

[Cite as *State v. Carr*, 2010-Ohio-3442.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23445
vs.	:	T.C. CASE NO. 05CR3133/1
JAMES C. CARR, JR.	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 23rd day of July, 2010.

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Attorneys for Plaintiff-Appellee

James C. Carr, Jr., #A568-610, Southern Ohio Correctional Inst., P.O. Box 45699, Lucasville, OH 45699
Defendant-Appellant, Pro Se

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GRADY, J.:

{¶ 1} Defendant, James Carr, appealed from his convictions following a jury trial of the offenses of aggravated murder, aggravated robbery, kidnapping, and having weapons while under a disability, and the sentences imposed for those offenses pursuant to law. We affirmed Defendant's convictions and sentences on

direct appeal. *State v. Carr*, Montgomery App. No. 22603, 2009-Ohio-1942.

{¶ 2} Defendant filed an R.C. 2953.21 petition for post-conviction relief while his direct appeal was pending. Defendant claimed ineffective assistance of counsel as grounds for relief. On April 30, 2009, the trial court granted the State's motion to dismiss/motion for summary judgment, finding that Defendant's ineffective assistance of counsel claim is barred by res judicata. Defendant filed a notice of appeal to this court.

FIRST ASSIGNMENT OF ERROR

{¶ 3} "INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO EXECUTE BASIC AND FUNDAMENTAL ACTS ENCOMPASSED WITH THE MINIMAL SCOPE OF ENSURING APPELLANT WAS ENTITLED TO A FAIR TRIAL AND DUE PROCESS OF LAW."

{¶ 4} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arose from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different.

Id.; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

{¶5} Defendant argued in his petition that his trial counsel was ineffective for failing to file a motion prior to trial asking the court to exclude the deposition testimony of Matthew Fairman because Fairman's testimony was unreliable, and by failing to adequately challenge inconsistencies in Fairman's testimony.

{¶6} In *State v. Perry* (1967), 10 Ohio St.2d 175, the Ohio Supreme Court stated in the syllabus:

{¶7} "8. The Supreme Court of Ohio will apply the doctrine of res judicata in determining whether post-conviction relief should be given under Section 2953.21 et seq., Revised Code.

{¶8} "9. 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 of conviction, or on an appeal from that judgment."

{¶9} The particular defects in counsel's performance Defendant argued as a basis for post-conviction relief could have been raised by Defendant in his direct appeal on a claim of

ineffective assistance of counsel. They were not raised. Therefore, the trial court correctly held that Defendant's claim is barred by res judicata as grounds for post-conviction relief. *Perry*.

{¶ 10} In any event, Defendant's claim of ineffective assistance lacked merit. Motions concerning evidentiary issues that are not capable of determination without a trial of the general issue, which include the credibility of a testifying witness, may not be filed prior to trial. Crim.R. 12(C). The trial court properly denied a pretrial motion challenging Fairman's testimony that was filed by a co-defendant. And, Defendant's counsel in his closing argument attacked inconsistencies in Fairman's deposition testimony. Neither a defect nor prejudice is shown.

{¶ 11} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 12} "INEFFECTIVE ASSISTANCE OF COUNSEL BY SQUANDERING APPELLANT'S SIXTH AMENDMENT RIGHT TO THE U.S. CONSTITUTION TO EFFECTIVE CROSS-EXAMINATION OF ADVERSE WITNESS AGAINST HIM."

THIRD ASSIGNMENT OF ERROR

{¶ 13} "INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE SUBSTANTIAL AND KEY MOTION TO HAVE VIDEOTAPE PLAYED OF DEPOSITION TESTIMONY IN PLACE OF A READING OF A DEPOSITION TESTIMONY TRANSCRIPT."

{¶ 14} These particular grounds for his claim of ineffective assistance were not presented in the R.C. 2953.21 petition Defendant filed. They may not be raised for the first time on appeal. *State v. Slagle* (1992), 65 Ohio St.3d 597.

{¶ 15} The second and third assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FROELICH, J., concur.

Copies mailed to:

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Hon. Michael T. Hall