[Cite as *State v. Poling*, 2012-Ohio-3039.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-A-0002**
- vs -	:	
TIMOTHY F. POLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 363.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Timothy F. Poling, pro se, PID# A554896, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Timothy F. Poling, appeals from the December 22, 2011 Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing Poling's Petition to Vacate or Set Aside Sentence. The issues to be determined by this court are whether a second, successive postconviction petition is barred by res judicata when new evidence is discovered and whether evidence of juror misconduct is

admissible in an evidentiary hearing when the evidence is in the form of an alternate juror's affidavit. For the following reasons, we affirm the decision of the trial court.

{¶2} Poling was indicted on two counts of Rape, in violation of R.C. 2907.02(A)(1)(b) and R.C. 2907.02(A)(2), and 25 counts of Gross Sexual Imposition (GSI), in violation of R.C. 2907.05. A jury trial was held on October 7, 2008.

{¶3} The jury found Poling Guilty of both counts of Rape and four counts of GSI and Not Guilty on the remaining counts of GSI. Poling was sentenced to a mandatory term of life in prison for the Rape counts and a five year sentence for each of the four GSI counts, to be served concurrently.

{¶4} Poling appealed his conviction to this court and raised six assignments of error, including errors relating to the weight of the evidence, the admission of improper expert testimony, and ineffective assistance of counsel due to counsel's failure to object to the admission of certain testimony. The conviction was affirmed in *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155.

{¶5} On August 31, 2009, Poling filed a Petition to Vacate or Set Aside Judgment of Conviction or Sentence in the trial court. In the Petition, he raised the claim that his counsel was ineffective, by both falling asleep during the trial and by allowing a juror who knew Poling to be seated on the jury. Poling asserted that this juror, Lee Hoeffel, was his principal in high school, that he had "runs ins" with Hoeffel, and Hoeffel may have been prejudiced against Poling.

{¶6} The trial court issued a Judgment Entry on January 21, 2010, denying Poling's Petition. The trial court found that Poling failed to show sufficient operative

facts to demonstrate that counsel was ineffective and also found that the claims were barred by res judicata.

{¶7} On February 17, 2010, Poling filed a Notice of Appeal from that Judgment Entry. The appeal was subsequently dismissed by this court, due to Poling's failure to prosecute. Poling filed a Motion to Reinstate the appeal, which was overruled since Poling did not provide good cause for his failure to prosecute.

{¶8} On June 16, 2010, Poling filed an Application for Reopening with this court, pursuant to App.R. 26(B), asserting that his appellate counsel was ineffective for failing to raise four additional assignments of error in his direct appeal. This court, in a July 28, 2010 Judgment Entry, denied Poling's Application and found that he was unable to demonstrate his appellate counsel was ineffective for failing to assert Poling's proposed assignments of error.

{¶9} On October 25, 2011, Poling filed a second Petition to Vacate or Set Aside Sentence with the trial court, asserting that he had discovered new information. He presented the affidavit of alternate juror Cindy Hotchkiss, who asserted that juror Hoeffel, who personally knew Poling, disclosed negative information about Poling to the other jurors. The State filed a Motion to Dismiss this petition, asserting that it was barred by res judicata.

{¶10} The trial court found that the issue raised in this petition had been raised in the earlier postconviction petition, filed on August 31, 2009, and that it was barred by res judicata. The court also found that even if Poling's argument was not barred by res judicata, the affidavit of Hotchkiss would be inadmissible at an evidentiary hearing. The court granted the State's Motion and dismissed Poling's Petition.

{¶11} Poling timely appeals and raises the following assignments of error:

{¶12} "[1.] [It] was [an] abuse of discretion for [the] trial court not to grant [an] evidentiary hearing concerning juror misconduct when [the] affidavit pointed to extraneous information and [the] affidavit was new evidence dehors the record.

{¶13} "[2.] Petitioner was denied a fair trial and due process of law when juror violates court's instructions and petitioner's constitutional rights.

{¶14} "[3.] Trial counsel[']s failures resulted in prejudice towards appellant and denied him a fair trial and right to counsel.

{¶15} "[4.] Appellate counsel[']s failures resulted in prejudice towards the defendant denying him a fair trial, right to effective appellate counsel and review of substantial constitutional questions."

{¶16} This court has held that "[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." *State v. Reed*, 11th Dist. No. 2008-T-0087, 2009-Ohio-1720, ¶ 8, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. However, this court has also found that in cases where no evidentiary hearing was held, as is true in the present case, "an appellate court reviews the trial court's decision to grant or deny a petition for postconviction relief de novo." *State v. Gau*, 11th Dist. No. 2008-A-0030, 2008-Ohio-6988, ¶ 13; *State v. Williams*, 11th Dist. No. 2007-T-0105, 2008-Ohio-3257, ¶ 26. "A petition for postconviction relief may be dismissed without a hearing if a petitioner fails to submit evidentiary material that sets forth sufficient operative facts to demonstrate substantive grounds for relief." *Gau* at ¶ 13, citing *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980).

{¶17} Poling's first and second assignments of error will be considered jointly, as they contain interrelated arguments. Poling asserts that the trial court abused its discretion by failing to hold an evidentiary hearing on his Petition. He argues that new evidence was presented, the affidavit of alternate juror Hotchkiss, showing that juror Hoeffel made improper, negative statements to other jurors about Poling, based on personal knowledge Hoeffel had of Poling's bad behavior in high school. Poling argues that this raised sufficient facts to proceed to an evidentiary hearing.

{¶18} The State initially argues that Poling's arguments are barred by res judicata, as they could have or should have been raised in his prior appeal or postconviction petition, and, therefore, the trial court properly dismissed the Petition without holding a hearing.

{¶19} "Under the doctrine of res judicata, a defendant who was represented by counsel may not raise an issue in a petition for postconviction relief if he or she raised or could have raised the issue at trial or on direct appeal." *State v. Lesure*, 11th Dist. No. 2006-L-139, 2007-Ohio-4381, ¶ 22, citing *State v. Reynolds*, 79 Ohio St.3d 158, 161, 679 N.E.2d 1131 (1997). "To avoid the application of res judicata, the evidence supporting appellant's claim must assert competent, relevant and material evidence outside the trial court's record, and it must not be evidence that existed or was available for use at the time of trial." (Citation omitted.) (Emphasis deleted.) *State v. Schrock*, 11th Dist. No. 2007-L-191, 2008-Ohio-3745, ¶ 21.

{¶20} We note that the issue of potential bias or personal knowledge of Poling by juror Hoeffel was known to Poling and his counsel at the time of the trial. Hoeffel stated during voir dire that he knew Poling, as he had been Poling's principal. In fact,

Poling raised this issue in his first petition for postconviction relief. However, Poling asserts that although the *potential* bias of juror Hoeffel was known at the time of trial, the evidence that Hoeffel actually informed the other jurors of personal and negative information related to Poling was only discovered recently, after the trial and the filing of the first postconviction petition. Based on this argument, we will consider the merits of Poling's argument only as it relates to the newly discovered statements of alternate juror Hotchkiss.

{¶21} Since Poling has previously filed a petition for postconviction relief, he must first meet the jurisdictional requirements of R.C. 2953.23 to be entitled to a hearing. *Schrock* at ¶ 11. R.C. 2953.23 provides, in relevant part:

{¶22} "(A) * * * [A] court may not entertain * * * a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶23} "(1) Both of the following apply:

{¶24} "(a) * * * the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief * * *.

{¶25} "(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted * * *."

{¶26} In the present matter, Poling asserts that he was unavoidably prevented from the discovery of the facts regarding Hoeffel's statements to the other jurors because they were unknown to him at the time of the direct appeal and the prior

petition. Poling argues that Hotchkiss had not yet come forward with the information at that time and only came forward recently, prior to the filing of the second petition. In addition, he argues that the jurors were improperly influenced by Hoeffel's statements.

{¶27} Regardless of whether Poling was "prevented" from obtaining such evidence prior to the filing of the second petition, Poling failed to meet the second requirement of R.C. 2953.23(A)(1). Aside from arguing that the jurors may have been improperly influenced by the alleged statements made by juror Hoeffel, Poling does not advance an argument that but for this error, no reasonable factfinder would have found him guilty of the offense. He does not present any evidence that jurors were convinced of his guilt by the alleged statements or that they changed their verdict because of the statements. Since he cannot show that but for the jurors' consideration of Hoeffel's statements, they would not have found Poling guilty, he failed to meet the necessary jurisdictional requirement of R.C. 2953.23.

{¶28} Moreover, we note that Poling could not prevail on the constitutional claim that he asserts, since the affidavit in this matter would have been inadmissible at an evidentiary hearing to prove that constitutional error occurred. In support of his argument that Hoeffel disclosed improper information to the jurors, Poling presents only the affidavit of Hotchkiss. This affidavit would not be admissible in an evidentiary hearing, pursuant to Evid.R. 606(B).

{¶29} Evid.R. 606(B), also called the *aliunde* rule, addresses the admissibility of juror testimony unsupported by outside evidence:

> **{¶30}** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the

> course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented.

{¶31} "A firmly established common-law rule flatly prohibits the admission of juror testimony to impeach a jury verdict." *State v. Hessler*, 90 Ohio St.3d 108, 123, 734 N.E.2d 1237 (2000). The *aliunde* rule "requires a foundation from nonjuror sources" in order to admit such testimony. *Id.* "[I]nformation [alleging misconduct] must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence *aliunde* being introduced first." *State v. Schiebel*, 55 Ohio St.3d 71, 75, 564 N.E.2d 54 (1990).

{¶32} In the present case, the only evidence of juror misconduct related to juror deliberations comes from the sworn statement of another juror. Although she was an alternate juror, Hotchkiss' statement is not considered outside evidence, since she was present with the jury as an alternate while the alleged statements were made. *See Hessler* at 123 ("we do not consider the alternate juror's affidavit as outside evidence"); *State v. Reiner*, 89 Ohio St.3d 342, 351-352, 731 N.E.2d 662 (2000), *rev'd in part on other grounds*, *Ohio v. Reiner*, 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001) (an

alternate juror, who was "privy to the jury process up to the actual deliberations," was prohibited by the *aliunde* rule from giving testimony regarding juror misconduct that took place prior to deliberation). Hotchkiss' affidavit merely offers internal evidence of the jury member's conduct in order to impeach the jury's verdict. There is no external evidence such that it would be proper to admit her testimony.

{¶33} Since the affidavit and testimony of Hotchkiss would be inadmissible, the trial court was not required to hold an evidentiary hearing and did not err by denying Poling's request for such a hearing. *See State v. Jeffers*, 10th Dist. No. 10AP-1112, 2011-Ohio-3555, ¶ 25 (since the jury member's statement would have been inadmissible to prove the alleged error, the trial court did not abuse its discretion in concluding that appellant's petition did not present sufficient facts to warrant an evidentiary hearing); *State v. Miller*, 6th Dist. No. L-02-1265, 2003-Ohio-4857, ¶ 9 (where the affidavits supporting the postconviction petition were inadmissible under Evid.R. 606(B), the trial court acted properly when it denied the petition without a hearing).

{¶34} Based on the foregoing, we find that the trial court did not err by dismissing Poling's Petition and determining that an evidentiary hearing was not warranted.

{¶35} Poling also asserts that this court should consider the merits of the appeal related to his first postconviction petition, which this court dismissed for failure to prosecute. However, that petition is not before this court in the present matter and we cannot address its merits.

{¶36} The first and second assignments of error are without merit.

{¶37} In his third assignment of error, Poling asserts that his trial counsel was ineffective by falling asleep during voir dire and allowing juror Hoeffel to be placed on the jury, since counsel knew that Hoeffel and Poling had prior interactions.

{¶38} We find this assignment of error to be barred by res judicata. This was a matter known at the time of Poling's direct appeal, as it was brought forth at the trial during voir dire. Appellate counsel did raise several arguments regarding the effectiveness of trial counsel, but did not raise an argument regarding the selection of Hoeffel as a juror. Issues that were raised or could have been raised by a defendant at the trial court level or on direct appeal are res judicata and not subject to review in subsequent proceedings. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. This argument is further barred by res judicata since it was raised by Poling in his first postconviction petition in 2009.

{¶39} The third assignment of error is without merit.

{¶40} In his fourth assignment of error, Poling asserts that appellate counsel in his direct appeal was ineffective for not raising a claim related to the impartiality of the jury.

{¶41} This court has held that "claims regarding ineffective assistance of appellate counsel are not cognizable in postconviction proceedings brought pursuant to R.C. 2953.21." *State v. Love*, 11th Dist. No. 2007-L-030, 2007-Ohio-6256, ¶ 18, citing *Morgan v. Eads,* 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 6. Such claims must be raised in an application for reopening filed pursuant to App.R. 26(B). *Morgan* at ¶ 7. Poling cannot raise claims related to the ineffectiveness of his appellate counsel in these proceedings. In addition, Poling has already had an opportunity to

raise such concerns in his Application for Reopening filed on June 16, 2010, which was considered and denied by this court.

{¶42} The fourth assignment of error is without merit.

{¶43} For the foregoing reasons, the Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing Poling's Petition to Vacate or Set Aside Sentence, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.