

[Cite as *State v. Wood*, 2018-Ohio-3204.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2018-CA-1
	:	
v.	:	Trial Court Case Nos. 2016-CR-143 &
	:	2016-CR-144
MICHAEL A. WOOD	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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OPINION

Rendered on the 10th day of August, 2018.

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FROELICH, J.

{¶ 1} Michael A. Wood appeals from a judgment of the Clark County Court of Common Pleas, which denied his petition for postconviction relief without a hearing. For the following reasons, the judgment of the trial court will be affirmed.

Procedural History

{¶ 2} In each of two cases tried together, a jury found Wood guilty of two counts of operating a vehicle while under the influence of alcohol or drugs (“OVI”), in violation of R.C. 4511.19(A)(1)(a) and (A)(2). (Clark C.P. Nos. 16 CR 143 and 16 CR 144). The jury also found in each case that Wood had been convicted of five prior OVI offenses within the previous 20 years. In each case, the trial court merged the two OVI counts, sentenced Wood to 24 months in prison for OVI, with an additional one year on the prior convictions specification, to be served consecutively, fined Wood \$2,500, and suspended Wood’s driving privileges for 10 years. The trial court’s judgments do not specify whether the sentences in the two cases were to run concurrently or consecutively, but the judge stated at the sentencing hearing that they were to run concurrently, as is the presumption under R.C. 2929.41(A).

{¶ 3} Wood pursued a direct appeal from those 2016 convictions. *State v. Wood*, 2d Dist. Clark No. 2016-CA-69, 2018-Ohio-875. His five assignments of error included a challenge to the admissibility of evidence of two of Wood’s five prior OVI convictions, as well as a claim that his trial counsel provided ineffective assistance with respect to the evidence of those two prior convictions. *Id.* at ¶ 28, ¶ 43. Specifically, Wood argued that two of his prior OVI convictions were “uncounseled” and “unconstitutional,” and should not have been used to enhance the degree of his 2016 OVI offenses. *Id.* at ¶ 28. He also

contended that he was denied the effective assistance of counsel by his attorney's failure to file a motion in limine relative to Wood's uncounseled prior convictions, failure to investigate and present evidence about the circumstances of those prior convictions, and failure to stipulate to Wood's prior convictions instead of allowing the State to admit evidence of those convictions. *Id.* at ¶ 43.

{¶ 4} This Court overruled all assignments of error, finding, among other things, that Wood failed to present evidence to support the purported unconstitutionality of his prior pleas to OVI offenses or to show that the performance of his attorney was constitutionally deficient. *Id.* at ¶ 29, ¶ 54. The Court affirmed the judgments of the trial court. *Id.* at ¶ 71.

{¶ 5} On April 27, 2017, while his direct appeal remained pending, Wood filed a petition for postconviction relief in the trial court, asserting that his trial attorney's failure "to make a *prima facie* showing that [Wood's] 2001¹ and 2007 convictions for [OVI] were uncounseled" resulted in a denial of Wood's Sixth Amendment right to effective assistance of counsel. In support of his petition, Wood offered an unsworn "Affidavit of Varsity" [sic], asserting that his 2001 and 2007 convictions for OVI "were uncounseled, resulted in imprisonment and counsel was not validly waived." He also attached unauthenticated copies of what purport to be records of the Clark County Municipal Court regarding Wood's five prior OVI convictions.

{¶ 6} The trial court denied Wood's petition for postconviction relief by order entered on November 30, 2017. (Clark C.P. Nos. 16 CR 143 and 16 CR 144). The trial

¹ Wood's petition as originally filed raised an objection to his attorney's conduct as to Wood's 2007 and 2008 OVI convictions, but his amended petition filed on May 3, 2017 indicates that the "uncounseled" convictions instead were those of 2001 and 2007, in Clark County Municipal Court Case Nos. 117088 and 700132.

court determined that the unsworn “affidavit” and “partial unofficial records of the Clark County Municipal Court” advanced by Woods were insufficient to show “that evidence used by the [S]tate included convictions that were uncounseled and which were the result of pleas that were not knowingly, intelligently, and voluntarily entered into by [Wood].” Given that lack of evidence, the court found “no basis” to conclude that the performance of Wood’s trial attorney fell below an objective standard of reasonable representation.

{¶ 7} The matter now is before this Court on Wood’s appeal from the trial court’s denial of his petition for postconviction relief, which identifies three assignments of error.

Standard of Review

{¶ 8} A post-conviction proceeding is not an appeal from a criminal conviction; rather, it is a “civil collateral attack on a criminal judgment.” *State v. Wells*, 2d Dist. Montgomery No. 22389, 2008-Ohio-4932, ¶ 11, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). We review a denial of a petition for postconviction relief for which no hearing was held under an abuse of discretion standard. *State v. Harden*, 2d Dist. Montgomery 23617, 2010-Ohio-3343, ¶ 10, citing *State v. Hicks*, 4th Dist. Highland No. 09CA15, 2010-Ohio-89, ¶ 10 (surveying other Ohio courts). An abuse of discretion occurs when the trial court’s decision is unreasonable, arbitrary, or unconscionable. *State v. Turner*, 2d Dist. Montgomery No. 27350, 2017-Ohio-4101, ¶ 5, citing *State v. Jenkins*, 2d Dist. Montgomery No. 27173, 2017-Ohio-1073, ¶ 10.

{¶ 9} R.C. 2953.21(D) provides that, before granting a hearing on a petition for postconviction relief, the trial court shall determine whether there are substantive grounds for relief. A petitioner in a postconviction relief proceeding bears the initial burden of submitting evidentiary documents with sufficient facts to demonstrate a constitutional

deprivation, such as ineffective assistance of counsel, that would merit a hearing. *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980). Broad conclusory allegations are insufficient, as a matter of law, to require a hearing. *Id.* A petition for postconviction relief properly may be denied without a hearing where the petition, its supporting evidence, and the record “do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *Calhoun*, 86 Ohio St.3d at 291.

Timeliness

{¶ 10} Pursuant to R.C. 2953.21(A)(2), Wood was required to file a petition for postconviction relief “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication * * *.” In this case, Wood’s petition for postconviction relief was filed on April 27, 2017, even before the transcript was filed in his direct appeal on May 16, 2017. Thus, Wood’s petition was timely filed in accordance with R.C. 2953.21(A)(2)’s requirements.

Evidence of Prior Convictions

{¶ 11} In his first assignment of error, Wood contends that his 2001 and 2007 convictions for OVI were “unconstitutionally infirm” because they occurred without the benefit of counsel or a valid waiver of the right to counsel. As a result, he maintains that the use of those two prior convictions to enhance the degree of his 2016 OVI offenses violated the United States and Ohio Constitutions.

{¶ 12} Although this Court previously rejected Wood’s similar argument on direct appeal, that result was premised on the 2016 trial record’s silence regarding the circumstances of Wood’s prior OVI convictions. See *Wood*, 2d Dist. Clark No.

2016-CA-69, 2018-Ohio-875, at ¶ 31-34. A petition for postconviction relief, however, “is a means by which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner’s criminal conviction.” *State v. Clark*, 2017-Ohio-120, 80 N.E.3d 1251, ¶ 14 (2d Dist.), quoting *State v. Monroe*, 2015-Ohio-844, 29 N.E.3d 391, ¶ 37 (10th Dist.). As Wood’s petition for postconviction relief represents Wood’s first opportunity to present this Court with evidence about the purportedly “uncounseled” nature of his prior OVI convictions, the doctrine of *res judicata* does not preclude Wood from now challenging his 2016 convictions on that basis. See *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982) (introduction on petition for postconviction relief of evidence dehors the record suffices “at least to avoid dismissal on the basis of *res judicata*”).

{¶ 13} Nevertheless, we conclude that Wood still has failed to present cognizable evidence to show that his prior OVI convictions were constitutionally deficient. In considering the same issue on Wood’s direct appeal, this Court articulated the applicable standard as follows:

“Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity.” With respect to “uncounseled” pleas, we presume that the trial court in the prior convictions proceeded constitutionally until a defendant introduces evidence to the contrary. Thus, we conclude that for purposes of

penalty enhancement in later convictions under R.C. 4511.19, after the defendant presents a prima facie showing that the prior convictions were unconstitutional because the defendant had not been represented by counsel and had not validly waived the right to counsel and that the prior convictions had resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

Wood at ¶ 29, quoting *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, 903 N.E.2d 618, ¶ 6, quoting *State v. Brandon*, 45 Ohio St.3d 85, 543 N.E.2d 501 (1989), syllabus.

{¶ 14} The statute that governs postconviction relief permits a petitioner to “file a supporting affidavit and other documentary evidence in support of the claim for relief.” R.C. 2953.21(A)(1)(a). As the trial court accurately recounted in deciding *Wood*’s petition for postconviction relief, *Wood* offered two types of documents in support of his petition. The first was a document bearing *Wood*’s signature and titled “Affidavit of Varsity” [sic], which consisted of a typed statement that has not been confirmed by an oath or affirmation before a notary public or other officer authorized to administer such. The second consisted of five pages that appeared to be printouts of Clark County Municipal Court records from five different cases in which *Wood* appeared as a defendant, to which some unattributed handwritten notes had been added. Neither was a cognizable form of evidence.

{¶ 15} According to the Ohio Supreme Court, “[a]n affidavit must appear, on its face, to have been taken before the proper officer and in compliance with all legal requisites. A paper purporting to be an affidavit, but not to have been sworn to before an

officer, is not an affidavit.” *In re Disqualification of Pokorny*, 74 Ohio St.3d 1238, 657 N.E.2d 1345 (1992) (citation omitted). Because Wood’s purported “affidavit” contained no such indicia of reliability, it in fact was *not* an affidavit, and is not proper evidence to be considered by this Court.

{¶ 16} Similarly, the unauthenticated copies of court records attached to Wood’s “affidavit” did not comport with Evid.R. 901. “[I]t is well settled that unauthenticated documents which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value.” *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, ¶ 25 (7th Dist.), citing *Citizens Ins. Co. v. Burkes*, 56 Ohio App.2d 88, 95-96, 381 N.E.2d 963 (8th Dist.1978); *Sparks v. Erie Cty. Bd. of Comms.*, 6th Dist. Erie No. E-97-007, 1998 WL 15929 (Jan. 16, 1998).

{¶ 17} Even if the trial court had considered the unauthenticated copies that Wood produced, however, those copies at most showed that Clark County Municipal Court records reflect no attorney appearing on Wood’s behalf in Case Nos. 1-17088, 7-00132, or 12-14318. Such documents offer nothing regarding the effectiveness of Wood’s waiver of the right to counsel in any of those cases. Therefore, although the State admits that Clark County Municipal Court Case Nos. “1214318,” “700132” and “11708” were among the prior OVI convictions on which it relied to charge Wood with felony OVI in the 2016 cases (see Brief of Appellee, the State of Ohio, pp. 2-3), that admission was not enough to satisfy Wood’s evidentiary burden.²

{¶ 18} Given the absence of cognizable evidence to demonstrate the

² As we stated in *Wood*, 2d Dist. Clark No. 2016-CA-69, 2018-Ohio-875, ¶ 29 (and at ¶ 13 above), the defendant bears the burden of showing both that he was unrepresented and that he had not validly waived his right to counsel.

constitutional deficiency of any of Wood's five prior OVI convictions used to enhance the conviction under review, his first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 19} Wood's second assignment of error argues that he was denied the effective assistance of counsel due to his trial attorney's failure to investigate Wood's prior OVI convictions and prevent the use of two uncounseled prior convictions to elevate Wood's 2016 offenses to felonies. A two-step process applies to evaluate allegations of ineffective assistance of counsel:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”

State v. Calhoun, 86 Ohio St. 3d 279, 289–90, 714 N.E.2d 905, 914–15 (1999), quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 20} The petitioner has the burden of proof on the issue of ineffective assistance of counsel, as licensed attorneys in Ohio are presumed to be competent. *Id.*, citing *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 209 N.E.2d 164 (1965), *State v. Jackson*, 64 Ohio St.2d 107, 110–111, 413 N.E.2d 819 (1980). A postconviction claim of ineffective assistance of counsel may be dismissed without a hearing when the record demonstrates that the petitioner has failed to submit evidentiary documents containing sufficient

operative facts to substantiate that claim. *Id.*, citing *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983).

{¶ 21} Here, Wood’s failure to produce cognizable evidence regarding his prior convictions was fatal to his ineffective assistance of counsel claim. For that reason, Wood’s second assignment of error is overruled.

Denial of Evidentiary Hearing

{¶ 22} Finally, Wood’s third assignment of error contends that the trial court abused its discretion and violated his constitutional rights by denying his petition for postconviction relief without holding an evidentiary hearing. Ohio’s postconviction relief statute provides that “[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.” R.C. 2953.21(F). Before granting such a hearing, “the court shall determine whether there are substantive grounds for relief” by considering, “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(D).

{¶ 23} Under those provisions, “a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing.” *Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905. Rather, the court first is to decide “whether there are grounds to believe 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.’ ” *Id.* at 283, quoting R.C.

2953.21(A)(1). Thus, in order to be entitled to a hearing, Wood bore the initial burden to provide evidentiary materials containing sufficient operative facts to demonstrate a claim of constitutional error. *Kapper*, 5 Ohio St.3d 36, 38-39, 448 N.E.2d 823.

{¶ 24} Here, where Wood presented no evidence capable of supporting his claim of a constitutional infringement, the trial court properly could deny his petition for postconviction relief without first affording him a hearing. See R.C. 2953.21(D), (F). Wood's third assignment of error therefore is overruled.

Conclusion

{¶ 25} The judgment of the trial court will be affirmed.

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HALL, J. and TUCKER, J., concur.

Copies mailed to:

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