

[Cite as *State v. Yaacov*, 2009-Ohio-3739.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92104

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ABRAHAM YAACOV

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-450218

BEFORE: Stewart, J., McMonagle, P.J., and Blackmon, J.

RELEASED: July 30, 2009

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Abraham Yaacov, appeals the trial court's dismissal of his petition for postconviction relief. For the reasons set forth below, we affirm.

{¶ 2} In 2004, a jury convicted appellant on multiple charges of rape, gross sexual imposition, sexual battery, and tampering with evidence arising from appellant's molestation of his minor daughter. Appellant was sentenced to a 38-year prison term and a \$10,000 fine.

{¶ 3} Appellant timely appealed his conviction raising as error the form of the indictment and the effectiveness of his trial counsel. On October 12, 2006, this court affirmed appellant's convictions but reversed and remanded the matter for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, discretionary appeal not allowed, 112 Ohio St.3d 1494, 2007-Ohio-724.

{¶ 4} On remand, appellant was sentenced to a 36-year prison term and a \$5,000 fine. This sentence was affirmed on appeal. *State v. Yaacov*, Cuyahoga App. No. 89980, 2008-Ohio-856.

{¶ 5} On February 10, 2006, appellant filed a petition for postconviction relief pursuant to R.C. 2953.21 and requested a hearing on the matter. In his petition, appellant claimed that his trial counsel provided ineffective assistance by failing to use material witnesses and pertinent documents available to her that would have

supported an alibi defense and would have impeached the credibility of the state's primary witness's testimony.

{¶ 6} The trial court granted appellant leave to amend the petition to provide his affidavit and evidence in support of his petition. This evidence included copies of appellant's "Driver's Daily Log," paycheck stubs from the trucking companies appellant worked for, and the names of two witnesses from one of the trucking companies who could testify to the rules and regulations truck drivers were required to follow and how appellant's whereabouts were monitored during his employment. Appellant claimed that the evidence showed that he worked as an over-the-road truck driver during the time of the alleged incidents and therefore could not have committed the offenses as charged.

{¶ 7} On March 6, 2006, the trial court denied appellant's petition without a hearing. On August 25, 2008, the trial court entered findings of fact and conclusions of law regarding its denial of appellant's petition.

{¶ 8} Appellant now appeals the trial court's denial of his petition and asserts the following two assignments of error for our review.

{¶ 9} "I. The trial court erred to the prejudice of the Appellant when it denied the Petition without an evidentiary hearing."

{¶ 10} "II. Appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 11} Because these assignments of error are related in law and fact, we will address them together.

{¶ 12} “A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927, ¶8, quoting *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. In reviewing whether the trial court erred in denying a petition for postconviction relief without an evidentiary hearing, we apply an abuse of discretion standard. *Hines* at ¶8. An abuse of discretion is more than a mere error in judgment, it implies that a court’s ruling is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 13} Proper grounds for dismissing a petition for postconviction relief without holding an evidentiary hearing include: “1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and 2) the operation of res judicata to bar the constitutional claims raised in the petition.” *State v. Thomas*, Cuyahoga App. No. 87666, 2006-Ohio-6588, citing *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 530, 1994-Ohio-532.

{¶ 14} “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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. Perry* (1967), 10 Ohio St.2d 175, 180.

{¶ 15} “Generally, the introduction in an R.C. 2953.21 petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata*.” *State v. Cole* (1982), 2 Ohio St.3d 112, 114. However, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal. The evidence submitted in support of the petition “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. Lawson* (1995), 103 Ohio App.3d 307. The evidence submitted with the petition must be competent, relevant, and material and not merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 98.

{¶ 16} In its findings of fact and conclusions of law, the trial court correctly found that appellant’s claim of ineffective assistance of counsel for failure to file a notice of alibi and present witnesses were addressed and rejected by this court on direct appeal.

{¶ 17} In the direct appeal of his conviction, Yaacov claimed that his counsel was ineffective for failing to file a motion for a more specific bill of particulars or a motion to dismiss because the indictment was not specific. He also claimed that his

counsel failed to file a notice of alibi and to present witnesses who would have shown that he was working as a trucker and was home only sporadically during the three years the abuse occurred.

{¶ 18} In the decision affirming the conviction, this court stated:

{¶ 19} “The decision to call or forego calling witnesses is a tactical decision which is within reasonable trial strategy. Likewise, the decision regarding which defense to pursue is a tactical decision, and appellate courts will not second-guess what may be tactical decisions by counsel. Although Yaacov suggests that calling witnesses to testify that he was ‘never home’ could have provided exculpatory evidence, he fails to reveal what testimony would have been offered. Moreover, Mesha Yaacov, Mesha’s mother, and Yaacov himself testified regarding his busy work schedule. Merely asserting that additional witnesses’ testimony would have affected the outcome of the trial is insufficient to satisfy Yaacov’s burden of proving that his trial counsel was ineffective.” *Yaacov*, supra, 2006-Ohio-5321, at ¶¶30-31.

{¶ 20} It is clear that the issues raised in the petition for postconviction relief were addressed and rejected on direct appeal. Although *res judicata* does not bar an ineffective assistance of counsel claim if the claim concerns a matter outside the record, in this case the exhibits attached to the petition were available at the time of trial and are alternative and cumulative to other evidence about appellant’s work schedule and absence from home that is in the trial record. After reviewing the record, and appellant’s petition for relief, including the attached exhibits, we find the trial court did not abuse its discretion when it denied appellant’s postconviction

petition without ordering an evidentiary hearing. Accordingly, appellant's two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MELODY J. STEWART, JUDGE _____

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR