

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 16AP-803 (C.P.C. No. 14CR-4988)
Kyle L. Jones,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 27, 2017

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee. **Argued:** *Laura R. Swisher*.

On brief: *Timothy Young*, Ohio Public Defender, and *Eric M. Hedrick*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Kyle L. Jones, appeals the October 20, 2016 decision and entry of the Franklin County Court of Common Pleas denying his motion for postconviction relief. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} This matter is before us for the second time. We incorporate the statement of facts and prior procedural history as detailed in our first decision in this case, *State v. Jones*, 10th Dist. No. 15AP-670, 2017-Ohio-1168, ¶ 2-13. In our prior decision, we affirmed appellant's conviction and sentence, finding: (1) the trial court did not abuse its discretion because its response to the jury's question answered the question with an accurate statement of law while also reiterating the appropriate legal standard to be considered by the jury, (2) the trial court's response to the jury's question did not have the

effect of amending the indictment, (3) appellant failed to establish ineffective assistance of counsel because he could not demonstrate he was prejudiced by trial counsel's allegedly deficient performance in failing to secure the testimony of Amanda Barber, and (4) the trial court did not abuse its discretion by refusing to merge the kidnapping conviction with the rape convictions for purposes of sentencing.

{¶ 3} While appellant's direct appeal was pending, on August 26, 2016, appellant filed a petition for postconviction relief pursuant to R.C. 2953.21. On August 29, 2016, appellant filed an amended petition for postconviction relief. On October 11, 2016, plaintiff-appellee, State of Ohio, filed an answer to appellant's petition for postconviction relief and motion to dismiss. On October 20, 2016, the trial court filed a decision and entry denying appellant's petition for postconviction relief.

II. Assignment of Error

{¶ 4} Appellant appeals and assigns the following single assignment of error for our review:

The trial court abused its discretion when it denied [appellant]'s petition for postconviction relief without an evidentiary hearing. Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 9, 10, and 16 of the Ohio Constitution.

III. Discussion

{¶ 5} In his single assignment of error, appellant contends the trial court abused its discretion by denying his petition for postconviction relief without a hearing.

A. Applicable Law

1. Postconviction Relief as Statutory Remedy

{¶ 6} Postconviction relief is a civil collateral attack on a judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). A petition for postconviction relief allows the petitioner to present constitutional issues that would otherwise be unreviewable on direct appeal because the evidence supporting those issues is not contained in the record of the criminal conviction. *State v. Carter*, 10th Dist. No. 13AP-4, 2013-Ohio-4058, ¶ 15. A postconviction relief petition does not, however,

provide a second opportunity to litigate the conviction. *Id.* Postconviction relief is governed by R.C. 2953.21,¹ which provides in pertinent part:

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that 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 * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Thus, postconviction review is not a constitutional right, but, instead, is a narrow statutory remedy which affords a petitioner no rights beyond those granted by statute. *Calhoun* at 281-82.

2. Requirements for Evidentiary Hearing

{¶ 7} A defendant is not automatically entitled to an evidentiary hearing on a petition for postconviction relief. *State v. Sidibeh*, 10th Dist. No. 12AP-498, 2013-Ohio-2309, ¶ 13, citing *State v. Jackson*, 64 Ohio St.2d 107, 110-13 (1980). Regarding the requirements for a hearing on a postconviction petition, R.C. 2953.21 provides in pertinent part:

(D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. 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. 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. * * * If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

* * *

¹ We note that R.C. 2953.21 was recently amended by 2016 S.B. No. 139 (effective April 6, 2017). Although not relevant to the disposition of this appeal, we refer to the provisions of R.C. 2953.21 in accordance with the amended statute.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.

Thus, to warrant an evidentiary hearing on a petition for postconviction relief, a petitioner bears the initial burden of providing evidence that demonstrates a cognizable claim of constitutional error. *Sidibeh* at ¶ 13. A trial court has a statutorily imposed duty to ensure that the defendant meets this burden. R.C. 2953.21(D); *State v. Cole*, 2 Ohio St.3d 112, 113 (1982). A trial court may deny a defendant's petition for postconviction relief without an evidentiary hearing where the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *State v. Ibrahim*, 10th Dist. No. 14AP-355, 2014-Ohio-5307, ¶ 9, citing *Calhoun* at paragraph two of the syllabus.

3. Res Judicata Applicable in Postconviction Proceedings

{¶ 8} A trial court may also dismiss a petition for postconviction relief without holding an evidentiary hearing where the claims raised in the petition are barred by the doctrine of res judicata. *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 16, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. "Res judicata is applicable in all postconviction relief proceedings." *Szefcyk* at 95. "Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal." *Ibrahim* at ¶ 10, citing *Szefcyk* at syllabus. "Where new counsel represents a defendant on direct appeal and the ineffectiveness of trial counsel could have been determined without resort to evidence outside the record, a petition for postconviction relief alleging ineffective assistance of trial counsel is barred by res judicata." *Ibrahim* at ¶ 11, citing *Cole* at 114. Therefore, in order to avoid application of res judicata, the petitioner must make a claim that was not raised or could not have been raised at the time of trial or on direct appeal, and support such claim with competent, relevant, and material evidence outside the record. *Id.*, citing *State v. Braden*, 10th Dist. No. 02AP-954, 2003-Ohio-2949, ¶ 27.

4. Standard of Review

{¶ 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. *See Calhoun* at 284 (noting that postconviction relief "statute clearly calls for discretion in determining whether to grant a hearing"); *Ibrahim* at ¶ 9, citing *State v. Holloman*, 10th Dist. No. 06AP-608, 2006-Ohio-6789, ¶ 7.

B. Analysis

{¶ 10} Appellant contends he received ineffective assistance of counsel because trial counsel unreasonably failed to obtain the testimony of witnesses essential to his defense. In support of this claim, appellant points to the affidavits attached to his petition for postconviction relief.

{¶ 11} A convicted defendant alleging ineffective assistance of counsel must demonstrate that: (1) defense counsel's performance was so deficient that 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 him or her of a trial whose result is reliable. *Campbell* at ¶ 24, citing *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. In order to secure a hearing on an ineffective assistance of counsel claim in a petition for postconviction relief, the petitioner bears the initial burden of submitting evidentiary documents that together contain sufficient operative facts which, if believed, would establish trial counsel had substantially violated at least one of a defense attorney's essential duties to his client and that the petitioner was prejudiced as a result. *Cole* at 114; *Jackson* at syllabus. "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* at 689. *See Bradley* at 142. In Ohio, a properly licensed attorney is presumed to be competent. *State v. Davis*, 10th Dist. No. 13AP-98, 2014-Ohio-90, ¶ 20, citing *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Furthermore, trial counsel is entitled to a strong

presumption that all decisions fall within the wide range of reasonable professional assistance. *Id.*, citing *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998).

{¶ 12} Here, the trial court declined to hold an evidentiary hearing on appellant's petition for postconviction relief based on the following reasons and findings:

1. The Affidavit of Mr. Morgan, Counsel for the Defendant, is contradicted by the Court's website indicating he did subpoena the witness contrary to his assertions otherwise;
2. None of the Affiants or witnesses were eyewitnesses to the crime itself;
3. The evidence in the Affidavits are hearsay statements allegedly made by the victim and inadmissible except for impeachment purposes. Defense Counsel failed to confront the victim with the alleged statements on cross-examination [as] required by Evid.R. 613;
4. The claim for relief in the Petition is that the Affidavits would help establish the Defendant['s] innocence because the sex with the victim was allegedly consensual because the victim was "trading sex for drugs." The Defendant in his statements to the police, which were admitted at trial, denied ever having sex with the victim. Therefore, the Affiants['] "new evidence" would contradict the Defendant's own claim he did not have sex with the victim;
5. Prior Defense Counsel had all the information and evidence these witness[es] were going to offer, but declined to call at least one of the witnesses who was at Court ready to testify which appeared to be a strategy decision. (How could the Defendant argue consent when the Defendant himself denied having sex with the victim?);
6. The evidence in the Affidavits [is] not new evidence and was available to the Defense at trial and therefore, there was no denial of due process;
7. The "missing witness" had been subpoenaed and Defense Counsel did not ask the Court to "enforce the subpoena." The Court did recess the case at noon for an overnight recess for Defense Counsel to locate the witness. The next day Defense Counsel told the Court the witness was not present and he did not know if the witness would ever show up;

8. The Defendant's new Affidavit is completely contrary to and contradicted by his statement to the police and therefore of no evidentiary value.

(Decision at 1-2.)

1. Res Judicata Bars Hearing

{¶ 13} First, we address appellant's contention that he received ineffective assistance of counsel because trial counsel allegedly failed to secure the testimony of Amanda Barber. Appellant supported this claim with affidavits from Barber and Michael E. Morgan, appellant's trial counsel. Morgan stated in his affidavit attached to appellant's postconviction petition that he "intended that the defense case of [appellant] would consist of the testimony of Amanda Barber" and that "[h]er testimony was intended to be the cornerstone of [appellant's] defense." (Postconviction Petition, Ex. D at 1.) Morgan averred that he "failed to subpoena Ms. Barber and, as a result, failed to obtain her appearance for [appellant's] trial." (Postconviction Petition, Ex. D at 1.)

{¶ 14} In our prior decision on appellant's direct appeal of his conviction and sentence, we addressed appellant's claim of ineffective assistance of trial counsel relating to securing Barber's testimony. *Jones* at ¶ 24-31. Contradicting trial counsel's claim that he "failed to subpoena" Barber, we found that "[t]he record reflects that a subpoena was issued to Barber by regular mail" and that "trial counsel asserted to the court that Barber had confirmed receipt of the subpoena during a telephone call." *Id.* at ¶ 27. We noted that "Crim.R. 17(D) does not expressly authorize service of a subpoena on a witness in a criminal case by regular mail." *Id.* We stated that "[i]t appears that appellant's trial counsel attempted to secure Barber's testimony but failed to ensure that she was present at trial." *Id.* Assuming for purposes of analysis that appellant's trial counsel performed deficiently by failing to secure Barber's testimony, we considered Barber's statements in her affidavit filed in support of appellant's motion for a new trial in determining whether appellant suffered prejudice.² We concluded appellant was not prejudiced by trial counsel's allegedly deficient performance because he "failed to establish a reasonable probability of a different result if Barber had been secured as a witness and her testimony had been admitted." *Id.* at ¶ 30.

² We note that Barber's affidavit attached to appellant's postconviction petition is the same affidavit filed in support of appellant's motion for a new trial.

{¶ 15} Therefore, because appellant raised this issue on direct appeal and we fully reviewed it at that time, *res judicata* precludes our review of the same here. *Ibrahim* at ¶ 10, citing *Szefcyk* at 95.

2. Credibility of Other Affidavits

{¶ 16} Finally, we address appellant's contentions with regard to the alleged failure of his trial counsel to call Robert Davis as a witness. Appellant supported this claim with his own affidavit in addition to the affidavits of his trial counsel and Davis. The Supreme Court of Ohio has stated that " 'in reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact.' " *State v. Jeffers*, 10th Dist. No. 10AP-1112, 2011-Ohio-3555, ¶ 11, quoting *Calhoun* at 284. In postconviction relief proceedings, the trial court may, under appropriate circumstances, deem affidavit testimony to lack credibility without first observing or examining the affiant. *State v. Taylor*, 10th Dist. No. 14AP-166, 2014-Ohio-3574, ¶ 16; *Davis* at ¶ 26, citing *Calhoun* at 284.

{¶ 17} The Supreme Court of Ohio has stated that trial courts, in determining the credibility of supporting affidavits in postconviction relief proceedings, should consider all relevant factors, including, but not limited to:

- (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. See *State v. Canada*, 10th Dist. No. 16AP-7, 2016-Ohio-5948, ¶ 18; *Taylor* at ¶ 23; *Ibrahim* at ¶ 24. "Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony." *Calhoun* at 285. Considering the entire record, one or more of the above non-exclusive list of factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. *Id.* Although such credibility determinations lie within the

sound discretion of the trial court, "[a] trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur." *Id.*

{¶ 18} Morgan stated in his affidavit that "because I was planning to rely solely on the testimony of Ms. Barber, I was unprepared to call [Davis] as a defense witness, even though I was aware that he would be able to provide favorable testimony." (Postconviction Petition, Ex. D at 1.) Morgan averred that "Davis was present at [appellant's] trial and available to testify." (Postconviction Petition, Ex. D at 2.) However, Morgan claimed that his "decision not to call [Davis] was not strategic," but rather, "due to inadvertence, I had not met with [Davis] in advance of trial to discuss his potential testimony and, for that reason, I felt that I could not call him." (Postconviction Petition, Ex. D at 2.)

{¶ 19} Davis stated in his affidavit that on the day the incident occurred, appellant informed him that B.D. was seeking crack cocaine in exchange for sexual intercourse. Davis met B.D., who asked him for crack cocaine in exchange for sex; thereafter, Davis handed appellant the crack cocaine. Davis stated that "[l]ater on," appellant and B.D. came to Davis's location and Davis provided appellant with more crack cocaine for B.D. (Postconviction Petition, Ex. C at 2.) Finally, Davis stated that he was at the courthouse during appellant's trial, but was not called to testify.

{¶ 20} Furthermore, appellant, in his own affidavit, claimed that he asked Davis for crack cocaine to give to B.D. in exchange for sexual intercourse.

{¶ 21} The state asserts that even if appellant's trial counsel was deficient in failing to call Davis as a witness, appellant was not prejudiced by such deficient performance because his proposed testimony was inadmissible hearsay or inadmissible impeachment because B.D. was not questioned about the statements. The state also asserts that Davis lacks credibility because he is appellant's cousin.

{¶ 22} Assuming *arguendo* that appellant's trial counsel performed deficiently by failing to call Davis as a witness, appellant must also provide sufficient operative facts to demonstrate that he was prejudiced by trial counsel's performance. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must

prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at paragraph three of the syllabus.

{¶ 23} If Davis had testified consistent with the statements in his affidavit, that testimony may have cast some doubt on B.D.'s testimony in the minds of the jurors. However, the fact that Davis is related to appellant is a factor which points to a lack of credibility. Furthermore, as we noted in appellant's direct appeal, portions of the testimony of James Gwynn, Jr. supported B.D.'s account, including Gwynn's testimony regarding the amount of time that appellant and B.D. were in the basement and the fact that B.D. was injured over her eye while in the basement with appellant. Gwynn also testified that he observed appellant "begging and pleading for [B.D.'s] forgiveness." *Jones* at ¶ 6. Additionally, physical evidence in the form of seminal fluid on the vaginal and anal samples taken from B.D. and a DNA profile consistent with appellant's DNA in the vaginal sample is consistent with B.D.'s account. That same evidence contradicts appellant's claim in the police interview that he and B.D. never removed their clothes and that no penetration occurred. Thus, Davis's testimony that he provided appellant with crack cocaine to give to B.D. in exchange for sexual intercourse is of dubious evidentiary value given appellant's claim that he did not have sexual intercourse with B.D. Therefore, under the facts and circumstances of this case, we cannot find that the trial court abused its discretion in denying a hearing on appellant's petition for postconviction relief because the affidavits, if believed, do not provide sufficient operative facts to demonstrate a reasonable probability of a different outcome.

{¶ 24} Accordingly, we overrule appellant's single assignment of error.

IV. Conclusion

{¶ 25} Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and LUPER SCHUSTER, JJ., concur.
