

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2018-T-0064
JONATHAN R. EMERINE,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CR 00693.

Judgment: Affirmed.

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

Jonathan R. Emerine, pro se, PID: A683-007, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Jonathan R. Emerine, appeals from the July 3, 2018 judgment of the Trumbull County Court of Common Pleas, dismissing his pro se petition to vacate or set aside judgment without a hearing. On appeal, appellant asserts the trial court erred in applying the doctrine of res judicata to his timely filed petition for postconviction

relief because he presented sufficient evidence to merit an evidentiary hearing. Finding no reversible error, we affirm.

{¶2} On September 4, 2015, the Trumbull County Grand Jury indicted appellant on one count of rape and three counts of gross sexual imposition. Appellant was represented by counsel, entered a not guilty plea at his arraignment, and waived his right to a speedy trial.

{¶3} A jury trial commenced on March 28, 2016. Following trial, the jury found appellant guilty on all counts. On May 2, 2016, the trial court sentenced appellant to an aggregate term of 31 and one-half years to life in prison and labeled him a Tier III sex offender. The court also notified appellant that post-release control is mandatory for five years.

{¶4} Appellant filed a timely direct appeal with this court, Case No. 2016-T-0048. In that appeal, appellant asserted the trial court erred in not providing lesser included offense instructions and alleged his conviction was against the manifest weight of the evidence. Finding no error, this court affirmed the judgment of the trial court on March 31, 2017. *State v. Emerine*, 11th Dist. Trumbull No. 2016-T-0048, 2017-Ohio-1206. Appellant later sought reopening with this court, which we overruled. Appellant's appeals to the Supreme Court of Ohio were not accepted for review. *State v. Emerine*, 150 Ohio St.3d 1432, 2017-Ohio-7567; *State v. Emerine*, 151 Ohio St.3d 1457, 2017-Ohio-8842.

{¶5} On June 15, 2017, appellant filed a timely pro se petition to vacate or set aside judgment pursuant to R.C. 2953.21. The state filed a motion to dismiss the petition on July 28, 2017. On August 1, 2017, the trial court denied appellant's petition

without a hearing and without entering findings of fact and conclusions of law. Appellant filed an appeal, Case No. 2017-T-0091, asserting that the trial court erred in denying his postconviction relief petition without issuing findings of fact and conclusions of law. The state agreed. On June 25, 2018, this court dismissed and remanded for the required findings. *State v. Emerine*, 11th Dist. Trumbull No. 2017-T-0091, 2018-Ohio-2458.

{¶6} Pursuant to our mandate, the trial court entered its findings of fact and conclusions of law dismissing appellant’s petition to vacate or set aside judgment without a hearing on July 3, 2018. The court found appellant’s claims were barred under the doctrine of res judicata and indicated that he failed to set forth sufficient operative facts to establish substantive grounds for relief. Appellant filed the instant appeal, Case No. 2018-T-0064, and raises the following two assignments of error:

{¶7} “[1.] The trial court abused its discretion in its application of the doctrine of res judicata to Emerine’s timely filed petition for post-conviction relief pursuant to O.R.C. 2953.21 thus violating Emerine’s rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1 and 14 of the Ohio Constitution.

{¶8} “[2.] The trial court erred in denying Emerine’s post-conviction relief petition where he presented sufficient evidence dehors the record to merit an evidentiary hearing.”

{¶9} In his first assignment of error, appellant argues the trial court erred in applying the doctrine of res judicata to his timely filed petition for postconviction relief.

{¶10} In his second assignment of error, appellant alleges the trial court erred in dismissing his petition for postconviction relief because he presented sufficient evidence dehors the record to merit an evidentiary hearing.

{¶11} Because appellant's first and second assignments of error are interrelated, we will address them together.

{¶12} This court reviews the dismissal of a petition for postconviction relief for an abuse of discretion. *State v. Cline*, 11th Dist. Geauga No. 2012-G-3101, 2013-Ohio-1843, ¶9. The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶13} "[A] postconviction proceeding is a collateral civil attack on a criminal judgment. *State v. Dudley*, 2d Dist. No. 23613, 2010-Ohio-4152, ¶30, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 * * *. It is therefore not an appeal of a criminal conviction. *Id.* Consequently, postconviction relief is not a constitutional right, but is instead afforded to a convicted defendant as a statutory remedy. *Id.*, citing *State v. Moore*, 99 Ohio App.3d 748, 751 * * * (1st Dist.1994)." (Parallel citations omitted.) *Cline, supra*, at ¶10.

{¶14} R.C. 2953.21 states in part:

{¶15} "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child 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."

{¶16} "Pursuant to R.C. 2953.21(C), a defendant's petition may be denied without a hearing when the petition, supporting affidavits, documentary evidence, files, and records do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief.' *State v. Adams*, 11th Dist. No. 2003-T-0064, 2005-Ohio-348, ¶37." *Cline, supra*, at ¶11; see also *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, ¶29 ("To warrant an evidentiary hearing in a postconviction proceeding, a petitioner must submit evidence outside the record that sufficiently establishes that the petitioner is entitled to relief on one or more asserted constitutional grounds.")

{¶17} "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. Knapp*, 11th Dist. Ashtabula No. 2012-A-0035, 2013-Ohio-870, ¶29. "In order to prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668 * * * (* * *). * * * Thus, appellant must show that counsel's performance was deficient and "must also show prejudice

resulting from the deficient performance.”” (Citations omitted.) *State v. Kirschenmann*, 11th Dist. Portage Nos. 2014-P-0031 and 2014-P-0032, 2015-Ohio-3544, ¶16.

{¶18} “Under *Strickland* as interpreted by Ohio courts, attorneys are presumed competent, reviewing courts must refrain from second-guessing strategic, tactical decisions and strongly presume that counsel’s performance falls within a wide range of reasonable legal assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.” *State v. Brown*, 11th Dist. Ashtabula No. 2013-A-0065, 2014-Ohio-2878, ¶42.

{¶19} “[P]ostconviction relief is a particularly narrow remedy because the doctrine of *res judicata* bars any claim that was or could have been raised at trial or on direct appeal.” *Cline, supra*, at ¶15.

{¶20} “[T]he doctrine of *res judicata* requires that the evidence presented in support of the petition come from outside, or “*dehors*,” the record. In *State v. Cole* (1982), 2 Ohio St.3d 112, the Ohio Supreme Court explained: “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel 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 or conviction, or on an appeal from that judgment.” (*Id.* at 113, quoting *State v. Perry*, paragraph nine of the syllabus.)’ *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 WL 1877526, *2 (Dec. 26, 2000).” *State v. DiBiase*, 11th Dist. Lake No. 2017-L-027, 2018-Ohio-2250, ¶6.

{¶21} In this case, appellant claims his trial counsel was ineffective in failing to interview witnesses, failing to call any witnesses at trial, and abrogating appellant’s right

to testify in his own behalf. Appellant claims his trial counsel made a unilateral decision without his consent. Appellant also claims he later learned of alleged juror and witness misconduct. In support, appellant attached to his petition his own affidavit and that of three others, his wife, his friend, and his father-in-law. All four affidavits appear to have been drafted by the same person, on the same typewriter, using nearly identical language, and notarized by the same Notary Public.

{¶22} We note that the judge who reviewed the postconviction relief petition also presided over appellant's trial. We further note that a trial court may discount self-serving affidavits from the petitioner or his family members and when the affidavits are nearly identical and rely on hearsay, the court may determine that they are not credible. See *Moore, supra*, at 754-756; *State v. Calhoun*, 86 Ohio St.3d 279 (1999).

{¶23} Appellant asserts these affidavits are outside the record and should not be barred by res judicata. Appellant's claims are not supported by the record. After the state rested its case at trial, the following exchange took place:

{¶24} “[DEFENSE COUNSEL]: “I provided a witness list with three witnesses. I've discussed the matter with my client, both as to whether he testified and as to what, if any, witnesses will testify. We are going to rest.

{¶25} “THE COURT: Mr. Emerine, is that your decision along with your attorney?

{¶26} “THE DEFENDANT: Yes, Your Honor.” (Jury Trial T.p. 459-460).

{¶27} The record establishes that appellant's trial counsel did not make any unilateral decision. Appellant agreed on the record to not call any witnesses and to not testify himself. This court must refrain from second-guessing trial counsel's strategic

decisions. *Brown, supra*, at ¶42. Appellant could have raised these issues in his direct appeal. He did not.

{¶28} We conclude that the trial court correctly dismissed appellant's pro se petition for postconviction relief without a hearing due to the absence of sufficient operative facts to establish grounds for relief. Since these issues could have been raised on direct appeal, res judicata bars their consideration now. *DiBiase, supra*, at ¶6.

{¶29} Appellant's first and second assignments of error are without merit.

{¶30} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

THOMAS R. WRIGHT, P.J., concurs in judgment only.