

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 109611
	:	
v.	:	
	:	
ARTHUR MCDANIEL,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 1, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-633120-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Arthur McDaniel, *pro se*.

SEAN C. GALLAGHER, J.:

{¶ 1} Arthur McDaniel appeals the denial of his motion for postconviction relief. For the following reasons, we affirm.

{¶ 2} McDaniel pleaded guilty to various criminal offenses associated with the sexual abuse of two victims. The court sentenced McDaniel to life in prison with

the possibility of parole after 35 years. McDaniel’s convictions and sentences were affirmed on direct appeal. *State v. McDaniel*, 8th Dist. Cuyahoga No. 108282, 2020-Ohio-489. During the direct appeal, McDaniel filed a petition for postconviction relief, which as is pertinent to this appeal, is based on claims that his trial counsel rendered ineffective assistance by failing to call several witnesses at trial who would have testified favorably for McDaniel.¹ According to McDaniel, the trial court erred by denying his petition without a hearing.

{¶ 3} “The postconviction relief process is a civil collateral attack on a criminal judgment, in which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting the issues is not contained in the record of the petitioner’s criminal conviction.” *State v. Curry*, 8th Dist. Cuyahoga No. 108088, 2019-Ohio-5338, ¶ 12, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905, and *State v. Carter*, 10th Dist. Franklin No. 13AP-4, 2013-Ohio-4058, ¶ 15. “[C]ourts are not required to hold a hearing in every postconviction case.” (Citations omitted.) *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, 833 N.E.2d 291, ¶ 10. Before granting a hearing on a petition for postconviction relief, “the court shall determine whether there are substantive grounds for relief.” R.C. 2953.21(D). “In

¹ In an earlier appeal, 8th Dist. Cuyahoga No. 108978, McDaniel’s appeal was dismissed based on the fact that the trial court had not issued findings of fact or conclusions of law in denying McDaniel’s petition for postconviction relief. That omission has been rectified and directly leads to the current appeal. Accordingly, McDaniel’s assignment of error with respect to the failure to issue findings of facts and conclusions of law is now moot. We need not consider such argument within the current appeal.

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 * * *.” *Id.*

{¶ 4} A trial court’s ruling on a petition for postconviction relief is reviewed for an abuse of discretion. *Curry* at ¶ 15, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 45. “The trial court does not abuse its discretion in dismissing a petition without a hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition.” *Id.*, citing *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15.

{¶ 5} In this case, McDaniel’s petition for postconviction relief relies on claims that his trial counsel was constitutionally ineffective for failing to present testimony from several witnesses at trial, a claim that necessarily relies on evidence outside the trial record. *State v. Jones*, 8th Dist. Cuyahoga No. 83601, 2004-Ohio-3868, ¶ 6 (res judicata does not preclude a defendant from basing a postconviction relief motion upon an ineffective assistance of counsel claim if such claims are based on evidence outside the record and despite attempting or asserting any such claims in the direct appeal). Accordingly, we need not address the state’s argument that the doctrine of res judicata precludes review of McDaniel’s petition for postconviction relief. Any ineffective assistance of counsel claims regarding the failure to call witnesses at trial can be demonstrated only through producing evidence outside the trial record to demonstrate the scope and nature of an alleged

witness's testimony. *See generally Curry*, 8th Dist. Cuyahoga No. 108088, 2019-Ohio-5338 (addressing the merits of a petition for postconviction relief in which the defendant advanced an ineffective assistance of counsel claim based on the failure to call certain witnesses at trial).

{¶ 6} Thus, the only issue for review is whether McDaniel presented sufficient operative facts to establish substantive grounds for relief.² On this point, the trial court concluded that McDaniel failed to provide any information or affidavits demonstrating the nature of the proposed witnesses' testimony that would have supported that particular ineffective assistance of counsel claim. McDaniel's petition included affidavits from him and his wife, evidence of past employment, and family photos, but did not contain any affidavits from the witnesses he claimed his trial counsel failed to call at trial. As the trial court concluded, "[o]utside of the brief assertions in his petition, McDaniel did not provide any information about the evidence that he alleges that his trial counsel failed to introduce or the witnesses that he believes should have been called."³

{¶ 7} The Ohio Supreme Court has held that "[b]road assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction

² Although the trial court found no merit to McDaniel's claim that the state failed to provide him exculpatory evidence prior to the trial, he has not briefed this issue for our review. App.R. 16(A)(7).

³ In this appeal, McDaniel attempted to remedy the failure to provide the evidence by providing a recitation of the testimony each witness could have provided at trial. We cannot review evidence introduced for the first time on appeal, and thus, any attempt to supplement the record at this point in the process is without merit. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus.

petitions. General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing.” *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980). “[I]n the interest of judicial economy and efficiency, it is not unreasonable to require the defendant to show prejudicial factors in his petition for postconviction relief before a hearing is scheduled.” *Id.* at 112. Thus, before a hearing is statutorily required, the petitioner bears the burden to submit evidentiary documents containing sufficient operative facts demonstrating the lack of competent counsel. *Id.* Without such support, a trial court does not err in denying the petition without a hearing. *Id.* at 113.

{¶ 8} The petition for postconviction relief in this case was devoid of any documentary evidence that could be considered to substantiate the allegations advanced therein. At a minimum, when a petition for postconviction relief advances claims based on missing witnesses, such a claim must be based on affidavits from the witnesses demonstrating the basis of their testimony. *See, e.g., State v. Chandler*, 5th Dist. Stark Nos. 2018CA00046 and 2018CA00056, 2018-Ohio-3560; *State v. Jones*, 8th Dist. Cuyahoga No. 105405, 2017-Ohio-7326. Supposition and conclusory statements in the petition itself are insufficient.

{¶ 9} The trial court did not err in denying McDaniel’s petition without a hearing, and accordingly, the trial court’s decision is affirmed.

It is ordered that appellee recover from appellant 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 common pleas court 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.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., CONCURS;

PATRICIA ANN BLACKMON, J., CONCURS IN JUDGMENT ONLY