

[Cite as *State v. Stafford*, 2009-Ohio-5167.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

DAMIEN STAFFORD

Appellant

C. A. No. 24674

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. CR 2007-08-2834(A)
 CR 2007-05-1466
 CR 2006-10-3743(B)

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Damien Stafford, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 6, 2007, Stafford was indicted for the August 18, 2007 robbery of Terrance Owens. Ronald Lewis was also arrested and charged with the robbery. Stafford was charged with one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), with a firearm specification, in violation of R.C. 2941.145, and one count of robbery, in violation of R.C. 2911.02(A)(1)/(2), with a firearm specification, in violation of R.C. 2941.145. On October 2, 2007, a supplemental indictment was filed, charging Stafford with one count of criminal gang activity, in violation of R.C. 2923.42(A), and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(2)/(A)(3). On October 26, 2007, another

supplemental indictment was filed, charging Stafford with one count of criminal gang activity, in violation of R.C. 2923.42(A). Stafford pled not guilty to the charges in the indictment.

{¶3} Prior to trial, the trial court dismissed the robbery count and the October 2, 2007 count of criminal gang activity. The case proceeded to a jury trial, and on January 18, 2008, the jury found Stafford guilty of aggravated robbery with a firearm specification, having weapons while under disability, and criminal gang activity. On February 22, 2008, the trial court sentenced Stafford to eight years of incarceration. Stafford timely appealed the verdict and sentence, and on February 18, 2009, this Court affirmed the trial court’s decision. On January 13, 2009, during the pendency of his appeal, Stafford filed a timely petition for post-conviction relief, arguing in pertinent part, that his trial counsel was ineffective for failing to call Ronald Lewis to testify at trial. The trial court denied the petition for post-conviction relief without holding a hearing. Stafford timely appealed from this order, and has raised one assignment of error for our review.

II

ASSIGNMENT OF ERROR

“REMAND WAS REQUIRED TO PROVIDE [STAFFORD] AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF.”

{¶4} In his sole assignment of error, Stafford contends that the trial court erred when it denied his petition for post-conviction relief without holding a hearing. We do not agree.

{¶5} This Court reviews a trial court’s decision not to hold a hearing on a petition for post-conviction relief for an abuse of discretion. *State v. Houser*, 9th Dist. No. 21555, 2003-Ohio-6811, at ¶12. Abuse of discretion requires more than simply an error in judgment; it

implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} Pursuant to R.C. 2953.21(E), a trial court is required to hold a hearing regarding a petition for post-conviction relief “[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief[.]” See, also, *State v. Jackson* (1980), 64 Ohio St.2d 107. We have explained that “[a] hearing is not automatically required for every petition for post-conviction relief.” *State v. Sales*, 9th Dist. No. 23498, 2007-Ohio-4136, at ¶7. Rather, “the pivotal concern is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavit and the files and records of this cause.” *Jackson*, supra, at 110. Stafford bore 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.” *Id.* at syllabus. “General conclusory allegations as to counsel’s ineffectiveness or broad assertions are inadequate as a matter of law to warrant an evidentiary hearing or support a finding of post-conviction relief.” (Internal citations and quotations omitted.) *Sales*, supra, at ¶7. Stafford’s argument on appeal focuses on his contention that his trial counsel was ineffective for failing to call Lewis to testify at his trial. Therefore, we will limit our discussion to this specific argument.

{¶7} To show ineffective assistance of counsel, Stafford was required to satisfy a two prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he was required to show that his trial counsel engaged in a “substantial violation of any *** essential duties to his client.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he was required to show that his trial counsel’s ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397.

Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. We may “analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice.” *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶ 37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83 (overruled on other grounds).

{¶8} Stafford failed to submit evidentiary documents that contained sufficient operative facts to demonstrate that he was prejudiced by his counsel’s alleged ineffectiveness. Stafford contends that his counsel should have called Lewis to testify. However, Lewis stated in his affidavit that his counsel advised him that it would not be in his best interest to testify on Stafford’s behalf. Therefore, a claim that Lewis would have testified on his behalf is speculative and does not support his claim of prejudice. See *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, at ¶132. Accordingly, the trial court’s conclusion that Stafford failed to show substantive grounds for relief that would necessitate a hearing was not an abuse of discretion.

{¶9} Stafford’s assignment of error is overruled.

III.

{¶10} The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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.

CARLA MOORE
FOR THE COURT

BELFANCE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶1} I agree with the majority’s statement in paragraph six that, under Section 2953.21(E) of the Ohio Revised Code, a trial court is required to hold a hearing on a petition for post-conviction relief “[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief[.]” Whether “the petition and the files and records of the case show the petitioner is not entitled to relief” is a question of law. “[T]he Ohio Supreme Court has held that “[w]hen a court’s judgment is based on an [arguably] erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.” *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶ 4 (quoting *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶ 13). I, therefore, disagree with the statement in paragraph five that

this court reviews a trial court's decision of whether to hold a hearing on a petition for post-conviction relief "for an abuse of discretion." We review that decision de novo. Applying that standard, I agree that the trial court's decision should be affirmed.

APPEARANCES:

DAMIEN STAFFORD, pro se, Appellant.

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