appellant.

C. David Kelley, Adams County Prosecuting Attorney, and Mark R. Weaver, Assistant Prosecuting Attorney, West Union, Ohio, for Appellee.

Smith, P.J.

{¶1} In this consolidated appeal, Denny W. Blanton, Jr. ("Appellant") appeals the orders of the Adams County Court of Common Pleas, dated July 1, 2019, denying his petitions for postconviction relief. Appellant was convicted in Adams County Case Number CRI2016-0037 of two counts of rape and two counts of kidnapping. Appellant was also convicted in Adams County Case Number CRI2016-0109 of three counts of kidnapping, felonious assault, and misdemeanor assault. He filed petitions for

postconviction relief in the trial court in both cases. On appeal, Appellant asserts the trial court erred and abused its discretion by denying his postconviction petitions without holding an evidentiary hearing. However, upon our review, we find the trial court did not abuse its discretion with regard to either of the postconviction petitions. Accordingly, we overrule Appellant's assignments of error and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

{¶2} On September 20, 2016, following a jury trial, Blanton was found guilty of two counts of rape and two counts of kidnapping.[1] Following a separate hearing, the jury also specified that Blanton was a sexually violent predator as to each of the four felony counts. This case was assigned Adams County Case No. CRI2016-0037.

{¶3} Blanton filed a direct appeal to this court. The underlying facts to the case are set forth fully in our decision, *State v. Blanton,* 4th Dist. Adams No. 16CA1931, 2018-Ohio-1275, at paragraphs 3-11 ("*Blanton 1*.") On direct appeal, Blanton contended that he was entitled to a new trial for several reasons: (1) the trial court made several rulings that resulted in constitutional violations; (2) the trial court erred in making other evidentiary

[1] Blanton was indicted on four counts: Count 1—rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification, a felony of the first degree; Count 2—kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motive specification and sexually violent predator specification, a felony of the first degree; Count 3—kidnapping in violation of R.C. 2905.01(A)(2), with a sexual motive specification and sexually violent predator specification, a felony of the first degree; and Count 4—rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification, a felony of the first degree.

rulings; and (3) he received ineffective assistance from his trial counsel. Alternatively, Blanton contended that several sentencing errors necessitated a re-sentencing hearing. Having reviewed the record, we found no merit to Blanton's assignments of error. Furthermore, where the trial court did commit error, we found the error to be harmless and did not find the outcome of the proceedings to have been affected. Accordingly, we affirmed the judgment of the trial court.

{¶4} While lodged in the Adams County Jail awaiting trial on the above felony counts, Appellant was indicted for additional felony offenses of kidnapping, felonious assault, and misdemeanor assault. These charges were assigned Adams County Case No. CRI2016-0109. Appellant eventually proceeded to a three-day jury trial on these additional felony counts and was found guilty of one count each of kidnapping, felonious assault, and misdemeanor assault. Appellant filed a direct appeal of his convictions and sentence to this court. In *State v. Blanton,* 2018-Ohio-1278, 110 N.E.3d 1, (4th Dist.) ("*Blanton II*"), we also overruled the assignments of error and affirmed the judgment of the trial court. The underlying facts and circumstances of the *Blanton II* counts are set forth at paragraphs 3 through 9.

{¶5} On December 1, 2017, Appellant filed a postconviction petition relating to his *Blanton I* convictions. He also filed his own affidavit in support of the postconviction petition. On January 24, 2018, Appellant filed a postconviction petition relating to his *Blanton II* convictions. Appellant's postconviction petition was supported with his own affidavit, as well as affidavits from Michael Kelly, one of his attorneys; Teresa Edwards, a private investigator who interviewed Attorney Cantrell; Denny Blanton, Sr., Appellant's father; and Lisa Blanton, Appellant's mother.

{¶6} The decisions in both *Blanton I* and *Blanton II* were released on March 27, 2018. On July 1, 2019, the trial court Judge Eugene Lucci sitting by assignment denied Appellant's postconviction petitions.[2] This timely appeal followed.

ASSIGNMENTS OF ERROR

> "I. THE DISMISSAL OF THE PETITION FOR POST-CONVICTION RELIEF IN ADAMS C.P. CASE NO. CRI 2016-0037 (RAPE/KIDNAPPING) WITHOUT A HEARING VIOLATED R.C. 2953.21(D) AND DEPRIVED DEFENDANT-APPELLANT OF HIS RIGHT TO MEANINGFUL REVIEW OF HIS CONSTITUTIONAL CLAIMS FOR RELIEF.
>
> II. THE DISMISSAL OF THE PETITION FOR POST-CONVICTION RELIEF IN ADAMS C.P. CASE NO. CRI 2019-0109 (FELONIOUS ASSAULT/KIDNAPPING)

[2] Both of Appellant's jury trials were presided over by the Honorable Brett M. Spencer of the Adams County Court of Common Pleas.

WITHOUT A HEARING VIOLATED R.C.2953.21(D) AND DEPRIVED DEFENDANT-APPELLANT OF HIS RIGHT TO MEANINGFUL REVIEW OF HIS CONSTIUTIONAL CLAIMS FOR RELIEF."

A. STANDARD OF REVIEW

{¶7} Generally we review decisions granting or denying a postconviction relief petition filed pursuant to R.C. 2953.21 under an abuse of discretion standard. *State v. Smith,* 4th Dist. Highland No. 19CA16, 2020-Ohio-116, at ¶ 16; *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. In *Gondor,* the Court recognized that the differences between a direct appeal and an appeal from a postconviction relief petition warranted different appellate standards of review. *Id*. at ¶ 53-54. The Court stated, "A postconviction claim is not an ordinary appeal: 'A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.' " *Id*. at ¶ 48, quoting *State v. Steffen,* 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). The holding in *Gondor* broadly applies to all appellate postconviction petition review: "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Gondor* at ¶ 58; *State v. Black,* 4th Dist. Ross No. 15CA3509, 2016-Ohio-

3104, ¶ 7. " 'A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable.' " *State v. Knauff,* 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 19, quoting *Cullen v. State Farm Mut. Auto Ins. Co.,* 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 19.

{¶8} The postconviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *See Smith, supra,* at ¶ 17*; State v. Calhoun,* 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905. The postconviction relief proceeding is designed to determine whether "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A)(1)(a). Postconviction review is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Id*. It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *State v. Teets,* 4th Dist. Pickaway No. 17CA21, 2018-Ohio-5019, ¶ 14. " 'This means that any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly.' " *Smith, supra*, quoting

State v. Apanovitch, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 35.

{¶9} A criminal defendant seeking to challenge a conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *See Smith, supra* at ¶ 18; *Calhoun* at 282, citing *State v. Cole,* 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing, the trial court must determine whether substantive grounds for relief exist. R.C. 2953.21(D). In making such a determination, the court shall consider the petition, supporting affidavits, documentary evidence, and all the files and records from the case. *Calhoun* at 284 (noting that R.C. 2953.21 "clearly calls for discretion in determining whether to grant a hearing" on a petition for postconviction relief).

{¶10} " 'Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a violation of the petitioner's constitutional rights.' " *Smith, supra,* at ¶ 19, quoting *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, ¶ 11. Moreover, before a hearing is warranted, the petitioner must demonstrate that the claimed "errors resulted in prejudice." *Calhoun* at 283. A court may dismiss a petition for postconviction relief without a hearing when the petitioner fails

to submit evidentiary material "demonstrat[ing] that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Id*. at paragraph two of the syllabus. *See also State v. Lewis,* 4th Dist. Ross No. 10CA3181, 2011-Ohio-5224, ¶ 11; *State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012-Ohio-1936, ¶ 14. A petitioner is not entitled to a hearing if his claim for relief is belied by the record and is unsupported by any operative facts other than Defendant's own self-serving affidavit or statements in his petition, which alone are legally insufficient to rebut the record on review. "In reviewing petitions for post-conviction relief, a trial court may, in the exercise of its sound discretion, weigh the credibility of affidavits submitted in support of the petition in determining whether to accept the affidavit as true statements of fact. (Citations and internal quotations omitted.)" *State v. Quinn,* 2017-Ohio-8107, 98 N.E.3d 1184, ¶ 35 (2d Dist.).

B. LEGAL ANALYSIS

{¶11} In the trial court's order denying Appellant's petitions for postconviction relief, the trial court set forth in the first paragraph:

> The court has considered: (1) the defendant's petition to vacate or set aside judgment of conviction or sentence, filed December 1, 2017; (2) the affidavit of Denny W. Blanton, Jr., filed December 1, 2017; (3) the defendant's petition to vacate or set aside judgment of conviction filed January 24, 2018; (4) the affidavit of Denny W. Blanton, Jr., filed January 24, 2018; (5)

> the state's briefs in opposition, filed December 5, 2018; (6) the defendant's reply briefs in support, filed January 18, 2019; (7) the affidavit of Lisa Marie Blanton, filed January 18, 2019; (8) the affidavit of Denny Blanton, Sr., filed January 18, 2019; (9) the affidavit of Teresa L. Edwards, filed January 18, 2019; (10) the affidavit of Attorney Michael Kelly, filed January 18, 2019; and (11) the state's surreply briefs, filed February 19, 2019.

{¶12} The trial court's decision also set forth the applicable legal principles with regard to the issues raised by Appellant's petitions, and we set them forth as well.

1. Res judicata

{¶13} "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 of conviction, or on an appeal from that judgment." *State v. Toliver*, 4th Dist. Athens No. 19CA3, 2019-Ohio-3669, at ¶ 14; *State v. Cox,* 5th Dist. Muskingum No. CT2018-0075, 2019-Ohio-521, at ¶ 11; *State v. Szefcyk,* 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus, approving and following *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. It is well settled that, "pursuant to res judicata, a defendant cannot raise an issue in a [petition] for post-conviction

relief if he or she could have raised the issue on direct appeal." *State v. Reynolds,* 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997). "A petition for postconviction relief is not a substitute for a direct appeal." *Cox, supra,* at ¶ 13; *State v. Holliday,* 5th Dist. Delaware No. 2012-Ohio-2376, ¶ 17 citing *State v. Thompson,* 9th Dist. 11CAA110104, 2009-Ohio-200.

> Our statutes do not contemplate relitigation of those claims in post-conviction proceedings where there are no allegations to show that they could not have been fully adjudicated by the judgment of conviction and an appeal therefrom. *Perry, supra,* 10 Ohio St. 2d 175, 180. To overcome the res judicata bar, the petitioner must produce new evidence that renders the judgment void or voidable, and show that he could not have appealed the claim based upon information contained in the original record. *State v. Aldridge,* 120 Ohio App. 3d 122, 151, 697 N.E. 2d 288 (2nd Dist. 1997). Res judicata also implicitly bars a petitioner from 'repackaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal. *State v. Monroe,* 10th Dist. Franklin No. 04AP-658, 2005-Ohio-5242, ¶ 9.

See State v. Ervin, 4th Dist. Highland No. 19CA7, 2019-Ohio-4708, ¶17, quoting *State v. Quinn,* 2017-Ohio-8107, 98 N.E.3d 1184, ¶ 35 (2nd Dist.).

2. Ineffective Assistance of Counsel

{¶14} To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his or her counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him or her of a fair trial. *State v. Howard,* 4th Dist.

Ross No. 18CA3666, 2019-Ohio-5419, ¶ 51; *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶15} When considering whether trial counsel's representation amounts to deficient performance, " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]' " *Howard, supra,* at ¶ 52, quoting *Strickland* at 689, 104 S.Ct. 2052. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation omitted.) *Id*. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor,* 4th Dist. Washington No. 07CA11, 2008-Ohio-

482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *See State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61.

{¶16} " 'Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated.' " *Howard, supra,* at ¶ 53, quoting *State v. Walters,* 4th Dist. Washington Nos. 13CA33, 13CA36, 2014-Ohio-4966, ¶ 24; *State v. Jones,* 2018-Ohio-239, 104 N.E.3d 34, ¶ 21-24 (4th Dist.).

3. Cumulative Error

{¶17} "If a reviewing court finds no prior instances of error, then the cumulative error doctrine does not apply." *See State v. Chafin,* 4th Dist. Scioto 16CA3769, 2017-Ohio-7622, ¶ 56; *State v. Smith,* 2016-Ohio-5062, 70 N.E.3d 150, ¶ 65 (4th Dist.); quoting *State v. Jackson,* 4th Dist. Pickaway No. 11CA20, 2012-Ohio-6276, ¶ 52; quoting *State v. McKnight,* 4th Dist. Vinton No. 07CA665, 2008-Ohio-2435, ¶ 108.

4. Appellate case number 19CA1096, rape and kidnapping convictions subject of *Blanton I.*

a. Was Appellant entitled to a hearing to determine whether his defense was prejudiced by his counsel's trial strategy and alleged failure to comply with Appellant's wishes?

{¶18} The first claim asserted in Appellant's postconviction petition was that his attorneys performed deficiently by failing to include him in the decision-making process regarding his defense of consent. Appellant explained the circumstances as follows in his affidavit at paragraph 2:

> During our first meeting, I told Mr. Cantrell that I had lied to the Sheriff and the Prosecutor's Office investigator about my contact with J.S., the alleged minor victim. During the questioning following my detention and arrest, I had told law enforcement officials several times that I did not engage in sexual conduct with her. I explained to Mr. Cantrell that I had not been truthful with the investigators about this subject because I was afraid that [my girlfriend at the time] would learn about the affair. I told Mr. Cantrell that J.S. and I did have sexual relations and that J.S. was a willing participant. I asked Mr. Cantrell to notify the Prosecutor's Office about my desire to tell the truth and to request an opportunity for me to submit to a second interview. Mr. Cantrell disagreed with me and did not contact the prosecutor.

{¶19} Appellant argues that when defense counsel failed to inform the jury in the opening statement that Blanton conceded the occurrence of sexual conduct, but instead focused on the State's burden of proving sexual conduct, this conveyed a false impression to the jury and resulted in significant prejudice to Appellant's defense. Appellant concludes his counsel's strategy created the impression that he had changed his entire line

of defense only after hearing the State's evidence. Appellant argues under the circumstances of this case, defense counsel's refusal to honor his wishes regarding the defense of consent rose to the level of a violation of his Sixth and Fourteenth Amendment rights.

{¶20} Appellant emphasizes that his affidavit in support of the postconviction petition provides the necessary evidence outside of the record. Appellant argues that a hearing is necessary to develop testimony regarding the "adequacy of communications" between Appellant and his counsel, and whether the attorneys deprived Appellant of his fundamental right to participate in the shaping of the defense strategy. Regarding this argument, the trial court found:

> The defendant's arguments do not overcome the strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. *Strickland v. Washington* (citation omitted.) Further the defendant's argument that he was prejudiced by this is speculative at best and does not show a reasonable probability that the outcome would have been different. *Strickland, supra.* * * * Moreover, the defendant was aware at trial of the content of his attorney's opening statement and could have raised this argument on appeal. The defendant argues that he could not litigate this on appeal because his statements that he told his attorney prior to trial that he had lied were not part of the record. However, his trial testimony regarding consent and his reasons for lying to the police were in the record, so that the defendant could have raised this argument on appeal.

{¶21} We agree with the trial court's analysis. Appellant alleged numerous instances of ineffective assistance in his direct appeal. While he did not raise the exact argument that he has in the postconviction petition, the trial court pointed to evidence in the record by which the argument could have been made. To the extent that Appellant argues that the information he gave to his attorneys in confidence was not part of the trial court record, we point out that Appellant's self-serving affidavit need not be accepted as true.

{¶22} Appellant's argument herein is barred by res judicata. As such, the trial court did not err by failing to hold an evidentiary hearing as to his claim that counsel failed to abide by his wishes and thus rendered ineffective assistance.

b. Was Appellant entitled to a hearing to determine whether his defense was prejudiced by his counsel's failure to file an affidavit of disqualification?

{¶23} Appellant's second claim in his postconviction petition was that given the nature of the relationship between the trial judge and the alleged victim's father, Appellant was highly concerned about the risk of bias and instructed his attorneys to take all necessary measures to remove the trial judge from the case. Appellant asserted that his attorneys knew that the trial judge's wife was employed by the same local school district where the alleged victim's father was employed as superintendent and even held a

supervisory position over the judge's wife. Appellant's affidavit set forth the following:

> My attorneys told me that there is a procedure for filing an affidavit in the Ohio Supreme Court to disqualify the trial judge due to bias or prejudice, I asked them to file such an affidavit because I did not feel I could get a fair trial before Judge Spencer. They said they could not file the affidavit due to personal reasons. During the trial, Judge Spencer made comments, some of which were not recorded, and rulings that confirmed my belief that he was biased against me and felt my defense of consent was based on perjured testimony.

{¶24} Appellant contends that if the trial judge had been disqualified, there is a reasonable probability that his trial and sentencing would have been more favorable. Appellant asserts that the additional evidence is sufficient to support his request for a hearing on the issue of the trial judge's bias. In the trial court's ruling on this claim, the court concluded:

> The defendant's allegations are based on information that was available to him prior to trial. In fact, defense counsel filed a motion to recuse the trial judge on this basis. In his affidavit, the defendant indicates that his trial counsel informed him that there was a procedure to seek disqualification of a judge through the Ohio Supreme Court, that he requested that they seek disqualification of the judge, and that they refused to do so for personal reasons. Thus, the defendant was aware of all the information upon which he bases his claim prior to trial and could have raised this issue on appeal. The defendant argues that he could not have raised this issue on appeal because his affidavit alleging that counsel refused to file an affidavit of disqualification for personal reasons was not in the record. However, the motion to recuse the judge and its denial were in the record. Thus, there was sufficient information in the record

> to permit the defendant to argue that his counsel was ineffective for failing to file an affidavit of disqualification.

{¶25} " 'It is well established that 'a judge's adverse rulings, even erroneous ones, are not evidence of bias or prejudice.' " *In re Disqualification of Collier-Williams,* 150 Ohio St.3d 1286, 2017-Ohio-5718, 83 N.E.3d 928, ¶ 14, quoting *In re Disqualification of Fuerst,* 134 Ohio St.3d 1267, 2012-Ohio-6344, 984 N.E.2d 1079, ¶ 14. However, the trial court record reflects that a motion to recuse was filed on Appellant's behalf. Appellant's argument herein could have been raised on direct appeal but was not. Thus, this claim is now barred by application of the doctrine of res judicata. The trial court did not abuse its discretion by failing to hold a hearing based on the second claim of Appellant's postconviction petition.

c. Was Blanton entitled to a hearing to determine whether his defense was prejudiced by his counsel's alleged errors involving expert testimony and evidence?

{¶26} The third claim in Appellant's postconviction petition was that: (1) his counsel failed to call at trial an expert who had examined the victim's running shorts; and, (2) his counsel failed to consult with a medical expert to counter testimony given by the State's expert, Dr. Makaroff. The trial court found:

> Additionally, the defendant argues that counsel hired an expert in microscopy and microchemistry, but failed to call this expert at trial. The defendant states that the expert examined the

> victim's running shorts and opined that the soil stains on her shorts were caused by contact with a muddy object, and that this opinion contradicted the state's theory that the stains were from the defendant pushing the victim down. The court questions whether these are two contradictory assertions. However, generally, decisions as to whether to call a witness, including the failure to call an expert, are considered trial strategy and do not constitute ineffective assistance of counsel. *In re B.C.S.* (citation omitted.) * * * Furthermore, the defendant complains that his attorney failed to consult with a medical expert regarding the testimony of Dr. Makaroff that the victims genital bruising and bleeding were consistent with sexual assault. Again, the defendant knew this at the time of trial and made this argument on appeal."

{¶27} Again, we agree with the trial court's findings. The decision whether or not to call a witness is trial strategy and does not amount to ineffective assistance. Furthermore, this claim was raised in the direct appeal. As to the Appellant's argument regarding the failure to consult with a medical expert to counter Dr. Makaroff's testimony—that claim was also raised in the direct appeal. Both claims are therefore barred by res judicata. As such, we find the trial court did not abuse its discretion by failing to hold an evidentiary hearing regarding these claims.

d. <u>Was Blanton entitled to a hearing to determine whether he was prejudiced by his counsel's decisions to withdraw Appellant's girlfriend as a witness?</u>

{¶28} Appellant also asserted a fourth postconviction issue, claiming that his attorneys rendered deficient performance when they announced to the jury that they were calling his girlfriend to testify and

thereafter, withdrew her as a witness. Appellant argued that this conduct was prejudicial because it invited the jury to conclude that perhaps Appellant's girlfriend's testimony would not corroborate his.

{¶29} Appellant raised this issue in his direct appeal. This court found that Appellant's claim that the withdrawal of his girlfriend as a witness caused the jury to think that the girlfriend's testimony "would contradict Blanton's testimony * * * and further preju[dice] his defense," was a speculative argument. We agree with the trial court's reasoning and further find this ineffective assistance claim is also barred by res judicata. Therefore, we find the trial court did not abuse its discretion by failing to conduct an evidentiary hearing on the fourth claim.

e. Was Blanton entitled to a hearing to determine whether he was prejudiced by his counsel's failure to request a change of venue?

{¶30} Appellant argued he was prejudiced by his counsel's failure to request a change of venue in his sixth claim. Appellant pointed out that Adams County is a county with a small population; that the case attracted a great deal of media attention; and that several of the jurors had ties to the victim's family or to local law enforcement. Appellant argues on appeal that the trial court treated this claim in his petition in a cursory manner.

Appellant also asserts that there is a reasonable probability of a more favorable outcome if the trial had been moved to a larger, distant county.

{¶31} We disagree. These facts were known to Appellant and his attorneys at the time of the direct appeal. Appellant's sixth claim could have been raised on direct appeal and was not. Therefore, it is also barred by application of the doctrine of res judicata. We also find the trial court did not err by failing to conduct an evidentiary hearing on the sixth claim.

f. Was Blanton entitled to a hearing on the question of whether he was prejudiced by the cumulative effect of his counsel's alleged multiple unprofessional errors?

{¶32} In the direct appeal, this court found "because [Appellant] failed to show that his counsel committed any error, his cumulative error argument also fails." Regarding the postconviction petition, citing *State v. Dean,* 146 Ohio St.3d 106, 166, 2015-Ohio-4347, 54 N.E.2d 8, ¶ 296, the trial court found "[B]ecause none of [the defendant's] individual claims of ineffective assistance has merit, he cannot establish a right to relief simply by joining these claims together." Again, we agree with the trial court's finding as to alleged cumulative error. Thus, the trial court did not err by failing to hold an evidentiary hearing on the cumulative error claim.

{¶33} For the foregoing reasons, we find no merit to Appellant's first assignment of error. It is hereby overruled.

5. Appellate case number 19CA1097, felonious assault and kidnapping convictions subject of *Blanton II.*

    a. Was Blanton entitled to a hearing to determine whether the State violated his fourteenth amendment rights by failing to preserve video footage of the felonious assault?

{¶34} In the postconviction petition, Appellant's first claim was that Lieutenant Poe, an officer with the Adams County Sheriff's Department, showed him video surveillance footage which clearly showed a "very conscious" Lunsford [the victim] using both arms to defend himself from Appellant's punches. Appellant alleges that the sheriff's office failed to preserve and/or deliberately erased the video footage of Lunsford defending himself. Appellant asserts his Fourteenth Amendment due process rights have been violated due to the state's withholding or destroying this materially exculpatory evidence. Appellant argues that the un-preserved video footage from the camera would have positively refuted the prosecutor's theory of guilt. Appellant specifically argues: "If the jurors had been presented with the footage of a conscious Lunsford defending himself, there is a reasonable probability that they would have returned a verdict of not guilty as to the felonious assault and kidnapping counts." Appellant concludes the video footage was materially exculpatory.

{¶35} Appellant also argues that his Fourteenth Amendment rights were violated due to the state's withholding potentially useful evidence in bad faith. Appellant alleges that Lieutenant Poe demonstrated personal animosity against Appellant. Appellant concludes that suspicious circumstances surrounding the handling and disposal of the video surveillance footage are sufficient to raise an inference that Lieutenant Poe destroyed or failed to preserve the video footage in bad faith.

{¶36} We find no merit to Appellant's assertions. In *Blanton II,* the direct appeal, Appellant argued that he was deprived of his constitutional rights when his motion to dismiss the indictment for failure to preserve the surveillance footage was denied without receiving testimony from him. In resolving the assignment of error, we necessarily determined that based upon the record, the requested surveillance footage was not materially exculpatory and even if it could be determined that the surveillance footage was potentially useful, there was no showing it was destroyed in bad faith.

{¶37} Appellant's arguments regarding the supposedly exculpatory video surveillance footage were raised and considered fully in the direct appeal. Thus, the doctrine of res judicata applies. Therefore, we cannot find the trial court abused its discretion in failing to hold an evidentiary hearing on the same claim contained in the postconviction petition.

b. Was Blanton entitled to a hearing to determine whether his counsel was ineffective for allegedly failing to preserve his rights under the sixth and fourteenth amendments?

{¶38} As indicated above, Appellant's trial counsel filed a motion to dismiss the indictment due to the State's alleged failure to preserve allegedly exculpatory video evidence. The trial court scheduled the motion for hearing on October 31, 2016. In the postconviction petition, Appellant claimed his Sixth Amendment right to confrontation and Fourteenth Amendment due process rights were violated because: (1) counsel did not discuss the scheduling of the hearing with Appellant; (2) counsel did not attempt to secure Appellant's presence at the hearing; and (3) counsel did not request a continuance of the hearing to arrange for his presence. In the direct appeal, we found that Appellant's interests were adequately protected and that by failing to timely object, he had waived the argument.

{¶39} Here, Appellant contends that he did not waive his presence for the hearing, and that his presence was required for full and fair litigation of the motion. Appellant claims that had his counsel taken the necessary measures to ensure his presence for the motion hearing, Appellant could have provided his attorneys with highly relevant information. Appellant references the transcript of the motion hearing where the judge inquired: "Do you have any reason to believe there is something exculpatory in

there?" Appellant argues that his counsel's response demonstrates that counsel had not spoken to his client about the subject and was unaware of the contents of the missing footage.

{¶40} Appellant made multiple ineffective assistance claims in his direct appeal. Here, Appellant points to evidence outside of the record to support these claims. Appellant's affidavit in support of the postconviction petition provided in pertinent part beginning at paragraph 9:

> 9. My attorneys did not tell me about the scheduling of the hearing, did not attempt to secure my appearance for the hearing, and did not request a continuance of the hearing to arrange for my presence. I did not authorize my attorneys to waive my presence for the hearing.
>
> 10. I believe arrangements for my presence at the hearing was essential for a full and fair resolution of the motion to dismiss. The transcript of the hearing reveals that my attorneys were not aware of the missing video footage from the second camera. Their arguments to the Court were focused on video recordings of earlier, unrelated incidents pertaining to the first kidnapping count (the June 5, 2016 to June 17, 2016 time frame) for which I was acquitted by the jury.
>
> 11. If I had been present for the hearing, I could have told my attorneys about the missing footage from the second camera, insisted on the need to call Lieutenant Poe to the witness stand, suggested a line of questioning directed to the destruction of the footage recorded by the second camera, and testified about my meeting with Lieutenant Poe and the exculpatory contents of the video footage that he showed me.
>
> 12. I do believe Lieutenant Poe deliberately erased, destroyed, or concealed the exculpatory video footage from the second camera due to his personal animosity against me. During the

> June 20, 2016 meeting in his office, he told me he had enough charges against me to ensure that I would never go home. He laughed at me after the jury found me guilty of the rape and kidnapping charges in the first trial in Case No. CRI2016-0037. He told me I would have 30 years to think about what I did.
>
> * * *
>
> 14. I wanted to testify in my own defense for the purpose of refuting the prosecutor's theory of guilty [sic]. If called to the witness stand, I would have told the jury that Gary Lunsford was fully conscious and deflecting my punches with his arms.

{¶41} We disagree with Appellant's argument. First, the trial court was not required to accept the assertions of Appellant's affidavit. "While a trial court should 'give due deference to affidavits sworn to under oath and filed in support of the petition,' the court in its discretion may judge the affiant's 'credibility in determining whether to accept the affidavits as true statements of fact.' " *State v. Teets,* 4th Dist. Pickaway No. 17CA21, 2018-Ohio-5019, at ¶ 23, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E. 2d 905. Thus, "[t]he trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." *Id*. In assessing the credibility of affidavit testimony the court should consider the following factors:

> (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, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

Calhoun, at 285.

{¶42} In the postconviction petition decision, the trial court found Appellant's argument barred by the doctrine of res judicata. We find the trial court's judgment overruling Appellant's claim hereunder to be correct, albeit on different grounds. *See Teets, supra,* at ¶ 41. *See also State v. Shaffer,* 4th Dist. Lawrence No. 14CA15, 2014-Ohio-4976, ¶ 14 (noting that a reviewing court "will not reverse a correct judgment merely because it is based on an erroneous rationale").

{¶43} In the postconviction proceedings, a different judge sitting by assignment ruled on Appellant's postconviction petition. The trial court's decision reveals an in-depth review of the petition, the briefs submitted, the affidavits attached, and the appellate decisions. Additionally, Appellant's affidavit may fairly be considered "self-serving." We find the trial court did not abuse its discretion by failing to give Appellant's affidavit credence. Thus, the trial court did not abuse its discretion by failing to hold an evidentiary hearing as to this claim.

c. Was Blanton entitled to a hearing to determine whether his counsel was ineffective for allegedly rendering incomplete

and misleading advice regarding the ramifications of his right to testify in his own behalf?

{¶44} From the outset, Appellant maintained his innocence on all counts of the indictment. In the postconviction petition, Appellant claimed that his counsel did not meet with him except on one occasion to discuss and prepare a defense to the indictment. Appellant asserts that during trial, he advised his attorneys he would like to testify on his own behalf but they cautioned him against it, advising he would be impeached with his prior conviction. Appellant asserts this advice was incorrect and misleading because the prosecutor does not have an absolute right to impeach with a prior conviction. Appellant also points out that a defendant who wishes to testify may seek a preliminary ruling regarding the admissibility of his prior convictions.

{¶45} Generally, the decision whether to call a witness " 'falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *Teets, supra,* at ¶ 20, quoting *State v. Treesh,* 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749. *See also State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E. 2d 27, ¶ 127 (noting that decision about "which witnesses to call * * * are committed to counsel's professional judgment"); *State v. Betts,* 4th Dist. Pickaway No. 03CA25, 2005-Ohio-2913, ¶ 18.

{¶46} In the direct appeal, Appellant raised the issue of alleged ineffective assistance, arguing that counsel failed to insist on his presence at the hearing on the motion to dismiss; that counsel failed to argue the doctrine of impossibility as to the second kidnapping count; that counsel failed to make a motion to dismiss the second kidnapping count; and that counsel failed to object to the complicity jury instruction. The additional arguments Appellant makes herein regarding his counsel's alleged ineffective assistance could have been included in the direct appeal. As such, they are also barred by the doctrine of res judicata.

{¶47} Even if Appellant could raise an ineffective assistance claim for his counsel's failure to call him as a witness, we would find no error. In the direct appeal, we noted that we found based on the record—in particular Appellant's statements at sentencing—that Appellant's presence would have "contributed little." Likewise, in Appellant's affidavit, he avers at paragraph 14: "If called to the witness stand, I would have told the jury that Gary Lunsford was fully conscious and deflecting my punches with his arms." Appellant fails to see how the statement "deflecting my punches with his arms" would not be helpful to him. Counsel's failure to call Appellant as a witness would be considered a matter of trial strategy.

{¶48} Nevertheless, we conclude that the trial court did not abuse its discretion by failing to conduct an evidentiary hearing regarding Appellant's claims of ineffective assistance for failing to call him as a witness at trial.

d. Was Blanton entitled to a hearing to determine whether his defense was prejudiced by his counsel's failure to file an affidavit of disqualification?

{¶49} Appellant argues that he and his attorneys discussed concerns about the fairness of holding the trial in Adams County before the trial judge. Appellant asserts that during trial preparations, he and his counsel learned that the father of the alleged rape victim in the other case is a school superintendent in Adams County, and that the judge's wife is employed in the same school district. Appellant also asserts that during the trial, the judge made comments, unrecorded, and rulings that confirmed Appellant's belief that the trial judge was biased against him. However, Appellant's attorneys refused to file a motion asking the trial court judge to recuse himself from presiding over the trial due to bias and prejudice carrying over from the previous case. Appellant concludes that the trial court's biased rulings prevented him from presenting a complete defense to the charges.

{¶50} Trial counsel's failure to file a motion does not per se constitute ineffective assistance of counsel. *See State v. Wilson*, at ¶ 92; *State v.*

Madrigal, 87 Ohio St.3d 378, 389, 2000-Ohio-0448, 721NE.2d 52. Counsel can only be found ineffective for failing to file a motion if, based on the record, the motion would have been granted. *See State v. Lavelle*, 5th Dist. No. 07 CA 130, 2008-Ohio-3119, ¶ 47; *State v. Cheatam*, 5th Dist. No. 06-CA-88, 2007-Ohio-3009, ¶ 86. The defendant must further show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986); *see also State v. Santana*, 90 Ohio St.3d 513, 739 N.E.2d 798 (2001), citing *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990). "A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George,* 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. We also observe that the law does not require counsel to take a futile act. *See State v. Cottrell,* 4th Dist. Ross Nos. 11CA3241,11CA3242, 2012-Ohio-4583, at ¶ 20, *State v. Blevins,* 4th Dist. Scioto No. 10CA3353, 2011-Ohio-3367, ¶ 30.

{¶51} However, the trial court found:

> [A]s discussed above, [the trial court's ruling on the bias claim contained in the postconviction petition filed in CRI2016-0037] the defendant alleges that the judge was biased against him and that his attorney should have sought to have the judge recuse

> himself or filed an affidavit of disqualification with the Supreme Court of Ohio. For the reasons discussed above, this argument is not well-taken.

{¶52} In the trial court's decision, discussed above at paragraph 25, the trial court noted that "there was sufficient information in the record to permit the defendant to argue that his counsel was ineffective for failing to file an affidavit of disqualification." Thus, the claim of ineffective assistance was barred by res judicata.

{¶53} We observe that Appellant's counsel was likely aware that a motion to disqualify the trial court judge would, in all likelihood, have been a futile act. We further observe that Appellant's postconviction petition is supported by various affidavits purporting to demonstrate evidence of bias outside the trial court record. Appellant's mother, Lisa Blanton, provided an affidavit supplemented with exhibits of text conversation between Attorney Cantrell and herself; social media posts; and local news articles. The text conversations demonstrate at most that defense counsel and Mrs. Blanton constantly commiserated about alleged unfairness of the trial court's attitude and rulings. The attached affidavit of Teresa Edwards, a private investigator hired by Appellant's family, contains similar ruminations from a conversation between Attorney Cantrell and Edwards. Attorney Michael Kelly's attached affidavit demonstrates his professional opinion. Appellant

also submitted an affidavit from his father. The trial court considered these affidavits in making its ruling.

{¶54} While Appellant and his family and supporters may sincerely believe he was a victim of bias and prejudice, any arguments in this regard were certainly known to him at the time he filed his direct appeal yet he did not raise them. We agree with the trial court that Appellant's claim here is barred by res judicata. As such, the trial court did not err by failing to hold an evidentiary hearing on his counsel's failure to file an affidavit of disqualification.

e. Was Blanton entitled to a hearing on the question of whether he was prejudiced by the cumulative effect of his counsel's alleged multiple unprofessional errors?

{¶55} Appellant claims that he has identified several instances of deficient performance. Appellant asserts that even if we find that no single error resulted in a degree of prejudice needed to grant postconviction relief, the combined effect of the errors is sufficient to undermine confidence in the outcome of his trial. However, we have found no trial court error. Thus, we find the trial court did not abuse its discretion in failing to hold an evidentiary hearing regarding Appellant's claim of cumulative error.

{¶56} For the foregoing reasons, we find no merit to Appellant's second assignment of error.

{¶57} Having found no merit in either of Appellant's assignments of error, the judgment of the trial court is hereby affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hess, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.