[Cite as *State v. Hendrex*, 2011-Ohio-1588.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0103**
- vs -	:	
JEREMY T. HENDREX,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CR 750.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Brett M. Mancino, 1000 IMG Center, 1360 East Ninth Street, Cleveland, OH 44114 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeremy T. Hendrex, appeals the judgment of the Trumbull County Court of Common Pleas denying his petition for post-conviction relief following his conviction by a jury of child endangering and felonious assault committed against his two-month old daughter. At issue is whether the trial court abused its discretion in denying appellant's petition without a hearing. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for child endangering resulting in serious physical harm, a felony of the second degree, in violation of R.C. 2919.22(B)(1) and (E)(1)(2)(d), and felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1) and (D)(1). Appellant pled not guilty and the case was tried to a jury.

{¶3} Appellant and Shari Jarome lived together between 2002 and 2006. Although they were never married, they had one child together, Alyssa Jarome, who was born on July 12, 2007.

{¶4} On September 22, 2007, Shari went to work, and appellant was home alone with Alyssa during the entire day. Shari returned home from work at about 5:00 p.m. At about 9:00 p.m., she met her sisters at a nearby bar and left Alyssa home alone with appellant. Shari returned home at about 11:30 p.m. While Shari was changing Alyssa's clothes, her arms and legs started to shake. As a result, Shari took Alyssa to St. Joseph's Hospital Emergency Room. Appellant did not go with them because, as he told Shari, "[h]e's never liked going to hospitals."

{¶5} Upon arrival at the hospital, Alyssa was still shaking and a doctor there determined that Alyssa was having a seizure. Hospital staff was unable to control her seizures so at about 4:30 a.m., on September 23, 2007, Shari and Alyssa were life-flighted to the Cleveland Clinic. Upon arrival, Shari called appellant and told him about Alyssa's condition, but he did not come to the Clinic. After taking a CAT scan, doctors determined that Alyssa had bleeding in her brain, which was caused by severe trauma.

{¶6} Shari stayed at the Cleveland Clinic with Alyssa until October 16, 2007. At first appellant did not stay there with them. Later, after he talked to police, he started to

stay with them because, as appellant told Shari, the police told him they would be watching him.

{¶7} Shari testified that at the time of trial, Alyssa was almost two years old. As a result of her injuries, she is completely blind. She is responsive to verbal commands, but can only speak about ten words.

{¶8} A caseworker with Trumbull County Children Services interviewed appellant on September 26, 2007. When asked how Alyssa could have sustained such severe injuries while he was alone with her, at first appellant said he took Alyssa out of the bathtub and she hit her head on the spigot. He later said that when he was holding Alyssa on his lap, she slipped through his legs and he caught her, but she hit her head and was crying. He said that both incidents occurred shortly before Alyssa was taken to the hospital. He said there were no other incidents in which Alyssa could have sustained these injuries.

{¶9} About one week later, appellant was interviewed again. He admitted he was alone with Alyssa the entire day prior to Shari taking her to the hospital. When asked how Alyssa could have sustained her injuries, appellant offered a third explanation. He said that during the afternoon prior to Shari taking Alyssa to the emergency room, as he was putting her down on the couch, she slipped and fell; but he did not know if Alyssa hit her head on the couch. When asked if he had ever thrown Alyssa, as one of the doctors had suggested, appellant said he never did.

{¶10} One week later, appellant was interviewed again. On this occasion, he offered a fourth reason for Alyssa's injuries. He said that on the day Alyssa went to the

hospital, he was carrying her in the living room. He tripped on an electrical cord, and Alyssa fell and hit her head on the back of a couch that had a wooden frame.

{¶11} Shari testified that after Alyssa had been at the hospital for three weeks, on October 16, 2007, appellant came to the Cleveland Clinic and, for the first time, told her that he had been involved in a series of incidents with Alyssa that may have caused her injuries. Shortly thereafter, appellant was arrested.

{¶12} Dr. Gary Hsich, a pediatric neurologist with the Cleveland Clinic, testified that upon arrival at the hospital, Alyssa was experiencing severe seizures. She also had significant brain injury, which required her to be on life support. CAT scans revealed that Alyssa had sustained two separate skull fractures. One was at the back of her skull. Dr. Hsich said that a significant traumatic injury would have been required to cause this fracture. There was also a second skull fracture near the top of her head. Alyssa also had an injury and bleeding in her head and brain, severe swelling inside the brain, and multiple retinal hemorrhages. Dr. Hsich said that the trauma that injured parts of Alyssa's brain caused those brain cells to die and they will never regenerate.

{¶13} Dr. Hsich testified that, due to Alyssa's significant brain injuries, she will have permanent developmental problems, learning disabilities, and difficulty walking and talking. Also, she will always be at risk for seizures.

{¶14} He also testified that Alyssa's injuries were acute, i.e., they were inflicted within the past few hours or at most within the past 24 hours. He said this trauma triggered all these injuries, including the subdural bleeding, severe seizures, and retinal hemorrhages.

{¶15} Dr. Hsich testified that, due to Alyssa's two separate skull fractures, the bleeding in her brain, her severe seizures, and retinal hemorrhages, it was his opinion that traumatic injury in the form of child abuse caused Alyssa's injuries and that her injuries were not accidental. Moreover, this was *not* a case of just "shaken baby syndrome" because Alyssa sustained traumatic injury to her head as evidenced from her two skull fractures. He opined that she sustained a recent impact injury, which means that her head was struck by some hard object. Dr. Hsich said, "[b]ased on the severity of [A]lyssa's injuries, the multiple skull fractures and the retinal hemorrhages, *** whatever this impact was, had to be quite significant."

{¶16} Dr. Hsich testified that nothing in Alyssa's pediatric records, which he had reviewed, explained her injuries. Alyssa had seen her pediatrician twice within the two weeks prior to her admission to the Cleveland Clinic, but there were no serious problems and her development was good.

{¶17} Dr. Jonathon Sears, ophthalmologist and retina specialist with the Cleveland Clinic, examined Alyssa in September 2007. He said she had hemorrhages in every quadrant of the retina in both eyes. He said that because both eyes had a similar finding, that means an external trauma caused these injuries. Dr. Sears testified that Alyssa also had a retinal detachment in one eye, and Alyssa will never again have any vision in that eye. He said the finding of retinal detachment also indicated a traumatic origin to the injury in Alyssa's eye that was consistent with a direct blow to the eye. He said the type of retinal hemorrhages Alyssa sustained in all four quadrants of both eyes and the hemorrhages that surrounded the optic nerve indicate a degree of severity almost always associated with shaken baby syndrome.

{¶18} Appellant testified, offering for the first time at trial new details concerning his throwing Alyssa against the couch. He said that at about noon on the day Alyssa was taken to the hospital, as he walked from the kitchen to the living room holding her, he tripped on a rug that had "bunched up." He said Alyssa flew out of his arms and he threw her to the couch. She flew several feet, hit the couch, and her head bounced back and hit the wood frame of the couch. He said Alyssa landed on her back, and when she hit the couch he heard a "thump." Alyssa was crying, but he did not think any medical attention was necessary. Appellant said that when Shari took Alyssa to the hospital that night, he did not go because he thought it was just a routine check-up.

{¶19} Appellant called Dr. Joseph Scheller, an expert in the area of child abuse and shaken baby syndrome, to testify on his behalf. Dr. Scheller testified there was no evidence that Alyssa was the victim of shaken baby syndrome or abuse because, he said, she did not have any broken limbs, neck injuries, or injury to the brain. Although he conceded that four hospital physicians noted Alyssa's skull fractures on a CAT scan, Dr. Scheller testified that, in his opinion, Alyssa's skull was not fractured. Instead, he said that Alyssa suffered from hydrocephalus, which is excess fluid around the brain, not child abuse.

{¶20} The jury returned its verdict finding appellant guilty of both counts. The trial court sentenced appellant to eight years in prison on each count, but merged them as allied offenses. Attorney Patrick Donlin represented appellant during the trial.

{¶21} Appellant filed a direct appeal, and was represented by new counsel, Brett Mancino, in those proceedings. Appellant challenged the sufficiency and weight of the evidence, but did not challenge the effectiveness of his trial counsel. This court affirmed

appellant's conviction in *State v. Hendrex*, 11th Dist. No. 2009-T-0091, 2010-Ohio-2820, discretionary appeal not allowed by the Supreme Court of Ohio at 126 Ohio St.3d 1618, 2010-Ohio-5101.

{¶22} While appellant's direct appeal was pending, Mr. Mancino filed a petition for post-conviction relief on behalf of appellant in the trial court. Mr. Mancino also represents appellant in this appeal. In his petition, appellant argued that he had been denied effective assistance of counsel because his trial counsel had failed to call two other experts in the area of shaken baby syndrome as witnesses on his behalf.

{¶23} Appellant filed the affidavit of his trial counsel, Mr. Donlin, in support of his petition. In his affidavit, Mr. Donlin said that two Ohio appellate cases had been brought to his attention in each of which an expert had testified concerning shaken baby syndrome. He said that in *State v. Morris*, 9th Dist. No. 22089, 2005-Ohio-1136, the Ninth District referenced the trial testimony of a Dr. Darryl Steiner, and in *State v. Gulertekin* (Dec. 3, 1998), 10th Dist. No. 97APA12-1607, 1998 Ohio App. LEXIS 5641, the Tenth District referenced the testimony of a Dr. Charles Johnson. Mr. Donlin said that if he had presented these experts, or experts "with similar backgrounds and credentials," it is "plausible" he would have presented a "better defense." He also said that because he did not call them to testify, he believes he was ineffective. He did not say how these experts would have testified in this case. Moreover, neither of these experts provided affidavits stating they were available to testify or how they would have testified if called as witnesses.

{¶24} Thereafter, the state filed a motion to dismiss appellant's petition without a hearing. On July 30, 2010, the trial court denied appellant's petition. Thereafter,

appellant filed a request for a hearing on his petition and a request for findings of fact and conclusions of law.

{¶25} On August 11, 2010, the trial court filed a ten-page findings of fact and conclusions of law. The trial court found that appellant had failed to articulate any substantive grounds for relief and further that his argument was barred by res judicata. Appellant appeals the trial court's judgment, asserting the following for his sole assignment of error:

{¶26} "The trial court erred in denying the defendant petitioner's petition for post-conviction relief without a hearing."

{¶27} Appellant argues that because he supported his petition with the affidavit of his trial counsel, who admitted he was ineffective, he was entitled to a new trial or at least to a hearing on his petition. We do not agree.

{¶28} Before addressing the merits of appellant's argument, we note that an appellate court applies an abuse of discretion standard in reviewing a trial court's ruling on a petition for post-conviction relief alleging ineffective assistance of counsel. *State v. Pierce* (Dec. 22, 2000), 11th Dist. No. 98-L-232, 2000 Ohio App. LEXIS 6091, *13-*14; *State v. Gondor*, 112 Ohio St.3d 377, 390, 2006-Ohio-6679. Further, an appellate court reviews a trial court's decision not to conduct a hearing in post-conviction matters under an abuse of discretion standard. *State v. Gibson*, 11th Dist. No. 2005-P-0006, 2006-Ohio-4171, at ¶17; *State v. West*, 8th Dist. No. 92800, 2009-Ohio-6464, at ¶13; *State v. Price*, 9th Dist. No. 03CA0046, 2004-Ohio-961, at ¶5; *State v. Watson* (1998), 126 Ohio App.3d 316, 324. This court has recently stated that the term "abuse of discretion" is

one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *In re Edgell*, 11th Dist. No. 2009-L-065, 2010-Ohio-6435, at ¶45.

{¶29} R.C. 2953.21 provides, in relevant part:

{¶30} "(A)(1)(a) Any person who has been convicted of a criminal offense *** 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.

{¶31} "***

{¶32} "(C) Before granting a hearing on a petition ***, 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. ***."

{¶33} This court in *State v. Noling*, 11th Dist. No. 98-P-0049, 2003-Ohio-5008, stated:

{¶34} "*** [A] defendant challenging his conviction through a petition for postconviction relief is not automatically entitled to a hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 1999-Ohio-102. 'Only after he meets his initial burden to show substantive grounds for relief from the files and records of the case and, often,

evidentiary materials dehors the record is a hearing required.' *State v. Davie* (Sept. 25, 1998), 11th Dist. No. 97-T-0175, 1998 Ohio App. LEXIS 4540 ***, at [*6]. Stated differently, '*** before a hearing is granted, "the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* to demonstrate ***"' that errors did occur and that the errors resulted in prejudice. (Emphasis sic.) *Calhoun* at 283, quoting *State v. Jackson* (1980), 64 Ohio St.2d 107, syllabus. Moreover, '*** if the court can resolve the averments contained within the petitioner's request based upon the material contained within the petition, and the files and records, it may properly dismiss the matter without conducting a hearing.' *State v. Hill* (June 16, 1995), 11th Dist. No. 94-T-5116, 1995 Ohio App. LEXIS 2684 ***, at [*4]." *Noling*, supra, at ¶22.

{¶35} This court in *State v. Schlee* (Dec. 31, 1998), 11th Dist. No. 97-L-121, 1998 Ohio App. LEXIS 6363, held that when a petition for post-conviction relief is based on ineffective assistance of counsel, the petitioner must submit "evidence dehors the record." Id. at *5. Further, the evidence outside the record "must meet some threshold standard of cogency." Id. In explaining this standard, this court stated:

{¶36} "'The evidence must be genuinely relevant, and it must materially advance a petitioner's claim that there has been a denial or infringement of his or her constitutional rights. In the absence of such a standard, it would be too easy for the petitioner to simply attach 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. Sopjack* (Aug. 22, 1997), [11th Dist.] No. 96-G-2004, 1997 Ohio App. LEXIS 3789, *10, quoting [*State v.*]*Coleman* [(Mar. 17, 1993), 1st Dist. No. C-900811], 1993 Ohio App. LEXIS 1485 at *21." *Schlee*, supra, at *5-*6.

{¶37} The Supreme Court of Ohio in *Jackson*, supra, held that "[i]n a petition for post-conviction relief, which asserts ineffective assistance of 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." Id. at syllabus.

{¶38} Further, the Supreme Court of Ohio in *Calhoun*, supra, held that in reviewing a petition for post-conviction relief, a trial court has the discretion to judge the credibility of affidavits in determining whether to accept them as true statements of fact. Id. at 284. The court held:

{¶39} "Because the statute clearly calls for discretion in determining whether to grant a hearing, accepting all supporting affidavits as true is certainly not what the statute intended. 'If we would allow any open-ended allegation or conclusory statement concerning competency of counsel without a further showing of prejudice to the defendant to automatically mandate a hearing, division (D) of R.C. 2953.21 would be effectively negated and useless.' *Jackson*, 64 Ohio St.2d at 112." *Calhoun*, supra.

{¶40} The court in *Calhoun*, supra, further held that "[t]he trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." Id. The court held that in assessing the credibility of affidavit testimony in post-conviction relief proceedings, the trial court should consider all relevant factors. These factors, as pertinent here, include: (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether the affidavits contain or rely on hearsay, (3) whether the affiants are interested in the success of the petitioner's efforts, and (4)

whether the affidavits contradict evidence proffered by the defense at trial. Id. at 285. The court further held that, "[d]epending on the entire record, *one or more of these factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility*." (Emphasis added.) Id.

{¶41} Next, the standard of review for ineffective assistance of counsel was stated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687, and has been repeatedly followed by this court. *Schlee*, supra, at *30-*31; *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256, at ¶187.

{¶42} In order to support a claim of ineffective assistance of counsel, the defendant must satisfy a two-prong test. First, he must show that counsel's performance was deficient. *Strickland*, supra. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Id. A properly licensed attorney is presumed to be competent. Id. at 688. In order to rebut this presumption, the defendant must show the actions of counsel did not fall within a range of reasonable assistance. Id. at 689. The Court in *Strickland* stated, "[t]here are countless ways to provide effective assistance in any given case. ***" Id. at 689. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential. ***" Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. In addition, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." Id.

{¶43} Second, the defendant must show the deficient performance prejudiced the defense. In order to satisfy this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's *** errors, the result of the [trial] would have been different." Id. at 694; accord, *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶44} It is well-settled that strategic and tactical decisions do not constitute a deprivation of the effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Errors of judgment regarding tactical matters do not substantiate a claim of ineffective assistance of counsel. Id.; accord, *State v. Lundgren* (Apr. 22, 1994), 11th Dist. No. 90-L-15-125, 1994 Ohio App. LEXIS 1722, *53-*54. In *State v. Wolf* (Dec. 30, 1994), 11th Dist. No. 93-L-151, 1994 Ohio App. LEXIS 5993, this court held, "the calling of *** a witness can best be viewed as a tactical decision ***." Id. at *27. Thus, the decision to call, or not to call, a certain witness to the stand is subject to the strong presumption that the decision might be considered sound trial strategy. Id. at *28.

{¶45} In *Clayton*, supra, the court held: "*** the fact that there was another and better strategy available [to counsel] does not amount to a breach of an essential duty to his client." Id. A reviewing court must not second-guess trial strategy decisions. Id.

{¶46} "Further, the doctrine of res judicata precludes a defendant from raising, in a petition for postconviction relief, an ineffective assistance of counsel claim that was or could have been raised at trial or on direct appeal. ***" (Internal citations omitted.) *State v. Vinson*, 11th Dist. No. 2007-L-088, 2008-Ohio-3059, at ¶32. "This is particularly true where the petitioner obtained new counsel for their direct appeal and the claim of ineffective assistance could have been raised without resorting to evidence

outside the record." *State v. McCaleb*, 11th Dist. No. 2004-L-003, 2005-Ohio-4038, at ¶19. Where an appellant is represented by new counsel on direct appeal and the ineffectiveness of appellant's trial counsel could have been determined without examining evidence outside the record, a petition for post-conviction relief alleging ineffective assistance of trial counsel is barred by res judicata. *State v. Cole* (1982), 2 Ohio St.3d 112, 113-114.

{¶47} First, appellant argues that because Mr. Donlin stated in his affidavit that he was ineffective, the trial court erred in finding that he provided effective assistance of counsel. However, the court noted that at trial, appellant, through Mr. Donlin, presented multiple theories of his innocence, one of which was supported by Dr. Scheller, an expert in the area of child abuse and shaken baby syndrome. Dr. Scheller testified that Alyssa had not sustained a traumatic injury; rather, she suffered from hydrocephalus. The court found that Mr. Donlin made a strategic decision not to present additional theories of appellant's innocence. The court also found that Mr. Donlin was not ineffective in retaining only one child abuse expert and not hiring other experts whose testimony might not be as favorable. Based on our review of the record, we cannot say the trial court abused its discretion in making these findings.

{¶48} Next, Mr. Donlin's affidavit does not support appellant's argument that he was ineffective. While appellant argues in his brief that Mr. Donlin stated in his affidavit "that had he called these experts[,] the outcome of the trial would have been different," *Mr. Donlin did not so aver in his affidavit*. To the contrary, he merely offered his opinion that if he had presented these experts, it is "plausible [he] would have presented a

better defense on behalf of Petitioner Hendrex ***." (Emphasis added.) This, however, "does not amount to a breach of an essential duty to his client." *Clayton*, supra.

{¶49} Further, since Mr. Donlin did not state in his affidavit that if he had presented these experts, there was a reasonable likelihood that the result of the trial would have been different, appellant has failed to submit any documentary evidence that he was prejudiced by his trial counsel.

{¶50} We note that appellant does not argue that his trial counsel was ineffective in retaining Dr. Scheller to testify as an expert on his behalf, nor does he argue that Dr. Scheller's testimony was incorrect. Further, in his affidavit, Mr. Donlin states he should have retained Dr. Steiner and Dr. Johnson or experts with similar credentials. Since appellant's expert, Dr. Scheller, is an expert in child abuse and shaken baby syndrome, he is an expert with similar credentials. There is, therefore, no reason to believe the testimony of the two other experts would not have been cumulative. For this additional reason, appellant failed to demonstrate prejudice.

{¶51} Moreover, we agree with the trial court's finding that appellant's evidentiary material, which consisted solely of Mr. Donlin's affidavit, did not contain sufficient operative facts to support his petition. Mr. Donlin's affidavit did not demonstrate that these experts had examined Alyssa; reviewed her medical records; were willing to testify; or how they would have testified if called as witnesses. Because Mr. Donlin's affidavit did not include their proposed testimony in this case, his affidavit presents nothing more than speculation and conjecture that their testimony would benefit the defense. In addition, because these doctors testified years ago regarding other victims in two unrelated cases, their testimony, as referenced in Mr. Donlin's

affidavit, was not relevant. See *Sopjack*, supra. Moreover, since appellant has not seen fit to submit affidavits from these doctors, Mr. Donlin's affidavit concerning their testimony amounted to hearsay.

{¶52} In *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002-Ohio-5177, the post-conviction relief petitioner submitted the affidavit of an investigator who had interviewed a witness, who said that the eyewitness to the crime had been drinking at the time. The Seventh District held that the trial court did not err in dismissing the credibility of the affidavit because the judge who reviewed the petition was the same judge who presided over the petitioner's trial and further because the affidavit relied on hearsay. Id. at ¶37. That same petitioner also argued his trial counsel was ineffective for failing to retain an eyewitness expert and a ballistics expert. In support of his argument, he submitted articles written by these experts. The Seventh District held: "These articles lacked the threshold standard of cogency. They are only marginally significant and do not advance the petitioner's claim beyond mere hypothesis. The articles *** do not in any way address or evaluate the specific facts and circumstances surrounding appellant's case." Id. at ¶39. The court also noted that the petitioner was represented by experienced trial counsel who presumably was aware of the issues involved. Id. at ¶43.

{¶53} Here, Mr. Donlin's affidavit contained irrelevant information and hearsay. This was a sufficient basis for the court to dismiss the credibility of his affidavit. *Sopjack*, supra; *Calhoun*, supra. In addition, the affidavit did not include the experts' proposed testimony with respect to the facts and circumstances in this case; the same judge who reviewed the petition presided over appellant's trial; and appellant was represented by experienced trial counsel, who was presumably familiar with the issues.

{¶54} In view of the foregoing, we cannot say the trial court abused its discretion in discounting the credibility of Mr. Donlin's affidavit. We therefore agree with the following finding of the trial court: "At best, Atty. Donlin offers mere conjecture and speculation that [the experts'] testimony would have been beneficial to Petitioner's defense ***. This court finds *** the affidavit *** woefully insufficient to support this ground for relief."

{¶55} Appellant's reference to the Sixth Circuit's recent decision in *Couch v. Booker* (C.A.6, 2011), 632 F.3d 241, is unavailing as it is readily distinguishable from the instant case. There, the Sixth Circuit affirmed the district court's grant of a writ of habeas corpus because it found trial counsel was ineffective. On direct appeal in state court, the defendant had argued his trial counsel was ineffective. At an oral hearing conducted by the district court, the defendant presented evidence that his trial counsel failed to investigate a causation defense about which the defendant had advised him. Counsel also failed to review a report prepared by the local fire department, which appellant had advised him would be helpful to his defense. In addition, at the district court's hearing, the defendant presented an expert who, upon reviewing the fire department report, offered testimony in support of the proposed defense. Finally, the Sixth Circuit noted the state's case was weak. The defendant made no admission of guilt, while another defendant admitted his guilt.

{¶56} Here, the state's case was strong. Further, appellant presented five different theories of his innocence at trial, one of which was supported by an expert with credentials similar to those of the two other experts he now claims, for the first time, would have benefitted his defense. He did not claim his trial counsel was ineffective on

direct appeal. Moreover, he failed to present any evidence in support of his petition that his two proposed experts would have offered anything in addition to the opinion offered by Dr. Scheller.

{¶57} Moreover, appellant's argument is barred by res judicata. The fact that Mr. Donlin did not call these experts to testify would have been apparent from the trial court record and could have been raised on direct appeal. Yet, Mr. Mancino failed to do so. He now attempts to avoid the res judicata bar by arguing that Mr. Donlin's reason for not calling the experts as witnesses was not apparent from the record. However, the gist of appellant's ineffectiveness argument is that he was prejudiced by Mr. Donlin's failure to call these experts as witnesses, and *this failure was apparent from the record*. We note that the reported Ohio Appellate court cases that identified these experts were reported many years before appellant's trial. As a result, their identities would have been available to both Mr. Donlin at trial and Mr. Mancino on direct appeal. Because Mr. Mancino could have but failed to raise this alleged deficiency on the part of Mr. Donlin on direct appeal, appellant's argument is additionally barred by res judicata.

{¶58} We therefore hold that the trial court did not abuse its discretion in denying appellant's petition for post-conviction relief without a hearing.

{¶59} For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and opinion of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.