[Cite as *State v. Hicks*, 2010-Ohio-89.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

The State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 09CA15
v.	:	
	:	<u>DECISION AND</u>
Anthony Wayne Hicks,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 1-11-10

<u>APPEARANCES:</u>

Anthony Wayne Hicks, pro se appellant.

James B. Grandey, Highland County Prosecutor, and Anneka P. Collins, Highland County Assistant Prosecutor, Hillsboro, Ohio, for appellee.

Kline, J.:

{¶1} Anthony Hicks (hereinafter "Hicks") appeals the trial court's dismissal of his petition for postconviction relief without an evidentiary hearing. Because Hicks did not attach any evidence to his petition, he has failed to meet his burden under R.C. 2953.21(C). Therefore, we find that the trial court did not abuse its discretion by dismissing Hicks's petition for postconviction relief without a hearing. Hicks also contends that the trial court should have granted his various motions related to expert assistance and the appointment of counsel. We disagree. As a petitioner in a postconviction relief proceeding, Hicks was not entitled to expert assistance. And because his petition did not warrant an evidentiary hearing, Hicks was not entitled to the appointment of counsel. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} This matter is before this court for the third time. See *State v. Hicks*, Highland App. No. 07CA7, 2008-Ohio-964 (affirming the judgment of the trial court on direct appeal) (hereinafter "*Hicks I*"); *State v. Hicks*, Highland App. No. 08CA12, 2009-Ohio-1260 (reversing the judgment of the trial court and remanding Hicks's petition for postconviction relief "to allow the trial court an opportunity to consider [certain] issues and develop a record") (hereinafter "*Hicks II*"). Because *Hicks I* and *Hicks II* recount many of the facts of this case, we will not repeat those facts here. Instead, we will only discuss the facts pertinent to this particular appeal.

{¶3} Hicks was convicted of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A). After his conviction, Hicks filed a petition for postconviction relief. He also filed a Motion for Appointment of Counsel and three Motions for Expert Assistance. In the Motions for Expert Assistance, Hicks requested "order[s] granting funds to pay the cost/fees of" (1) a "handwriting examiner," (2) a "linguist," and (3) an "investigator." For lack of jurisdiction, the trial court expressly dismissed the Motion for Appointment of Counsel and the Motions for Expert Assistance in the same entry that dismissed Hicks's petition for postconviction relief. Soon thereafter, Hicks filed his appeal in *Hicks II*.

{¶4} After our decision in *Hicks II*, which remanded this matter to the trial court, Hicks filed an amended petition for postconviction relief. The amended petition makes the following claims: (1) that the investigating officers falsified or fabricated written statements; (2) that the trial court judge made "statements or

comments about the outcome of the trial" and failed to maintain an "orderly and fair" trial; (3) that Hicks's trial counsel was essentially ineffective for various reasons; (4) that Hicks was essentially denied a fair and impartial jury for various reasons; and (5) that the state violated Hicks's speedy-trial rights. Hicks did not attach any evidence to his amended petition. Instead, Hicks wrote that "[e]vidence supporting [the first claim] is not attached because Petitioner is indigent and needs the assistance of an attorney, investigator, handwriting examiner, and a linguist to produce the evidence." He also wrote that "[e]vidence supporting [the second, third, fourth, and fifth claims] is not attached because Petitioner is indigent and needs the assistance of an attorney and an investigator to produce evidence." At the end of each claim, Hicks referenced the Motion for Appointment of Counsel and the Motions for Expert Assistance that he filed with his original petition before our decision in *Hicks II*.

{¶5} Once again, the trial court dismissed Hicks's petition without a hearing. However, this time, the trial court dismissed Hicks's amended petition because he "failed to submit sufficient evidence that entitle[d] him to a hearing or to relief on the claims set forth in his amended petition[.]" Decision and Entry Denying Petition for Post Conviction Relief Without Hearing at 1. Further, unlike the trial court's decision before in *Hicks II*, the decision at issue here does not expressly rule on Hicks's Motion for Appointment of Counsel or his three Motions for Expert Assistance.

{¶6} Hicks appeals, asserting the following assignments of error: I. "Trial court erred and abused its discretion when it dismissed all assignment of error

[sic] due to *res judicata*." And, II. "Trial court erred and abused its discretion when it dismissed the Petition without ruling on the Motions for Expert Assistance and for Appointment of Counsel."

II.

{¶7} Hicks's first assignment of error is not entirely clear. His brief states that the "[t]rial court erred and abused its discretion when it dismissed all assignment of error [sic] due to *res judicata*." Here, we presume that the term "assignment of error" refers to the "claims for relief" in Hicks's amended petition. Therefore, we believe that Hicks intended to argue the following: The trial court abused its discretion by finding that res judicata barred all of Hicks's claims for relief. Further, after reviewing the trial court's decision, it is clear that the trial court made no such finding. Hicks asserted five claims in his amended petition for postconviction relief. However, the trial court made res judicata findings as to only the second and fifth claims. As such, the trial court denied Hicks's first, third, and fourth claims for reasons other than res judicata. (Moreover, the trial court found that Hicks had not set forth sufficient operative facts to demonstrate substantive grounds for relief under his second and fifth claims, too. In relation to these claims, the trial court discussed res judicata as merely an alternate reason for denial.)

{¶8} For the foregoing reasons, we are unable to fully discern Hicks's first assignment of error. Regardless, in the interest of justice, we will interpret Hicks's first assignment of error in the broadest manner possible. Thus, we will

analyze the following question: Did the trial court err in dismissing Hicks's petition for postconviction relief without an evidentiary hearing?

{¶9} "[T]here is some uncertainty concerning the appropriate standard of review used by an appellate court when reviewing a trial court's decision to dismiss a petition for postconviction relief without an evidentiary hearing." *In re B.C.S.*, Washington App. No. 07CA60, 2008-Ohio-5771, at ¶9; *State v. Harrington*, 172 Ohio App.3d 595, 2007-Ohio-3796, at ¶9. See, also, *State v. McDougald*, Scioto App. No. 09CA3278, 2009-Ohio-4417, at ¶5 fn. 2. As we noted in *In re B.C.S.*, this court has applied varying standards, including (1) de novo review, see, e.g., *State v. Gibson*, Washington App. No. 05CA20, 2005-Ohio-5353, at ¶6; *State v. Thompson*, Washington App. No. 08CA20, 2009-Ohio-200, at ¶7; (2) abuse of discretion, see, e.g., *State v. Bradford*, Ross App. No. 08CA3053, 2009-Ohio-1864, at ¶8; *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶15; and (3) a mixed-question-of fact-and-law standard, see, e.g., *Harrington* at ¶9; *In re B.C.S.* at ¶9.

{¶10} However, after surveying other Ohio courts, we believe that abuse of discretion is the most prevalent standard for reviewing the dismissal of a petition for postconviction relief without a hearing. In addition to this court, nine other appellate districts have recently used the abuse-of-discretion standard. See, e.g., *State v. Abdussatar*, Cuyahoga App. No. 92439, 2009-Ohio-5232, at ¶15 (applying an abuse-of-discretion standard in the Eighth Appellate District); *State v. Wright*, Franklin App. No. 08AP-1095, 2009-Ohio-4651, at ¶9-10 (applying an abuse-of-discretion standard in the Tenth Appellate District); *State v. Patel*,

Summit App. No. 24645, 2009-Ohio-3184, at ¶¶2-4, 10 (applying an abuse-of-discretion standard in the Ninth Appellate District); *State v. West*, Jefferson App. No. 07 JE 26, 2009-Ohio-3347, at ¶¶19-22, 37 (applying an abuse-of-discretion standard in the Seventh Appellate District); *State v. Clark*, Warren App. No. CA2008-09-113, 2009-Ohio-2101, at ¶7 (applying an abuse-of-discretion standard in the Twelfth Appellate District); *State v. Horner*, Lucas App. No. L-08-1125, 2009-Ohio-1815, at ¶13 (applying an abuse-of-discretion standard in the Sixth Appellate District); *State v. Appenzeller*, Lake App. No. 2007-L-175, 2008-Ohio-6982, at ¶¶17-19, 45 (applying an abuse-of-discretion standard in the Eleventh Appellate District); *State v. Williams*, Licking App. No. 08-CA-23, 2008-Ohio-6842, at ¶¶11, 23 (applying an abuse-of-discretion standard in the Fifth Appellate District); *State v. Howald*, Union App. No. 14-08-23, 2008-Ohio-5404, at ¶10-12 (applying an abuse-of-discretion standard in the Third Appellate District). Accordingly, a near statewide consensus has emerged that abuse of discretion is the proper standard for reviewing these types of cases.

{¶11} We choose to follow the majority of Ohio courts. Therefore, we will review this case, and future cases, under the abuse-of-discretion standard. An abuse of discretion is more than an error of judgment; "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} "The post-conviction relief statute, R.C. 2953.21, provides a remedy for a collateral attack upon judgments of conviction claimed to be void or voidable under the Constitutions of the United States or Ohio." *Bradford* at ¶7, citing *State*

v. Hatton (Aug. 4, 2000), Pickaway App. No. 00CA10. In order to prevail on a postconviction relief petition, the petitioner must establish that he has suffered an infringement or deprivation of his constitutional rights. See R.C. 2953.21(A)(1); *State v. Calhoun* (1999), 86 Ohio St.3d 279, 283.

{¶13} A criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. See *State v. Cole* (1982), 2 Ohio St.3d 112, 113; *State ex rel. Jackson v. McMonagle* (1993), 67 Ohio St.3d 450, 451. "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." R.C. 2953.21(C).

{¶14} Indeed, R.C. 2953.21(C) imposes a duty on the trial court to ensure that the petitioner adduces sufficient evidence to warrant a hearing. *Cole* at 113; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36, 38; *State v. Carpenter* (1996), 116 Ohio App.3d 292, 295. "The court may dismiss a petition for post-conviction relief without a hearing when the petitioner fails to submit evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief." *Bradford* at ¶10, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 111. See, also, *State v. Wright*, Washington App. No. 06CA18, 2006-Ohio-7100, at ¶20; *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 98.

{¶15} "[E]vidence supporting a petition for post-conviction relief must meet some threshold level of cogency that advances the petitioner's claim beyond mere hypothesis. The evidence must be genuinely relevant, and it must materially advance petitioner's claim that there has been a denial or infringement of his or her constitutional rights." *Wright* at ¶22 (internal citation omitted); *Bradford* at ¶11. Additionally, the court is free to assess whether the petitioner's evidence is credible. *Wright* at ¶23, citing *Calhoun* at 284; *Bradford* at ¶11.

{¶16} "At the outset, we note the doctrine of *res judicata* bars claims for post-conviction relief based on allegations which the petitioner raised, or could have raised, in the trial court or on direct appeal." *State v. Howard* (Aug. 11, 1997), Scioto App. No. 96CA2470, citing *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus. We believe that the trial court could have probably denied all of Hicks's claims on this basis alone. See *Howard*. Nevertheless, the trial court did not deny Hicks's petition on the grounds of res judicata (except as an alternate reason for denying two of Hicks's claims). "Therefore, we will review the dismissal of appellant's petition on the assumption that his claims were not barred by an application of this doctrine." Id.

{¶17} Here, we find that the trial court did not abuse its discretion by dismissing Hicks's petition for postconviction relief without a hearing. In *Hicks II*, we remanded Hicks's petition "to allow the trial court an opportunity to consider [certain] issues and develop a record." *Hicks II* at ¶12. However, on remand, the trial court could not develop a record because Hicks failed to produce any new evidence in support of his petition. Instead, Hicks argued that he needed the

assistance of an "attorney, investigator, handwriting examiner, and a linguist" to produce the necessary evidence. Because Hicks did not attach any evidence to his amended petition, he has failed to meet his burden under R.C. 2953.21(C). "For this reason alone, the trial court was warranted to dismiss [Hicks's] petition for post-conviction relief without a hearing." *State v. Thorpe*, Franklin App. No. 04AP-245, 2005-Ohio-893, at ¶10. See, also, *State v. Girt*, Stark App. No. 2002-CA-00174, 2002-Ohio-6407, at ¶16; *State v. Stoneburner* (Aug. 31, 1988), Allen App. No. 1-86-58 ("When the petitioner fails to submit an affidavit or other evidence to the trial court * * * the court is correct in denying an evidentiary hearing."). In other words, a petitioner who does not submit *any* evidence will have necessarily failed to submit enough evidence to demonstrate substantive grounds for relief.

{¶18} Accordingly, we overrule Hicks's first assignment of error.

III.

{¶19} In his second assignment of error, Hicks contends that the trial court erred by failing to rule on his various motions. "[M]otions that a trial court fails to explicitly rule upon are deemed denied once a court enters final judgment." *Savage v. Cody-Ziegler, Inc.*, Athens App. No. 06CA5, 2006-Ohio-2760, at ¶28. See, also, *In re Lewis* (Apr. 30, 1997), Athens App. Nos. 96CA1760 & 96CA1763. Therefore, we construe Hicks's second assignment of error in the following manner: that the trial court erred in *denying* Hicks's various motions.

{¶20} Initially, we must note a deficiency in the argument supporting Hicks's second assignment of error. Pursuant to App.R. 16(A)(7), "[t]he appellant shall

include in its brief, under the headings and in the order indicated, all of the following: * * * An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary." However, Hicks has cited no authority in support of his second assignment of error – not a single statute, case, or treatise.

{¶21} "'If an argument exists that can support [an] assignment of error, it is not this court's duty to root it out.'" *Thomas v. Harmon*, Lawrence App. No. 08CA17, 2009-Ohio-3299, at ¶14, quoting *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31. "'It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.'" *Catanzarite v. Boswell*, Summit App. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Therefore, "[w]e may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions." *Frye v. Holzer Clinic, Inc.*, Gallia App. No. 07CA4, 2008-Ohio-2194, at ¶12. See, also, App.R. 16(A)(7); App.R. 12(A)(2); *Albright v. Albright*, Lawrence App. No. 06CA35, 2007-Ohio-3709, at ¶16; *Tally v. Patrick*, Trumbull App. No. 2008-T-0072, 2009-Ohio-1831, at ¶21-22; *Jarvis v. Stone*, Summit App. No. 23904, 2008-Ohio-3313, at ¶23. However, in the interest of justice, we choose to address Hicks's second assignment of error. See, e.g., *Frye* at ¶12; *Albright* at ¶16.

A. Expert Assistance

{¶22} Hicks filed various motions regarding expert assistance. Specifically, Hicks sought funding for (1) a handwriting examiner, (2) a linguist, and (3) an investigator. However, "R.C. 2953.21 does not provide a right to funding or appointment of expert witnesses or assistance in a postconviction petition." *State v. Madison*, Franklin App. No. 08AP-246, 2008-Ohio-5223, at ¶16, citing *State v. Tolliver*, Franklin App. No. 04AP-591, 2005-Ohio-989, at ¶25. See, also, *State v. Smith* (Mar. 15, 2000), Lorain App. No. 98CA007169; *State v. Hooks* (Oct. 30, 1998), Montgomery App. Nos. CA 16978 & CA 17007. Therefore, "[w]ith exceptions not applicable here, it is not error for a court to deny a defendant's request for [expert assistance] in support of his or her petition for postconviction relief." *State v. Starks*, Lucas App. No. L-08-1221, 2009-Ohio-1125, at ¶38. See, also, *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841, at ¶29 ("A petitioner in a post conviction proceeding is not entitled to the appointment of an expert witness to assist in discovery."); *Tolliver* at ¶25; *Hooks*.

{¶23} Accordingly, we find that the trial court did not err by denying Hicks's various motions for expert assistance.

B. Appointment of Counsel

{¶24} Hicks also filed a motion requesting the appointment of counsel. "[A]n indigent petitioner has neither a state nor a federal constitutional right to be represented by an attorney in a postconviction proceeding." *State v. Crowder* (1991), 60 Ohio St.3d 151, 152, citing *Pennsylvania v. Finley* (1987), 481 U.S.

551. Moreover, “appointed counsel is not required for the initial burden of preparing and presenting petitions for post-conviction relief.” *State v. Barnes* (1982), 7 Ohio App.3d 83, 86. See, also, *State v. Sheets*, Athens App. No. 03CA24, 2005-Ohio-803, at ¶22; *State v. Johnson*, Cuyahoga App. No. 82632, 2003-Ohio-4954, at ¶37. However, a petitioner is entitled to “the appointment of counsel if two conditions are met. First, the trial court must determine whether the petitioner’s allegations warrant an evidentiary hearing. * * * Second, the public defender must assess whether [the] petitioner’s allegations have arguable merit.” *State v. Smith*, Richland App. No. 02CA67, 2003-Ohio-5592, at ¶27, citing *Crowder* at paragraphs one and two of the syllabus. See, also, R.C. 120.16(A)(1) and (D); *Sheets* at ¶22; *Johnson*; at ¶37.

{¶25} Here, we found that the trial court did not abuse its discretion by dismissing Hicks’s petition without a hearing. Therefore, Hicks was not entitled to counsel. See *Sheets* at ¶23; *State v. Palacios*, Franklin App. No. 08AP-669, 2009-Ohio-1187, at ¶28; *Smith*, 2003-Ohio-5592, at ¶27-28. Accordingly, we find that the trial court did not err by denying Hicks’s motion for the appointment of counsel.

{¶26} For the foregoing reasons, we overrule Hicks’s second assignment of error. Having overruled both of Hicks’s assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the 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 Highland County Court of Common Pleas 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. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error II; Concurs in Judgment Only as to Assignment of Error I.

For the Court

BY: ____________________________
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.