**[Cite as *State v. Patel*, 2009-Ohio-3184.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| STATE OF OHIO<br><br>Appellee<br><br>v.<br><br>CHETANKUMAR PRAVIN PATEL<br><br>Appellant | C.A. No. 24645<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CR 2005 09 3493(C) |

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

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WHITMORE, Judge.

**{¶1}** Defendant-Appellant, Chetankumar Pravin Patel, appeals from the denial of his petition for post-conviction relief ("PCR") in the Summit County Court of Common Pleas. This Court affirms.

I

**{¶2}** In 2007, Patel was convicted of aggravated murder, tampering with the evidence, and abuse of a corpse for his role in the murder of his wife, Sejal. Sejal's body was found in the rear cargo compartment of Patel's Mercedes Benz one day after Patel had reported his wife missing. This Court affirmed Patel's convictions on September 17, 2008. *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693. During the pendency of his appeal, Patel filed a PCR petition. The trial court denied Patel's petition without a hearing on January 28, 2009. Patel now appeals from the trial court's denial of his petition and raises three assignments of error for our review. For ease of analysis, we consolidate two of the assignments of error.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT'S SIXTH AMENDMENT RIGHT BY NOT FINDING COUNSEL INEFFECTIVE FOR INTERFERING WITH HIS UNDERSTANDING AND RIGHT TO TESTIFY AND ABUSED ITS DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING."

**{¶3}** In his first assignment of error, Patel argues that the trial court erred by not finding his counsel ineffective for interfering with his right to testify in his own defense. Specifically, Patel argues that his counsel never advised him of his right to testify and decided, without his informed consent, that he would not testify.

**{¶4}** This Court reviews a trial court's denial of a PCR petition for an abuse of discretion. *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, at ¶11. An abuse of discretion is more than an error of judgment; rather it necessitates a finding that the trial court was unreasonable, arbitrary or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶5}** The statute governing a PCR petition permits:

> "Any person who has been convicted of a criminal offense *** 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 *** [to] 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." R.C. 2953.21(A)(1)(a).

A petitioner who asserts an ineffective assistance of counsel claim has the burden of meeting the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668. *State v. Gorospe*, 9th Dist. No. 24111, 2008-Ohio-6435, at ¶8. That is, he must show that: (1) counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To demonstrate prejudice, a petitioner must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Furthermore, this Court need not address both *Strickland* prongs if a petitioner fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

**{¶6}** In denying Patel's PCR petition, the trial court determined that Patel failed to demonstrate that his counsel's advice that he not testify was anything more than a trial tactic. The trial court correctly noted that a trial attorney makes a strategic decision when he advises his client not to testify. Indeed, this Court has held that "[t]he advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance." (Internal quotations and citations omitted.) *State v. Nesbit*, 9th Dist. No. 05CA0021, 2006-Ohio-921, at ¶9. In his affidavit in support of his petition, Patel asserted that his attorneys advised him not to testify and that he accepted their advice because he had no legal experience and did not feel that he could reject their recommendations. Patel did not aver, however, that he was unaware of his right to testify. Moreover, Patel's trial was consolidated with the trial of his mother, Minaxiben Pravinbhai Patel, who was on trial for the same murder and who testified in her own defense. Accordingly, the record supports the conclusion that Patel was aware that he had a right to testify, but was simply advised not to do so. Trial counsel's advice that Patel not testify falls

within the realm of trial tactics and does not support a claim of ineffective assistance of counsel. Id.

**{¶7}** To the extent that Patel's captioned assignment of error challenges the trial court's failure to hold an evidentiary hearing with regard to this ineffective assistance claim, we note that Patel has not addressed this alleged failure in the body of his argument. An appellant bears the burden of providing this Court with an argument on appeal and supporting that argument with citations to the record and applicable legal authority. App.R. 16(A)(7). Because Patel has not done so, we need not address this issue. Accordingly, Patel's first assignment of error is overruled.

Assignment of Error Number Two

> "DEFENDANT-APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND INTERVIEW TWO POTENTIAL WITNESSES FAVORABLE TO HIS DEFENSE AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING."

Assignment of Error Number Three

> "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING AND ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN THE COURT MADE A BLANKET ASSESSMENT REGARDING THE CREDIBILITY OF TWO POTENTIAL WITNESSES FOR THE DEFENSE."

**{¶8}** In his second assignment of error, Patel argues that the trial court erred by not finding his counsel ineffective for failing to investigate two potential witnesses and by not holding an evidentiary hearing as to this claim. In his third assignment of error, Patel further argues that the trial court erred by concluding, without an evidentiary hearing, that the testimony of his potential witnesses would not have changed the outcome of his trial. We disagree.

**{¶9}** We incorporate the standard of review set forth in Patel's first assignment of error. "In reviewing affidavits submitted in support of a [PCR] petition, a trial court may use its discretion in deciding whether to accept the statements as true." *State v. Rayl*, 9th Dist. No. 22496, 2005-Ohio-4263, at ¶10, citing *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284. In determining the credibility of the submitted affidavits, the trial court should consider the following factors:

> "(1) whether the judge reviewing the [PCR] petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial." *Calhoun*, 86 Ohio St.3d at 285.

Furthermore, this Court has repeatedly held that "[d]ecisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics." *State v. Pordash*, 9th Dist. No. 05CA008673, 2005-Ohio-4252, at ¶21, quoting *State v. Ambrosio*, 9th Dist. No. 03CA008387, 2004-Ohio-5552, at ¶10.

**{¶10}** This Court also reviews a trial court's decision not to hold a hearing on a [PCR] petition for an abuse of discretion. *State v. Clutter*, 9th Dist. No. 24096, 2008-Ohio-3954, at ¶8. Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore*, 5 Ohio St.3d at 219. "A hearing is not automatically required for every [PCR] petition[.]" *State v. Houser*, 9th Dist. No. 21555, 2003-Ohio-6811, at ¶15. "The trial court must first find substantive grounds for relief before a hearing is granted." Id. A petitioner bears "the initial burden of providing evidence of sufficient operative facts to demonstrate a cognizable claim of a constitutional error." *State v. Smith*, 9th Dist. No. 24382, 2009-Ohio-1497, at ¶8.

**{¶11}** Patel argues that his trial counsel was ineffective because he failed to investigate two potential witnesses, Meghna and Rasik. In support of Patel's PCR petition, Patel's father submitted an affidavit, which provided, in relevant part, as follows:

> "2. During the trial Vijay Patel testified that Chetan had paid him $10,000 for his role in a conspiracy to kill Sejal Patel and from those proceeds he paid $4,000 to 'Meghna' and $2,000 to 'Rasik';
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> "3. After the trial, and at the request of Attorney James L. Burdon, I contacted both in New Jersey;
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> "4. Each told me that they had not been paid money by Vijay Patel and further said they had never heard from Chetan's attorneys[.]"

In his own affidavit, Patel averred that he asked his attorney during trial to contact Meghna and Rasik because they "would confirm that Vijay Patel had lied under oath." The foregoing affidavits were the only evidence that Patel relied upon in support of his argument.

**{¶12}** The trial court rejected Patel's argument that his counsel was ineffective for failing to investigate because the only evidence that Patel submitted was hearsay and because "it is only speculation to assume that the testimony of these individuals would have changed the outcome of [Patel's] trial." Patel does not address the trial court's conclusion that his evidence amounted to hearsay, but argues that the trial court erred in rejecting his claim because Vijay's testimony was "the only substantive evidence upon which the [S]tate rest[ed] its prosecution[.]" On direct appeal, however, this Court specifically rejected Patel's argument that his convictions should be reversed because they rested solely upon the testimony of Vijay and Rupal, Vijay's roommate and Patel's lover. *Patel* at ¶55-56 (listing evidence, other than Vijay's and Rupal's testimony, that supported Patel's convictions). Accordingly, Patel's argument that Vijay's testimony was the "only substantive evidence" in the State's favor at trial lacks merit. The trial judge, who also presided at Patel's trial, had the discretion to reject Patel's affidavit evidence on the basis that it was hearsay. *Calhoun*, 86 Ohio St.3d at 285. Moreover, it was within the

discretion of Patel's trial counsel to decide whether to investigate and call potential witnesses. *Pordash* at ¶21. Patel has done nothing but speculate as to the potential value of having additional testimony. As such, the trial court did not err in rejecting Patel's ineffective assistance argument. *State v. Leyland*, 9th Dist. Nos. 23833 & 23900, 2008-Ohio-777, at ¶7 ("Speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel.").

**{¶13}** Because Patel did not set forth "sufficient operative facts to demonstrate a cognizable claim of a constitutional error," the trial court also did not err in denying his petition without holding a hearing. *Smith* at ¶8. Patel's second and third assignments of error are overruled.

III

**{¶14}** Patel's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
SLABY, J.
CONCUR

APPEARANCES:

CHETANKUMAR PRAVIN PATEL, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.