

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-847 (C.P.C. No. 06CR-03-1788)
Christie Messer-Tomak,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 28, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Eric J. Allen, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Christie Messer-Tomak, appeals from a judgment of the Franklin County Court of Common Pleas denying her petition for post-conviction relief pursuant to R.C. 2953.21 without a hearing. Because *res judicata* bars some of defendant's claims, and defendant did not attach to her petition evidence to support other claims in her petition, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed March 10, 2006, defendant was charged with one count of felonious assault and one count of aggravated rioting arising from a July 19, 2005 incident where defendant, along with a group of between eight to ten people, assaulted Trisha Lehman on her front porch in the culmination of a day-long series of clashes between defendant's and Lehman's daughters. *State v. Messer-Tomak*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶2. On August 3, 2007 the Franklin County Court of Common Pleas found defendant guilty, pursuant to jury verdict, of both counts charged in the indictment. Defendant appealed, asserting neither sufficient evidence nor the manifest weight of the evidence supported the trial court's judgment. She further contended she was denied her constitutional right to the effective assistance of counsel. This court affirmed the trial court's judgment. *Messer-Tomak*.

{¶3} On April 11, 2008, while her direct appeal was pending, defendant filed a petition to vacate or set aside her convictions pursuant to R.C. 2953.21. Defendant contended her trial counsel was ineffective in failing to file a motion to suppress the eyewitness identifications, to investigate and prepare for cross-examination, to request an expert on eyewitness identification, to call two additional witnesses, and to remove himself from her case in view of his conflict of interest. Defendant also claimed not only that the state denied her access to discovery prior to trial when it lost a photo array shown to one of the witnesses, but that her imprisonment violated the Eighth and Fourteenth Amendments to the Federal Constitution because she was innocent of the crimes charged.

{¶4} The state filed an answer to the petition on May 5, 2008 disputing all of defendant's grounds for relief. By judgment entry filed January 7, 2010, the trial court denied defendant's petition for post-conviction relief without a hearing. The court subsequently filed its decision on the merits determining res judicata barred defendant's claims.

II. Assignments of Error

{¶5} Defendant appeals, assigning the following errors:

Assignment of Error Number One

THE TRIAL COURT ERRED IN SPECIFICALLY FINDING THAT TRIAL COUNSEL WAS EFFECTIVE PURSUANT TO THE SIXTH AMENDMENT OF THE FEDERAL CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT

Assignment of Error Number Two

THE TRIAL COURT ERRED IN DENYING THE POST CONVICTION PETITION WITHOUT HOLDING AN EVIDENTIARY HEARING

{¶6} Defendant's assignments of error are interrelated and will be addressed together. Collectively, they raise the single issue of whether the trial court erred in denying, without a hearing, defendant's petition for post-conviction relief based on defendant's claims that defense counsel was ineffective.

III. Standard of Review

{¶7} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, cert. denied, 513 U.S. 895, 115 S.Ct. 248. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting

those issues is not contained" in the trial court record. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. Post-conviction review is not a constitutional right but rather a narrow remedy that affords a petitioner no rights beyond those the statute grants. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 282, 1999-Ohio-102. It does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32, discretionary appeal not allowed, 97 Ohio St.3d 1423, 2002-Ohio-5820; *Murphy*.

{¶8} A defendant is not automatically entitled to an evidentiary hearing on the petition. *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 113. To warrant an evidentiary hearing, the defendant bears the initial burden of providing evidence to demonstrate a cognizable claim of constitutional error. R.C. 2953.21(C); *Hessler* at ¶33. A trial court may deny a defendant's petition for post-conviction relief without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun* at paragraph two of the syllabus.

{¶9} "[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." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶58; *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶14, discretionary appeal not allowed, 102 Ohio St.3d 1470, 2004-Ohio-2830, quoting *Calhoun* at 284 (the post-conviction relief " 'statute clearly calls for discretion in determining whether to grant a hearing' ").

{¶10} The most significant restriction on Ohio's statutory procedure for post-conviction relief is the doctrine of res judicata. It "requires that the evidence presented in support of the petition come from outside, or 'dehors,' the record" of the direct criminal proceedings. *Hessler* at ¶34. " 'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment.' " *State v. Cole* (1982), 2 Ohio St.3d 112, 113, (emphasis omitted), quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Res judicata, applicable in all post-conviction proceedings, thus "implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *Hessler* at ¶37, citing *Murphy*, *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 1996-Ohio-337 (noting res judicata applies "in all postconviction relief proceedings").

{¶11} Defendant contends she is entitled to post-conviction relief because she was denied her constitutional right to effective assistance of trial counsel. To prevail on her claim, defendant must demonstrate (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving her of a trial whose result is reliable. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42

Ohio St.3d 136, paragraph two of the syllabus, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶12} In order to secure a hearing on her claim for post-conviction relief, defendant had the initial burden of submitting evidentiary documents that together contain sufficient operative facts which, if believed, would establish (1) counsel substantially violated at least one of the attorney's essential duties to his or her client, and (2) defendant was prejudiced as a result. *Cole* at 114; *Jackson* at syllabus; *Calhoun* at 289 (noting a post-conviction relief petitioner has the burden of proving counsel's ineffectiveness, since in Ohio a properly licensed attorney is presumed to be competent). "Judicial scrutiny of counsel's performance must be highly deferential * * * [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Bradley* at 142.

IV. Trial Court Properly Denied the Petition

{¶13} Defendant contends her convictions are constitutionally unsound because her trial counsel was ineffective in failing to investigate certain matters, to request funding for an expert, to call two essential witnesses, to recuse himself as counsel due to a conflict, and to file a motion to suppress evidence.

A. Failure to investigate

{¶14} Defendant claims her trial counsel failed to investigate various topics that would have enhanced counsel's ability to cross-examine the state's witnesses. Defendant, however, did not attach to her petition for post-conviction relief an affidavit from her trial counsel, or anyone else, stating what steps trial counsel took to prepare for

cross-examination. See *State v. Silverman*, 10th Dist. No. 06AP-1278, 2007-Ohio-6498, ¶27, discretionary appeal not allowed, 117 Ohio St.3d 1459, 2008-Ohio-1635 (concluding the petitioner's claim that her trial counsel failed to effectively investigate or prepare the case for trial was unmeritorious where "the record [did] not include an affidavit from trial counsel, the investigator, or any other non-interested party with personal knowledge of what steps trial counsel took in preparing appellant's case for trial"). Cf. *State v. Turner*, 10th Dist. No. 04AP-1143, 2006-Ohio-761, ¶24, discretionary appeal not allowed, 110 Ohio St.3d 1439, 2006-Ohio-3862, cert. denied, 549 U.S. 1132, 127 S.Ct. 972 (noting that although petitioner attached an affidavit from his daughter stating her impressions of trial counsel's preparation and a letter from his trial counsel sent one month before the mitigation hearing asking for names of potential witnesses to call, the evidence did not demonstrate substantive grounds for relief because neither exhibit demonstrated "trial counsel's investigation of appellant's background and preparation for the mitigation hearing was deficient").

{¶15} By failing to present sufficient operative facts indicating the extent of investigation counsel undertook, defendant failed to present sufficient facts that her trial counsel's investigation of the case was deficient. As a result, defendant failed to establish substantive grounds for a hearing or for relief on her claim of ineffective assistance of counsel based on counsel's failure to investigate the five topics she cites.

1. Distance between witness's home and victim's home

{¶16} Defendant claims her trial counsel was ineffective for failing to investigate the distance between 93 Eldon Avenue, where the incident occurred, and 71 Eldon Avenue, the home of one of the primary witnesses, Debra Hunt, who witnessed the

altercation from her front porch. Defendant attached to her petition a Google satellite image depicting the 157 foot distance between 71 Eldon and 93 Eldon, as well as direct images of each house in between the two residences. Although the images are outside the record, they do not present sufficient operative facts indicating trial counsel failed to investigate the distance between the houses, especially in view of counsel's extensive cross-examination on the topic at trial.

2. Photo Array Photograph

{¶17} Defendant alleges her counsel was ineffective for failing to investigate the photograph of defendant that police used to generate the photo array shown to the various witnesses. Defendant asserts the photograph taken in 2000 did not accurately depict her because defendant lost approximately 60 pounds since that time. Attached to defendant's petition are a May 2005 Columbus Division of Police booking photograph of defendant and miscellaneous personal photographs of her. The miscellaneous photographs are not dated and do not depict a drastic difference in defendant's appearance from the 2005 booking photograph.

{¶18} Not only does defendant's petition fail to demonstrate counsel did not investigate, but the trial record discloses defense counsel explored the difference in defendant's appearance in the photograph as compared to her appearance at trial, thus addressing the very issue defendant posits to support her claim of ineffective assistance of counsel. To the extent defendant challenges counsel's trial performance, she could have raised the issue on direct appeal. *State v. Mayrides*, 10th Dist. No. 03AP-347, 2004-Ohio-1623, ¶28, discretionary appeal not allowed, 103 Ohio St.3d 1426, 2004-Ohio-4524 (concluding appellant's contention in his petition for post-conviction relief

"that his counsel was ineffective in failing to elicit evidence that he did not have shoulder-length hair in February 1984 could have been raised on direct appeal"); *Turner* at ¶8 (noting "claims that could have been raised based on evidence in the record are also barred by res judicata even though the petitioner may have presented some additional evidence outside the record").

3. Green Scrubs

{¶19} Defendant asserts her trial counsel was ineffective for failing to investigate Hunt's statement to police that she saw a woman wearing green scrubs at the Lehman's house. Defendant attached to her petition for post-conviction relief a police report detailing an August 19, 2005 police interview with Hunt, who told police she saw the altercation and "observed a lady in green scrubs, a fat girl and a man with a baseball bat."

{¶20} Defendant's argument fails for more than one reason. Hunt never repeated during trial her statement that she saw an individual wearing green scrubs. Moreover, although an individual in hospital scrubs was referred to in the trial testimony, no one ever identified defendant as being the individual. As a result, defendant's own affidavit, attached to her petition, averring she has never owned a pair of green scrubs demonstrates nothing warranting a hearing or post-conviction relief. See also *State v. Holloman*, 10th Dist. No. 06AP-608, 2006-Ohio-6789, ¶9, discretionary appeal not allowed, 113 Ohio St.3d 1490, 2007-Ohio-1986, citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 37-38, cert. denied, 464 U.S. 856, 104 S.Ct. 174 (stating "evidence outside the record in the form of petitioner's own self-serving affidavit alleging constitutional deprivation will not compel a hearing").

4. Cross-racial identification

{¶21} Defendant contends her trial counsel was ineffective for failing to investigate the issue of cross-racial identification, since Hunt is African-American and defendant is Caucasian. Defendant attached a scholarly article to her petition that reviews "the own-race bias (ORB) phenomenon in memory for human faces, the finding that own-race faces are better remembered when compared with memory for faces of another, less familiar race." Defendant contends that because of "cross-race impairment" Hunt could not have accurately identified her.

{¶22} The evidence defendant suggests likely would not have been helpful. Hunt testified that all the individuals involved in the confrontation were Caucasian; "[t]hey were definitely not African American." (Tr. 272.) Trisha Lehman and another witness, Chris Messer, corroborated Hunt's statement, testifying all the individuals who arrived at the Lehman house on July 19, 2005 were Caucasian. At trial, defendant attempted to establish an African-American acquaintance of the Tomaks, known as Quincy or "Q," was involved in the altercation. Pursuant to the own-race bias theory, Hunt would have most easily remembered the only African-American in the group. Had defense counsel introduced the cross-racial identification information, it would have discredited defendant's assertion that an African-American was involved in the altercation. The evidence, thus, does not suggest counsel was ineffective.

5. Rapid decline of eyewitness memory

{¶23} Defendant contends her trial counsel was ineffective for failing to investigate the scientific proposition that time fades all memories. Citing to Roger N. Shepard, *Recognition Memory for Words, Sentences, and Pictures*, 6 *Journal of Verbal Learning*

and Verbal Behavior, 156, 156-63 (1967), defendant claims Hunt would have had difficulty remembering the "picture" of defendant when police showed Hunt the photo array one month after the incident. The trial record does not indicate that Hunt had any problem identifying defendant from the photo array, or in identifying defendant in the court room as the same individual she identified in the photo array.

{¶24} Evidence supporting a petition for post-conviction relief "must be genuinely relevant, and it must materially advance petitioner's claim that there has been a denial or infringement of his or her constitutional rights." *State v. Wright*, 4th Dist. No. 06CA18, 2006-Ohio-7100, ¶22, discretionary appeal not allowed, 113 Ohio St.3d 1513, 2007-Ohio-2208, citing *State v. Watson* (1998), 126 Ohio App.3d 316, 325. Here, the Shepard article is of questionable relevance, as it does not discuss recognition memory for eyewitnesses of crimes.

{¶25} Moreover, the trial record reflected Hunt's inability to remember some aspects of the incident. Hunt stated she could not remember whether she talked to Trisha Lehman about the types of cars present during the attack, a subject about which defense counsel cross-examined her. Hunt further repeated many times her inability to remember details of what she said to police or others. The Shepard article or its findings would have only duplicated what already was apparent from Hunt's testimony. A trial court may deny a post-conviction petition without a hearing when the evidence presented to support the petition is cumulative of evidence presented at trial. *State v. Combs*, (1994), 100 Ohio App.3d 90, 98, citing *State v. Powell* (1993), 90 Ohio App.3d 260, 270.

{¶26} Although the trial court, in deciding to deny defendant's petition, failed to address some of the topics fully, defendant was not prejudiced for the reasons noted. No evidentiary hearing was necessary.

B. Failure to request funding for an expert

{¶27} Defendant's petition also contends her trial counsel was ineffective in failing to request funding for an expert witness. Defendant states that "[g]iven the psychological complexity of this issue, it [was] imperative that an expert be hired and consulted regarding the eyewitness issues in this case." (Appellant's brief, 6.)

{¶28} To obtain funds for an expert, defendant would have been required to make a "particularized showing (1) of a reasonable probability that the requested expert would aid in [her] defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *State v. Mason*, 82 Ohio St.3d 144, 150, 1998-Ohio-370, cert. denied, 525 U.S. 1057, 119 S.Ct. 624. Defendant failed to attach the affidavit of an eyewitness identification expert discussing what the expert would have testified to had he or she been called during defendant's trial. Cf. *State v. Chinn*, 2d Dist. No. 18535, 2001-Ohio-1550, discretionary appeal not allowed, 93 Ohio St.3d 1473 (concluding petitioner in post-conviction relief entitled to a hearing regarding whether trial counsel was ineffective in failing to call an expert on eyewitness identification where petitioner attached the affidavit of an expert in the field of eyewitness identification).

{¶29} Because "nothing in the record indicates what kind of testimony an eyewitness identification expert could have provided," the record fails to indicate how such an expert would have aided in defendant's defense. *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 2000-Ohio-448, cert. denied, 531 U.S. 838, 121 S.Ct. 99. See also *Mayrides*

at ¶25, quoting *State v. Keeling*, 1st Dist. No. C-010610, 2002-Ohio-3299, ¶8 (stating " 'the decision to forgo an eyewitness-identification expert is a recognized trial strategy' "). The trial court thus could not determine whether the result of defendant's trial would have differed had defense counsel obtained such an expert. Although *res judicata* does not bar defendant's argument, defendant failed to present sufficient operative facts to establish either her counsel was deficient in failing to request funding for an expert or that the failure to seek funding for an expert prejudiced her case.

C. Failure to call two essential witnesses

{¶30} Defendant also asserted her trial counsel was ineffective in failing to call as witnesses two members of the Lehman family who could not identify defendant from photo arrays as the perpetrator of the charged offenses. Defendant contends "[m]ost significant[] is the fact that Sean Lehman could not identify Appellant." (Appellant's brief, 6.)

{¶31} Defendant attached police reports to her petition for post-conviction relief detailing interviews with members of the Lehman family shortly after the incident. On July 22, 2005 the police interviewed Sean Lehman, Trisha Lehman's husband, who stated he was in the backyard when he heard one of his daughters yelling. He ran through the house and observed numerous individuals who had pinned his wife against the screen door. Mr. Lehman stated he pushed through the screen door and began throwing people off his wife, but he "explained that he could not identify the suspects due to being sprayed with mace."

{¶32} Although the police reports constitute evidence outside the record, they were insufficient to entitle defendant to a hearing on her petition. Initially, counsel's

decision about whether to call a witness generally "falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, cert. denied, 533 U.S. 904, 121 S.Ct. 2247; *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶38, discretionary appeal not allowed, 102 Ohio St.3d 1470, 2004-Ohio-2830, citing *Hessler* at ¶42 (noting decisions regarding what "witnesses to call at trial falls with the purview of trial strategy and, absent prejudice, generally will not constitute ineffective assistance of counsel").

{¶33} Moreover, defendant did not explain how the failure to call Mr. Lehman as a witness either fell below an objective standard of reasonable representation or prejudiced her case. The police report indicates Mr. Lehman could not identify defendant, not because she was not present at his house but because his vision was impaired due to mace. In addition, defendant did not attach an affidavit from Mr. Lehman detailing what his testimony would have been had he been called as a witness at trial. See *State v. McKinney*, 10th Dist. No. 07AP-868, 2008-Ohio-1281, ¶13, discretionary appeal not allowed, 118 Ohio St.3d 1510, 2008-Ohio-3369 (pointing out that to support his claim three witnesses would have testified favorably to him, "defendant needed to submit affidavits from those with personal knowledge about their potential testimony: the witnesses themselves"). Absent information concerning the substance of Mr. Lehman's testimony proposed trial testimony, the trial court could not determine whether his testimony would have benefitted defendant.

{¶34} Although *res judicata* did not bar defendant's contentions regarding the witnesses who were not called, defendant, by failing to attach evidence of the testimony

the witnesses would have offered, failed to explain how either her counsel was deficient in failing to call these witnesses or the witnesses' absence prejudiced her case.

D. *Conflict of Interests*

{¶35} Defendant's petition for post-conviction relief also asserts she was deprived of the effective assistance of counsel because her attorney had a conflict of interest. To support her contentions, defendant attached her own affidavit that averred her court-appointed counsel served as her probation officer in a separate case. Although defendant asserts her trial counsel served as her probation officer, she fails to indicate how his former position prejudiced her or amounted to a constitutional deprivation. Nor did she at any time while her case was pending in the trial court ask the court to appoint new counsel for trial.

{¶36} "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia* (1981), 450 U.S. 261, 271, 101 S.Ct. 1097, 1103. See also *Holloway v. Arkansas* (1978), 435 U.S. 475, 482, 98 S.Ct. 1173, 1177. Consistent with that proposition, Ohio's Rules of Professional Conduct state an attorney may not accept or continue to represent a client where "there is a *substantial* risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." Prof.Con.R. 1.7(a)(2).

{¶37} "In order to establish a violation of [her] Sixth Amendment right to effective assistance of counsel, a defendant who raised no objection * * * at trial must demonstrate that an actual conflict of interest adversely affected [her] lawyer's performance." *State v.*

Manross (1988), 40 Ohio St.3d 180, 182, cert. denied, 490 U.S. 1083, 109 S.Ct. 2106, citing *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348, 100 S.Ct. 1708, 1718. "A reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." *Manross* at 182.

{¶38} Defendant asserts her former probation officer's serving as her court-appointed counsel raised "the appearance of impropriety" that made it "difficult to carry out his duties as defense counsel given his former employment." (Appellant's brief, 6-7.) Defendant, however, does not specify how her attorney's former position did so. Nor does her affidavit state how her former probation officer's serving as her appointed counsel resulted in a conflict of interest that adversely affected her attorney's performance. The record does not reveal any information that supports defendant's contentions.

{¶39} The trial court determined res judicata barred defendant's claim, as it was "strictly hypothetical in nature and supported only by the previous relationship." Even if res judicata does not bar the defendant's claim, her petition nonetheless fails to demonstrate a conflict of interest or any prejudice resulting from her attorney's former position as her probation officer.

E. Failure to file motion to suppress identification

{¶40} Defendant contends her trial counsel was ineffective in failing to move to suppress Chris Messer's pretrial identification of defendant. Messer was present at the Lehman house when the attack occurred, witnessed the event, and identified defendant from a photo array and in court as one of the individuals who assaulted Trisha Lehman. Defendant contends her counsel was ineffective in failing to file the motion because

(1) Messer must have lied when he said defendant lived across the street from him on Terrace Avenue, (2) defendant's photo in the array shown to Messer did not truly represent her appearance, (3) defendant did not own one of the two cars used in the attack, (4) the entire Lehman family could not identify defendant from a photo array but Messer could, and (5) psychological findings indicate post-event information can "enhance" an eyewitness' memory.

{¶41} "[F]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *Madrigal* at 389, quoting *Kimbleman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 2587. In order to demonstrate ineffective assistance of counsel premised on a failure to file a motion to suppress, defendant must establish a basis existed to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶35, cert. denied, 544 U.S. 1040, 125 S.Ct. 2271. See *State v. Randall*, 10th Dist. No. 03AP-352, 2003-Ohio-6111, ¶15, citing *State v. Robinson* (1996), 108 Ohio App.3d 428 (stating "[f]ailure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted").

{¶42} When the state shows a witness a suspect's photograph before trial, due process requires a court to suppress the photo identification of the suspect if the photo array was unnecessarily suggestive of the defendant's guilt and the identification was not reliable. *State v. Conkright*, 6th Dist. No. L-06-1107, 2007-Ohio-5315, ¶51, citing *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, superseded by constitutional amendment on other grounds. "No due process violation will be found where an identification does not stem from an impermissibly suggestive confrontation, but is, instead, the result of observations at the time of the crime." *State v. Santiago*, 10th Dist. No. 02AP-1094,

2003-Ohio-2877, ¶28, discretionary appeal not allowed, 100 Ohio St.3d 1424, 2003-Ohio-5232, citing *Coleman v. Alabama* (1970), 399 U.S. 1, 5-6, 90 S.Ct. 1999, 2001.

{¶43} The trial court determined res judicata barred defendant's claim that her counsel was ineffective in failing to file a motion to suppress pretrial eyewitness identifications, since the record revealed defendant was aware of all the facts concerning Messer's pretrial identification at the time of her initial appeal and could have asserted her trial counsel's ineffectiveness in that appeal. See *Mayrides* at ¶28 (agreeing "with the trial court that the photographic arrays constituted evidence in existence at trial and, thus, this issue could have been raised on direct appeal"). Indeed, defendant claimed in her initial appeal her counsel was ineffective for failing to file a motion to suppress the Hunter pretrial identification. *Messer-Tomak* at ¶28.

1. Terrace Avenue

{¶44} Defendant contends her counsel should have sought to suppress the Messer identification because Messer's claim that defendant lived across the street from him on Terrace Avenue could not have been true. Defendant attached to her petition for post-conviction relief her own affidavit, stating she has never lived on Terrace Avenue or met Messer, her sister's lease for the residence at 28 North Terrace Avenue, and court documents relevant to her sister's eviction from 28 North Terrace Avenue. Res judicata bars defendant's claim because none of the documents presents facts from outside the record, as Messer and defendant's sister both testified at trial concerning their respective living situations on Terrace Avenue. Moreover, defendant does not explain how Messer's in-court statement that defendant lived across the street from him rendered the photo array, shown to him before trial, impermissibly suggestive of

defendant's guilt. Nor does she explain how the trial court would have used such information to suppress the pretrial identification.

{¶45} In the end, whether Messer saw defendant at the house across the street from his on Terrace Avenue concerns the reliability and weight the jury should have accorded to his testimony. "[A] motion to suppress evidence 'is not used to test reliability or weight of the evidence.' " *Santiago* at ¶28, quoting *State v. Mengistu*, 10th Dist. No. 02AP-497, 2003-Ohio-1452, ¶43, quoting *State v. Stewart* (Dec. 15, 1997), 4th Dist. No. 96CA18.

2. Photograph in photo array

{¶46} Defendant next contends her trial counsel was ineffective in failing to seek suppression of Messer's pretrial identification because the photo array shown to Messer contained a 2000 photograph of defendant which did not adequately depict defendant's appearance in 2005. The photo array shown to Messer was a part of the trial record and defendant could have raised the issue concerning the difference in her appearance in her initial appeal. She cites no facts from outside the record which would defeat the application of res judicata.

3. Car ownership

{¶47} Defendant asserts her trial counsel was ineffective in failing to file a motion to suppress, because both eyewitnesses claimed the group that committed the assault on Lehman were in Lincoln and Buick automobiles. By affidavit attached to her petition, defendant asserts she never owned a Buick and others had access to the Lincoln she owned. Defendant also attached to her petition for post-conviction relief a Bureau of Motor Vehicle's print out that appears to indicate defendant was the title owner of a 1992

Lincoln. Whether defendant owned one, both, or none of the cars used in the attack on Lehman on July 19, 2005 would not have rendered the photo array shown to Messer impermissibly suggestive and subject to suppression. Indeed, the testimony at trial indicated defendant drove the light blue Lincoln, the car she admits in her affidavit she owned.

{¶48} Because defendant failed to present any information from outside the record, *res judicata* bars her claim that her counsel was ineffective in failing to file a motion to suppress Messer's pretrial identification based on defendant's owning only one of the two cars used in the attack.

4. Messer could identify defendant

{¶49} Defendant asserts her trial counsel was ineffective in failing to file a motion to suppress Messer's pretrial identification of defendant, because Messer could identify defendant from a photo array when no one in the Lehman family could. Defendant supports her contention with police reports attached to her petition for post-conviction relief. Defendant contends "[i]t is possible that [Messer's] incorrect assumption regarding a neighbor led him to identify the wrong person. It is also possible that he could have mentioned this to his then girlfriend, Jessica Tripp. This misinformation led to the misidentification of the Appellant." (Appellant's brief, 8.)

{¶50} *Res judicata* arguably bars defendant's contentions, but even if it does not, "[a] defendant must demonstrate more than vague speculations of prejudice to show that counsel was ineffective." *Turner* at ¶37, citing *State v. Otte*, 74 Ohio St.3d 555, 565, 1996-Ohio-108. Here, defendant's contentions about Messer's initial misidentification are only vague speculations. Nor does defendant explain how Messer's ability to identify

defendant, when the others could not, rendered the photo array shown to him impermissibly suggestive of defendant's guilt. The evidence that the Lehmans failed to identify defendant from the photo arrays shown to them would not have provided the trial court with a basis to suppress Messer's pretrial identification of defendant.

5. Psychology of eyewitness identification

{¶51} Defendant claims her trial counsel was ineffective for failing to seek suppression of Messer's identification because post-event information possibly enhanced Messer's initial misidentification of defendant. Defendant's petition for post-conviction relief, as well as her appellate brief, cite to Elizabeth Loftus, *Eyewitness Testimony* (Harvard University Press 1996), to support her contentions.

{¶52} Defendant did not attach the cited portions of the Loftus publication to her petition for post-conviction relief but rather attached an article Geoffery Loftus and Erin Harley wrote, entitled *Why is it easier to identify someone close than far away?* The Loftus article says nothing about how post-event information can enhance a witness' memory.

{¶53} Because defendant failed to attach materials from outside the record to support her claim that her trial counsel was ineffective for failing to seek suppression of Messer's pretrial identification on the basis of "memory enhancement," her contentions fail due to adequate evidentiary support, or application of res judicata to her claim. *Combs* at 97, citing *Perry* at paragraph nine of the syllabus (noting a court "may apply res judicata if the petition for postconviction relief does not include any materials out of the original record to support the claim for relief"); *Cole* at 114.

V. Disposition

{¶54} The trial court did not err when it dismissed defendant's petition for post-conviction relief without a hearing. Although in some instances the trial court improperly concluded res judicata barred some of petitioner's claims, the court's errors were harmless because where res judicata did not bar defendant's claims, defendant failed to present sufficient operative facts of a constitutional deprivation to entitle her to an evidentiary hearing. Accordingly, we overrule defendant's first and second assignments of error, and affirm the trial court's judgment denying defendant's petition for post-conviction relief without a hearing.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
