

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

NICOLAS CAROSIELLO,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0018

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2013 CR 190

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Robert L. Herron, Prosecuting Attorney, *Atty. Alec A. Beech*, 105 South Market Street, Lisbon, Ohio 44432 for Plaintiff-Appellee and

Nicolas Carosiello, *pro se*, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, Ohio 44430, for Defendant-Appellant.

Dated: June 24, 2019

Robb, J.

{¶1} Defendant-Appellant Nicolas Carosiello appeals the decision of the Columbiana County Common Pleas Court denying his petition for postconviction relief. Appellant contends his petition set forth sufficient operative facts entitling him to an evidentiary hearing on his claim of ineffective assistance of trial counsel and those facts warranted the granting of the petition. For the following reasons, the trial court's denial of the petition without a hearing is affirmed.

Statement of the Case

{¶2} Appellant was convicted of aggravated murder, tampering with evidence, drug possession, and three attendant firearm specifications. We affirmed the convictions in the direct appeal. *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2017-Ohio-8160.

{¶3} Following this court's decision, Appellant filed an application for reconsideration. We denied the application stating Appellant's arguments indicated he merely disagreed with our decision; Appellant did not demonstrate an obvious error in our decision or that an issue was raised that was either not dealt with or was not fully considered. *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2018-Ohio-860. Appellant also appealed our decision to the Ohio Supreme Court. The Court did not accept the appeal for review. *State v. Carosiello*, 152 Ohio St.3d 1425, 2018-Ohio-923.

{¶4} While Appellant's direct appeal was pending with this court, Appellant filed a postconviction relief petition, along with other motions. 1/23/17 Petition. The trial court stated the motions and petition were not in aid of his appeal and it did not believe it had continuing jurisdiction to consider or determine the motions or petition without a specific remand from our court. 2/21/17 J.E. Appellant tried to appeal that decision through a motion for delayed appeal filed with this court on August 28, 2017. NOA 17 CO 29. We dismissed the appeal indicating the trial court did not rule on any of the motions and the order was interlocutory and nonfinal. 9/25/17 17 CO 29 J.E.

{¶5} On April 12, 2018, Appellant filed another petition for postconviction relief and other motions in Columbiana County Court of Common Pleas, which were similar to

the ones filed January 2017. In the petition, Appellant asserted trial counsel was ineffective for failing to call witnesses, interview state and defense witnesses prior to trial, utilize the private investigator hired with court funds, hire a ballistics expert, request an “immunity hearing” on the Castle doctrine, collect police reports to establish the victim’s pattern of stalking Appellant, investigate the crime scene to familiarize themselves with the layout of the house, hire an expert on the plausibility of an A/C unit being pushed into a room and falling, file a change of venue motion, and file a motion to obtain the police interview and grand jury testimony of Rich Lewis, who passed away before trial. 4/12/18 Petition. Attached to this petition was an affidavit from Appellant reiterating these claims. 4/12/18 Petition. The trial court denied the petition without a hearing. 5/22/18 J.E. Appellant timely appealed the denial of the petition.

Statement of the Facts

{¶6} The facts surrounding the crimes are set forth in our decision in the direct appeal. *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2017-Ohio-8160.

{¶7} Appellant was a known drug dealer who kept large amounts of marijuana and cash inside his Wellsville residence. *Id.* at ¶ 2. Testimony established Appellant’s estranged wife and the victim, Holly, intended to break into his house to steal his drugs and money. *Id.* She intended to commit this burglary with a group of people and attempted the burglary more than once. *Id.* The first time, on August 11, 2011, the group saw people inside the house and left. *Id.* The second time was the next morning; Appellant’s mother and a large dog were home. When one of the would be thieves entered the house, Appellant’ mother ordered them to leave. *Id.* at ¶ 3.

{¶8} Appellant’s mother and one of the attempted thieves, Johnny Paroda, informed Appellant of the attempted theft. *Id.* at ¶ 4. Appellant asked Johnny to find out when the thieves planned to return. *Id.* at ¶5. He instructed Johnny to tell the thieves he would be out of the house for a few hours and that his mother and stepfather were out of town for a funeral. *Id.* at ¶ 6.

{¶9} Appellant then called his brother, Tony Carosiello, and his friend, Brian Specht, and asked them to come to the house. *Id.* at ¶ 5. Appellant hid his money and moved his drugs into a barn on the property and moved all the cars to a field behind the house. *Id.* Appellant was attempting to create the appearance the house was empty. *Id.* Appellant, armed with a rifle and handgun, and his friends concealed themselves in the

field behind the house and waited for the thieves to arrive. *Id.* Appellant's mother and stepfather waited inside the house; the stepfather was armed with a gun. *Id.*

{¶10} After waiting a while, Appellant and his friends believed the thieves were not coming so Appellant's friends left. *Id.* at ¶ 6. At approximately 9:30 p.m. on August 12, 2011, Johnny called Appellant and told him that the thieves were on their way to the house. *Id.* at ¶ 7. Appellant told his girlfriend to call Tony and instruct him to stay away from the house, because he knew the thieves would not return if they saw Tony. *Id.* Appellant also texted Brian and told him to stay away from the house; Brian texted in reply: “[k]ill those m* * * f* * *ers.” *Id.*

{¶11} The group of thieves included Holly, her boyfriend Josh Rudder, Jamie Adkins (Holly's brother), and Dustin Green. *Id.* at ¶ 8. Jamie texted Johnny to ensure that no one was home and Johnny swore that the house was empty. *Id.* After leaving Holly, Jamie, and Dustin at the house, Josh drove off. *Id.* Jamie unsuccessfully tried to kick down the door. *Id.* When that failed, he and Holly decided to lift her up to Appellant's window, so she could climb inside the house. *Id.* Jamie attempted to push in an air conditioner unit that was sitting in the window. *Id.* At first, he was met with resistance, but then the unit slid smoothly inside the house. *Id.* The state theorized the unit moved at that point because Appellant helped move it out of the way. *Id.* at ¶ 46-49. Once the air conditioner was out of the way, Jamie lifted Holly up to the window and she managed to climb partially inside. *Id.* at ¶ 9.

{¶12} Appellant was waiting armed with a .22 caliber pistol and shot his gun at Holly when she was partially inside the window. *Id.* at ¶ 8-9. The shot hit Holly between her eyes. *Id.* at ¶ 9. “Jamie saw a flash as Holly fell out of the window and landed on a cement staircase that led to the basement. Appellant then leaned out of his window, firing his gun several times and yelling, “[y]ou robbed the wrong house.” *Id.* Shortly thereafter, Appellant's girlfriend went outside and heard Appellant say, “[o]h, my God, I shot Holly.” *Id.*

{¶13} Appellant's stepfather eventually called 911. *Id.* at ¶ 10. Prior to the police arriving, Appellant told his family, “[y]ou can't tell them I shot her. Don't tell them I shot her.” *Id.* He also tried to convince his mother and Martina, his girlfriend, to tell the police that they shot Holly. *Id.* Appellant and his stepfather hid the drugs and put the guns away. *Id.*

{¶14} During the investigation, Appellant made four statements to the police, all which were admittedly untruthful. *Id.* at ¶ 12.

{¶15} At trial, the state theorized that Appellant made the house appear to be empty and lured the would-be thieves to enter the house with the intent to ambush them once inside. *Id.* at ¶ 13. In response, Appellant claimed that he acted in self-defense in accordance with the “Castle doctrine.” *Id.*

First Assignment of Error

“The trial court erred in denying Carosiello’s post-conviction petition, in violation of his Due Process protections under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section §10 of the Ohio Constitution.”

{¶16} The postconviction relief process is a collateral civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). Pursuant to R.C. 2953.21(A)(1)(a), a person who has been convicted of a criminal offense and who claims there was such an infringement of his constitutional rights that the judgment is void or voidable may file a petition in the court that imposed sentence which states the grounds for relief and asks the court to vacate the judgment or grant other appropriate relief. “Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief.” R.C. 2953.21(D). See *also* R.C. 2953.21(F) (the court need not proceed to a hearing on the issue if the petition and the files and records of the case show the petitioner is not entitled to relief). “In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript.” R.C. 2953.21(D).

{¶17} R.C. 2953.21(A)(2) provides a postconviction relief petition must be filed “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.” The last trial transcripts were filed in our court on April 28, 2016. Appellant filed the initial petition on January 23, 2017. Our decision in the direct appeal was not released until October 5, 2017. As aforementioned, the trial court refused to rule on the petition because it believed it was without jurisdiction since the direct appeal was still pending when the postconviction

relief petition was filed. Appellant attempted to untimely appeal that order. We indicated the trial court did not rule on the motion and, as its decision was interlocutory, the motion for a delayed appeal was denied.

{¶18} After this court rendered its ruling in the direct appeal, the trial court did not enter a ruling on the motions and petition for postconviction relief. Appellant then refiled the petition. The 2018 petition is very similar to the 2017 petition. Both indicate Appellant was deprived of his right to effective assistance of trial counsel due to a failure to call witnesses, failure to interview state and defense witnesses, failure to utilize the private investigator, failure to go to the crime scene, and in general failure to investigate. The 2018 petition also adds the failure to hire a ballistics expert, failure to ask for an “immunity hearing” on the Castle doctrine, failure to obtain the police reports on the victim’s pattern of stalking Appellant, failure to hire an expert on the plausibility of an A/C unit being pushed through the window, failure to move for change of venue, and failure to request grand jury transcripts. The 2018 petition is accompanied by Appellant’s affidavit, which reasserts his claims and minimally expands upon them. The 2017 petition is not accompanied by an affidavit or any expansion on the claims.

{¶19} Technically, the 2018 petition is untimely and Appellant does not make the necessary showing for an untimely or successive petition as set forth in R.C. 2953.23. That said, the 2017 petition was timely, but the trial court did not rule on it because it believed it was without jurisdiction to rule on it. In dismissing the motion for delayed appeal, we agreed with the trial court’s decision by indicating the trial court’s ruling was interlocutory. Since the trial court did not rule on the 2017 petition after it regained jurisdiction to rule on it, the 2018 petition could be seen merely as a request to rule on the 2017 petition, which was timely.

{¶20} Admittedly, the 2018 petition does add some claims – venue, ballistics expert, immunity hearing on Castle doctrine, etc. The trial court appears to have ruled on all the claims, including the new ones raised in the 2018 petition. The trial court’s ruling does not indicate the petition was untimely or was treated as an untimely petition. In the interest of thoroughness, this court will address all of the arguments.

{¶21} Ten claims of ineffective assistance of trial counsel are raised in the 2018 petition for postconviction relief, four of which are raised in the 2017 petition. Both petitions contain bare allegations of ineffective assistance of trial counsel. For instance,

Appellant asserts trial counsel failed to call witnesses. That is not a synopsis of his argument; it is his whole argument. His 2018 affidavit only slightly expands upon that assertion by claiming his mother, Patricia Lewis, and Brian Specht should have been called as witnesses. He does not provide an affidavit from Lewis or Specht indicating what their testimony would be or how this testimony would have benefited him and altered the outcome of the trial. Similarly, in the petition Appellant asserts trial counsel was ineffective for failing to hire a ballistics expert. He does not expand upon this in the petition and in his 2018 affidavit he merely adds that the expert could have determined the angle and the distance the gun was fired from the victim. Appellant does not explain how this information would help him, especially in light of the fact that he testified he shot at the victim.

{¶22} The trial court cited our decision in *Green* as a basis for denying the petition. In *Green* we stated:

Evidence attached to a petition for post-conviction relief must meet, “some threshold standard of cogency.” *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362. This standard is not met by evidence that is, “only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.” *Id.* Additionally, “where a petitioner relies upon affidavit testimony as the basis of entitlement to post-conviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284, 714 N.E.2d 905.

State v. Green, 7th Dist. Mahoning No. 02 CA 35, 2003-Ohio-5142, ¶ 25.

{¶23} The Twelfth Appellate District has stated:

“[E]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.” [*State v.*] *Coleman*, [1st Dist. No.] C-900811, [1993 WL 74756] at 7.

State v. Lawson, 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist.1995).

{¶24} The major deficiency with Appellant’s petition is that it provides no support for the claims asserted and provides no evidence; the allegations appear to be merely a desire for further discovery. For instance, Appellant asserts trial counsel was ineffective for failing to call witnesses, specifically in the affidavit attached to his 2018 petition he asserts his mother and Brian Specht should have been called. While failure to call a witness is a proper issue for a postconviction relief petition, Appellant does not explain what their testimony would be and how it would have impacted the result of the trial. A postconviction petition should not be used for a mere desire for further discovery. Similarly, his claims of failure to interview witnesses, utilize a private investigator, hire a ballistics expert, obtain police reports on the victim stalking Appellant, and investigate the crime scene may be proper issues for a postconviction relief petition. However, Appellant does not expound on these claims to indicate how they would have impacted his trial. For example, Appellant admitted to shooting at the window where the victim was coming through it. It is unclear what testimony or opinion an expert witness on ballistics would have that would alter the fact that Appellant shot at the victim. Or, how that opinion would alter the evidence that Appellant enticed the would-be thieves to his house under the belief that it was not occupied.

{¶25} Appellant also asserts trial counsel was ineffective for failing to request an “immunity hearing pursuant to the Castle doctrine.” Appellant’s defense at trial was the Castle doctrine. In the direct appeal, we explained the Castle doctrine is part of the self-defense body of law. *Carosiello*, 2017-Ohio-8160 at ¶ 22. It is unclear what Appellant means by an “immunity hearing;” it does not appear an immunity hearing exists for the asserted defense. It is presumed that Appellant wanted trial counsel to request a pretrial hearing. Pursuant to R.C. 2901.05(A) “the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.” Division (B)(1) indicates “a person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.” R.C.

2901.05(B)(1). Proving or disapproving a defense does not occur at a pre-trial hearing, it occurs at trial. Therefore, without further explanation of how an “immunity hearing” would have affected the outcome of trial, there is no basis for granting a postconviction relief petition on that claim.

{¶26} Without any expansion on the arguments it is pure speculation as to whether counsel’s performance was deficient and what the effect of the alleged ineffectiveness had on the outcome of the trial. Pure speculation is not enough to warrant the granting of a petition for postconviction relief.

{¶27} Furthermore, the argument regarding an “immunity hearing” and some of the other arguments asserted by Appellant may also be barred by res judicata. The doctrine of res judicata provides that:

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. Davis, 139 Ohio St.3d 122, 2014–Ohio–1615, 9 N.E.3d 1031, ¶ 28.

{¶28} Res judicata is a proper basis for dismissing a petition for postconviction relief “when the defendant, represented by new counsel on direct appeal, fails to raise therein the issue of competent trial counsel and the issue could fairly have been determined without resort to evidence outside the record.” *State v. Sturgill*, 12th Dist. Clermont Nos. CA2014–01–003 and CA2014–07–049, 2014–Ohio–5082, ¶ 13.

{¶29} The failure to request an “immunity hearing” is evident from the record and could have been raised in the direct appeal.

{¶30} Likewise, the claim that trial counsel was ineffective for failing to argue change of venue is also barred by res judicata. *State v. Morrar*, 12th Dist. Madison No. CA2013-08-027, 2014-Ohio-3663, ¶ 7-8 (venue argument barred by res judicata); *State v. Harris II*, 2d Dist. Champaign No.2013 CA 10, 2013–Ohio–4818, ¶ 12 (finding appellant's argument regarding improper venue barred by res judicata where appellant did not challenge venue on direct appeal); *State v. Piesciuk*, 12th Dist. Butler No. CA2013-

01-011, 2013-Ohio-3879, ¶ 45 (Venue issue could have been raised on direct appeal and thus was barred by res judicata.). This claim is also similar to the above claims; Appellant does not expand upon the claim. He fails to attach any evidence to the petition for postconviction relief demonstrating venue prevented him from obtaining a fair and impartial jury. *Piesciuk*.

{¶31} Appellant’s last asserted claim in the petition is trial counsel was ineffective for failing to request grand jury transcripts. The Sixth Appellate District has indicated this claim is barred by res judicata since it can be raised and addressed in the direct appeal; it does not rely on matters outside the record. *State v. Zich*, 6th Dist. Lucas No. L-15-1263, 2017-Ohio-414, ¶ 19. In reaching this conclusion, the court cited its direct appeal in *Zich* where it explained that grand jury proceedings are “secret and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.’ *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus.” *Id.* at ¶ 18.

{¶32} Here, Appellant did not explain why the transcripts are needed or why counsel was ineffective for failing to request the transcripts. Without a particularized need for the transcripts, Appellant would not be entitled to them and counsel would not be considered ineffective for failing to request them.

{¶33} Therefore, for the above stated reasons, the first assignment of error lacks merit.

Second Assignment of Error

“The trial court erred in denying Carosiello’s post-conviction petition without a hearing, in violation of his Due Process protections under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section § 10 of the Ohio Constitution.”

{¶34} A petitioner is not automatically entitled to a hearing on his/her postconviction petition. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999). The trial court has “a gatekeeping role as to whether a defendant will even receive a hearing” on a post-conviction petition. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 51. A trial court can deny a petition for postconviction relief without a hearing “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,” i.e., the submissions do not establish the conviction is voidable (or void) due to an infringement of constitutional rights. *Calhoun*, 86 Ohio St.3d at 282-283.

{¶35} Prior to any hearing on a petition raising ineffective assistance of trial counsel, “the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.” *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus. The trial court's decision on whether to grant a hearing is subject to an abuse of discretion review. *Gondor* at ¶ 51.

{¶36} Here, as explained above, there were no substantive grounds for relief. The petition for postconviction relief does not set forth a basis for granting it. The petition contains only allegations and does not expand on these allegations in any manner that could provide a basis for granting the petition. Also, some of the arguments are barred by res judicata.

{¶37} Therefore, for those reasons, the trial court did not abuse its discretion in denying the petition without a hearing. This assignment of error lacks merit.

Conclusion

{¶38} Both assignments of error lack merit. The trial court's denial of the postconviction relief petition without a hearing is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.