

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2018-L-055
GINA B. MILLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2015 CR 000776.

Judgment: Affirmed in part; reversed in part and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Jennifer A. McGee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Albert L. Purola, 38298 Ridge Road, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Gina B. Miller, appeals from the April 4, 2018 judgment of the Lake County Court of Common Pleas, denying her petition for postconviction relief without a hearing.

{¶2} On September 6, 2016, after a police investigation uncovered impropriety in connection with appellant’s fortune-telling business, appellant was charged in a 28-count indictment, which included felonies for engaging in a pattern of corrupt activity, aggravated theft, telecommunications fraud, identity fraud, securing writings by

deception, grand theft, and theft. Several of the charges included a forfeiture specification. Appellant initially entered a plea of not guilty to the indictment.

{¶3} A plea hearing was held on March 10, 2017. Appellant withdrew her plea of not guilty and entered a plea of guilty to an amended count of aggravated theft, a second-degree felony in violation of R.C. 2913.02(A)(3). The remaining counts were dismissed. The matter was referred to the Lake County Adult Probation Department for a pre-sentence investigation report (“PSI”).

{¶4} A sentencing hearing was held on April 27, 2017. Appellant was sentenced to serve eight years in prison. Appellant stipulated to an order requiring her to pay her victims \$1.4 million in restitution. All items seized by police from appellant’s home and business were to be forfeited and items distributed to the victims. The trial court filed its judgment entry of sentence on April 28, 2017.

{¶5} Appellant noticed a direct appeal, arguing her sentence was contrary to law. This court affirmed the trial court’s judgment. See *State v. Miller*, 11th Dist. Lake No. 2017-L-074, 2017-Ohio-8809.

{¶6} On October 12, 2017, appellant filed a petition for postconviction relief pursuant to R.C. 2953.21. Appellant argued she was entitled to relief because there was insufficient evidence that she deceived the victims. Appellant also asserted a claim of ineffective assistance of counsel, arguing that because there was insufficient evidence of deception, her defense counsel should have tried the case. Attached to the petition was the appellant’s affidavit, in which she averred that prior to her plea hearing she had instructed trial counsel she did not want to enter a guilty plea and wanted to go to trial; that trial counsel told her she would “not be locked up, and at the sentencing

hearing, Affiant would probably get probation or at most two (2) years”; that she is poorly educated and was overpowered by the situation; “that at the trial, she wrote on a legal pad belonging to [trial counsel], that may still be in existence, that she did not want to go to trial”¹; and that she never deceived anyone and instead, “[s]he just talked to them, and they liked her.” The state filed a response, arguing appellant’s petition was barred by *res judicata*, or in the alternative, that her claims lacked a substantive basis on which to grant relief. Appellant filed a reply, arguing a “hearing is required to have [trial counsel] explain to what attention he gave to the question of deception, the words actually spoken to [appellant], and to have the complaining witnesses elucidate the actual dynamics of the dialogue.”

{¶7} In a judgment entry filed April 4, 2018, the trial court denied appellant’s petition for postconviction relief. The trial court stated that with regard to a petition for postconviction relief that alleges ineffective assistance of counsel, “when a defendant, represented by new counsel upon direct appeal, fails to raise in the appeal the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant’s petition for post conviction relief.” The trial court determined the petition was barred by *res judicata* because appellant filed a direct appeal from her conviction for which she was represented by new counsel. The trial court further determined appellant could have raised on direct appeal the issues in her petition.

{¶8} Appellant noticed a timely appeal. She asserts a sole assignment of error, which states:

¹. We note that this statement is inconsistent with the other statements in appellant’s affidavit and with her assertion that she wanted to go to trial. On appeal, appellee argues this inconsistency brings the credibility of the affidavit into question. Below, we discuss the issue of credibility.

{¶9} “The trial court erred in dismissing the petition without a hearing.”

{¶10} Appellant presents two “questions” under her assignment of error, which we construe as issues. They state:

[1.] Does the trial court’s action violate *State v. Hester*, 45 Ohio St. 2d 71?

[2.] Does the doctrine of *Res Judicata* have any place in post-conviction law after *Young v. Ragan*, 337 U.S. 235?

{¶11} In her first issue, appellant argues that because the claim for ineffective assistance of counsel raised in her petition for postconviction relief was based on evidence dehors the record, the trial court erred when it determined the petition was barred by res judicata.

{¶12} In *State v. Gondor*, the Supreme Court of Ohio 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[.]” 112 Ohio St.3d 377, 2006-Ohio-6679, ¶58; see also *State v. Martin*, 11th Dist. Trumbull No. 2017-T-0014, 2018-Ohio-3244, ¶20 (affirming the dismissal of a petition without a hearing).

{¶13} Since *Gondor*, there has been uncertainty among and within appellate districts regarding the appropriate standard of review when the trial court dismisses a petition for postconviction relief without a hearing. See *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, ¶9; *State v. Kirklin*, 11th Dist. Portage No. 2013-P-0085, 2014-Ohio-4301, ¶7, citing *State v. Hicks*, 4th Dist. Highland No. 09CA15, 2010-Ohio-89, ¶10 (collecting cases). However, in *Gondor* the Supreme Court made clear that in matters relating to postconviction relief, the trial court’s decision should be given deference:

In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing. In *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, paragraph two of the syllabus, this court held that a trial court could dismiss a petition for postconviction relief without a hearing “where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” This court reversed the judgment of the appellate court in *Calhoun*, holding that “the trial court *did not abuse its discretion* in dismissing the credibility of [the] affidavits,” which served as the basis for his petition. (Emphasis added.) *Id.* at 286, 714 N.E.2d 905.

We thus determined in *Calhoun* that the trial court’s gatekeeping function in the postconviction relief process is entitled to deference, including the court’s decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. We established in *Calhoun* that a court reviewing the trial court’s decision in regard to its gatekeeping function should apply an abuse-of-discretion standard. The consistent approach is to grant that same level of deference to the trial court in regard to its posthearing decision.

Gondor, supra, at ¶51-52.

{¶14} “When, however, a trial court denies a petition by operation of law, e.g., by application of the doctrine of res judicata, this court’s review is de novo.” *State v. Butcher*, 11th Dist. Portage No. 2013-P-0090, 2014-Ohio-4302, ¶6, citing *Zamos v. Zamos*, 11th Dist. Portage No. 2008-P-0021, 2009-Ohio-1321, ¶14 and *State v. Prade*, 9th Dist. Summit No. 26775, 2014-Ohio-1035, ¶18 (procedural defects in a petition for postconviction relief, such as one that is barred by res judicata, is reviewed on appeal de novo).

{¶15} R.C. 2953.21, Ohio’s postconviction relief statute, states, in pertinent part:

(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.

* * *

(D) * * * 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[.]

(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 * * * [.]

{¶16} “In 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.” *State v. Jackson*, 64 Ohio St.2d 107 (1980), at syllabus. “For purposes of determining whether there are substantive grounds for postconviction relief that would warrant a hearing, it is generally accepted that affidavits presented in support of the petition should be accepted as true.” *State v. Pierce*, 127 Ohio App.3d 578, 586 (11th Dist.1998).

{¶17} Further, a petition for postconviction relief may be dismissed without an evidentiary hearing when the claims raised are barred by the doctrine of res judicata. *State v. Perry*, 10 Ohio St.2d 175, 180 (1967). Application of the doctrine of res judicata prevents relitigation of issues that were already decided by a court and litigation of matters that should have been brought in a previous action. *State v. McDonald*, 11th Dist. Lake No. 2003-L-155, 2004-Ohio-6332, ¶21 (citation omitted). “When a defendant

is represented by different counsel at trial and on direct appeal, *res judicata* ordinarily bars the relitigation of any ineffective assistance of counsel claims that could have been raised on direct appeal *without reference to evidence dehors the record.*” *State v. Palmer*, 9th Dist. Summit No. 28723, 2018-Ohio-1486, ¶11, quoting *State v. Pannell*, 9th Dist. Wayne No. 98CA0034, 1999 WL 25618, *2 (Jan. 20, 1999) (emphasis added), citing *State v. Lentz*, 70 Ohio St.3d 527 (1994), syllabus.

{¶18} “A claim is not barred by the operation of *res judicata* to the extent a petitioner sets forth competent, relevant, and material evidence *dehors the record.*” *State v. Vinson*, 11th Dist. Lake No. 2007-L-0088, 2008-Ohio-3059, ¶32, quoting *State v. Delmonico*, 11th Dist. Ashtabula No. 2004-A-0033, 2005-Ohio-2882, ¶14 (citation omitted); see also *State v. Cole*, 2 Ohio St.3d 112, 114 (1982). “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.*” *Cole, supra, at 171.*

{¶19} “To be genuinely relevant, the evidence *dehors the record* must materially advance the petitioner’s claim and ‘meet some threshold standard of cogency.’” *Delmonico, supra, at ¶14*, quoting *State v. Schlee*, 11th Dist. Lake No. 97-L-121, 1998 WL 964291, *2 (Dec. 31, 1998). 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*, 11th Dist. Geauga No. 96-G-2004, 1997 WL 585904, *3 (Aug. 22, 1997), quoting *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756, *7 (Mar. 17, 1993).

{¶20} In her petition and on appeal, appellant raises two grounds for her claim of ineffective assistance of counsel. Appellant first maintains trial counsel's performance fell below an objective standard of reasonable representation because he should have taken the case to trial, as there was insufficient evidence to support appellant deceived the victims. This claim, however, is not based on competent, relevant, and material evidence dehors the record.

{¶21} The record reflects that at appellant's plea hearing the state discussed what the facts would show were the matter to proceed to trial. The prosecutor stated:

In a continuing course of conduct * * * the Defendant met the twelve individuals identified in Count Two in the indictment in her capacity as a psychic reader at her place of employment. After earning their trust, the Defendant stole money, property and services from those twelve individuals by deception. The value of the money, property and services is stipulated to be one point four million dollars.

Additionally, at appellant's sentencing hearing, the state discussed extensively the evidence underlying the charge. The state introduced several exhibits, including an expert witness report. The prosecutor explained the expert

reviewed all the documentation and he concludes that many of Ms. Miller's victims came to her seeking answers, comfort, assurance while going through a very difficult time in their lives. The victims were experiencing problems with their life related to various issues including love, money, health and it made them highly susceptible to her psychological tactics. Ms. Miller utilized carefully managed psychological manipulations to steal money and other property from her victims. She preyed on her victims who were extremely vulnerable and often used fear while exerting undo influence upon them.

The state also introduced recordings of appellant speaking to one of the victims who wore a wire as part of the investigation and to "a BCI agent" posing "as a person

seeking a psychic reading in an undercover capacity.” The recordings exhibited some of the tactics employed by appellant to deceive her victims.

{¶22} Further, although in her affidavit appellant averred she did not deceive anyone, this is a mere conclusion made by appellant and does not materially advance her claim. The challenges related to the sufficiency of the evidence were well known to counsel at the time of the plea and also known to new counsel appointed for appellant’s direct appeal. Accordingly, the claim for ineffective assistance of counsel as it relates to sufficiency of the evidence could have been raised in appellant’s direct appeal. Because it was not, the claim is now barred by res judicata.

{¶23} Appellant next suggests her trial counsel’s performance was defective because he coerced her to enter a guilty plea, rendering her plea involuntary. In her appellate brief she states: “It goes without saying, a plea coerced, or induced, by promise from anyone, including your lawyer, especially including your lawyer, is not the plea consonant with the Fifth Amendment.” This claim is supported by appellant’s affidavit, which contains allegations that were not part of the record in the prior appeal and could not have been raised on direct appeal. Further, the allegations materially advance her claim of ineffective assistance of trial counsel. Thus, contrary to the conclusion of the trial court, this aspect of the claim is not barred by res judicata.

{¶24} Appellee argues that the affidavit lacks credibility and that appellant is not entitled to a hearing on her petition. “[I]n 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 the credibility of the affidavits in determining whether to accept the

affidavits as true statements of fact.” *Calhoun*, paragraph one of the syllabus. Here, however, the trial court did not address the credibility of appellant’s affidavit or determine whether it presented substantive grounds for postconviction that would warrant a hearing. The sole basis for the denial of a hearing was *res judicata*, which we have determined was improper. However, because we defer to the trial court’s discretion with regard to the credibility of an affidavit in a petition for postconviction relief, we must remand this matter to the trial court to exercise its discretion and determine whether the affidavit is credible and presents substantive grounds for postconviction relief. This should be done solely on the claim for ineffective assistance of counsel as it relates to the potential involuntariness of the plea as set forth in appellant’s affidavit.

{¶25} Under her second issue, appellant argues, in general, that Ohio has not made meaningful use of postconviction relief. She did not raise this argument at the trial court and fails under this argument to raise any specific error in the trial court’s judgment. “This court may ‘disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based * * *, as required by App.R. 16(A).” *South Russell v. Upchurch*, 11th Dist. Geauga Nos. 2001-G-2395 & 2001-G-2396, 2003-Ohio-2099, ¶9, quoting App.R. 12(A)(2). We, therefore, decline to address this issue.

{¶26} Appellant’s sole assignment of error has merit to the extent discussed.

{¶27} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded for proceedings consistent with this opinion.

THOMAS R. WRIGHT, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.