

[Cite as *State v. West*, 2009-Ohio-3347.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 JE 26
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
TIMOTHY WEST	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Jefferson County,  
Ohio  
Case No. 05 CR 58

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee: Atty. Thomas R. Straus  
Prosecuting Attorney  
Atty. Frank J. Bruzzese  
Assistant Prosecuting Attorney  
Jefferson County Justice Center  
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Steubenville, Ohio 43952

For Defendant-Appellant: Atty. Timothy Young  
Ohio Public Defender  
Atty. Jeremy J. Masters  
Assistant State Public Defender  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215

JUDGES:  
Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: June 30, 2009

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WAITE, J.

{¶1} Appellant Timothy West filed a petition for postconviction relief in the Jefferson County Court of Common Pleas that was denied without a hearing. In Appellant's petition he argued that he received ineffective assistance of trial counsel when he was tried and convicted on six counts of rape of a child under 13 years old. Appellant filed a direct appeal of his conviction and sentence. The conviction was upheld but the matter was remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. See *State v. West*, 7th Dist. No. 05 JE 57, 2007-Ohio-5240. Appellant was resentenced and once again was given a sixty-year prison term. That sentence was upheld on appeal. *State v. West*, 7th Dist. No. 07-JE-52, 2008-Ohio-3248.

{¶2} The trial court acted within its discretion in denying the petition for postconviction relief. Appellant's petition was very narrowly focused on one specific incidence of alleged ineffective assistance. Appellant argued that his trial counsel should have tried more vigorously to obtain discovery of any records that were kept by the Jefferson County Children Services Board (hereinafter "JCCSB") regarding prior allegations of sexual misconduct involving the victim or other minors in the family. Counsel did try to obtain such records during discovery, but no records were found after a search was completed by the prosecutor's office. Appellant contends that his counsel should have demanded an in camera search of the records by the trial judge.

{¶3} As the state points out, Appellant failed to raise this issue in his direct appeal, and thus, the argument is barred by res judicata. Appellant is basically

challenging his counsel's trial tactics, even though trial tactics are not a basis for a claim of ineffective assistance of counsel. Further, Appellant wants to obtain privileged records from a children services agency simply to challenge the general credibility of a number of witnesses. This is not a permissible use of such records. *State v. Hart* (1988), 57 Ohio App.3d 4, 7, 566 N.E.2d 174. Based on principles of res judicata and on Appellant's failure to cite any legal basis for relief, the trial court was within its discretion to deny Appellant's petition for postconviction relief. The judgment of the trial court is affirmed.

#### History of the Case

{¶14} Appellant was indicted on May 4, 2005. He was charged with six counts of rape of a minor less than 13 years old, R.C. 2907.02(A)(1)(b). The crimes were first degree felonies. The victim was "B.D.," born 7/26/91. B.D.'s mother is Dee Dee McGhee, who was involved in a romantic relationship with Appellant when the crimes occurred. Appellant was also charged with a seventh count of rape regarding B.D.'s younger sister, A.H. That count was severed into a separate proceeding and is not at issue in this appeal.

{¶15} On August 9, 2005, Appellant filed a discovery motion for release of records from JCCSB and for an in camera inspection of prior reports made by Dee Dee McGhee where she alleged any sexual misconduct involving her children. The state opposed the motion, and the matter proceeded to oral hearing. During the hearing, defense counsel agreed to narrow the inquiry to JCCSB records pertaining to prior allegations made by the victim rather than those made by her mother. The

trial judge stated at the hearing that any JCCSB records pertaining to Dee Dee McGhee's past were irrelevant to the case and were privileged.

{¶16} On September 22, 2005, an agreed journal entry was filed directing the prosecutor to determine if JCCSB had any records in which B.D. or A.H. made prior accusations of sexual misconduct against a person other than the defendant, and in which that accused person was later exonerated. There was no request for an in camera review of JCCSB's records. The prosecutor found no records which met the agreed upon parameters, and no JCCSB records were turned over to defense counsel.

{¶17} The matter went to jury trial. The state called the victim to testify, and she recounted in detail at least six counts of rape. She testified that Appellant threatened to beat her unless she submitted to the sexual acts, which included oral and anal sex. She described, step by step, what occurred during each rape. Her testimony was corroborated by testimony from her younger brother and by testimony of a friend of the victim. The state also called an expert witness, Dr. Stephen Mascio, to testify about physical evidence of rape. The state did not call Ms. McGhee as a witness.

{¶18} Appellant called Dee Dee McGhee to testify, as well as a medical expert, Dr. Lawrence Rosenburg. Appellant also testified in his own defense.

{¶19} The jury found Appellant guilty on all six counts and rape. He was sentenced to ten years in prison on each count to be served consecutively.

{¶10} Appellant filed a direct appeal of his conviction. In that appeal he raised errors with regard to the indictment, lack of due process, the competency of the child witnesses, ineffective assistance of counsel (including 11 sub-errors), prosecutorial misconduct, insufficiency of the evidence, and a sentencing error based on *State v. Foster*, supra. We upheld Appellant's conviction, but remanded the case for resentencing pursuant to *Foster*.

{¶11} Appellant was resentenced to the same 60-year prison term, and the sentence was upheld on appeal.

{¶12} On September 18, 2006, Appellant filed a petition for postconviction relief with the trial court, alleging ineffective assistance of counsel. Appellant attached an affidavit to the petition signed by Clay Norris. The affidavit alleged that someone had falsely accused him of sexual misconduct and that JCCSB had records of these allegations. Appellant filed a motion for in camera inspection of JCCSB records at the same time that he filed his petition for postconviction relief. Appellee responded by filing a motion for summary judgment. The court denied the motion for inspection of records and overruled the petition for postconviction relief without a hearing. This timely appeal followed. Appellant's three assignments of error will be treated out of order for ease in analysis.

Assignment of Error No. 2

{¶13} "The trial court erred in overruling Timothy West's motion for an in camera inspection of records."

{¶14} Appellant filed a motion for in camera inspection of JCCSB records at the same time that he filed his petition for postconviction relief. He contends that he has a right to engage in discovery of new evidence that might tend to impeach the state's witnesses. He contends that the affidavit of Mr. Norris shows that Ms. McGhee had a history of making false accusations of sexual misconduct against her former boyfriends, and that records of such accusations might be in the files of JCCSB. Appellant relies on one case to support his argument. He cites an unreported federal case, *United States v. Velarde* (C.A.10, 2007), No. 06-2126. In *Velarde*, the defendant was convicted of sexually abusing a minor child. He filed a motion for a new trial under Fed.R.Crim.P. 33(b). He argued that the state failed to disclose evidence under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. He argued that the state suppressed evidence that the minor victim had previously accused her school teacher and vice principal of inappropriate touching. The trial court denied the motion for new trial without allowing an opportunity for new discovery. The judgment was reversed by the Tenth Circuit Court of Appeals, and the trial court was ordered to resolve whether a *Brady* violation had occurred, and if so, to determine if further discovery should be permitted.

{¶15} Appellant's reliance on *Velarde* is misplaced for a number of reasons. First, the issue in *Velarde* revolved around a *Brady* challenge regarding evidence unlawfully withheld by the prosecutor from the defendant. The *Brady* challenge was raised as part of the proceedings of a motion for new trial in a federal criminal prosecution. Appellant has not raised any *Brady* issues, did not file a motion for new

trial, and was prosecuted in state court. Appellant is arguing ineffective assistance of counsel, not prosecutorial misconduct. Appellant has not cited any rule or precedent that would have required the trial court to reopen discovery in postconviction relief proceedings, particularly discovery of privileged records. The long-standing rule in Ohio is that a convicted criminal defendant has no right to additional or new discovery, whether under Crim.R. 16 or any other rule, during postconviction relief proceedings. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159, 718 N.E.2d 426 (per curiam) certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1977; see also *State v. Gulertekin* (June 8, 2000), 10th Dist. No. 99AP-900 (there is no right to discovery of evidence outside the record in postconviction proceedings). We have come to the same conclusion a number of times. *State v. Ahmed*, 7th Dist. No. 05-BE-15, 2006-Ohio-7069, ¶38; *State v. Twyford* (March 19, 2001), 7th Dist. No. 98-JE-56.

{¶16} Appellant is also not entitled to discovery under any rule of civil procedure. It is true that postconviction relief proceedings under R.C. 2953.21 et seq. are treated as special civil proceedings used to collaterally attack a criminal conviction. *State v. Nichols* (1984), 11 Ohio St.3d 40, 42, 463 N.E.2d 375. Nevertheless, the Ohio Rules of Civil Procedure do not apply to special proceedings, such as postconviction relief proceedings, when the civil rules, by their nature, are clearly inapplicable to the special proceedings. Civ.R. 1(C). Courts have repeatedly held that the civil rules governing discovery do not apply to postconviction relief proceedings under R.C. 2953.21. *State v. McKnight*, 4th Dist. No. 07CA665, 2008-

Ohio-2435; *State v. Chinn* (Aug. 21, 1998), 2nd Dist. No. 16764; *State v. Smith* (1986), 30 Ohio App.3d 138, 506 N.E.2d 1205; *State v. Webb* (Oct. 20, 1997), 12th Dist. No. CA96-12-108.

{¶17} Appellant has not referred to any rule or caselaw holding that would entitle him to reopen discovery in a closed criminal case so that he might search for evidence that could possibly be used to impeach a witness at trial. We note that the discovery Appellant wanted to undertake, if successful, would have only enabled him to impeach Ms. McGhee, who was not one of the state's witnesses. He was already given an opportunity prior to trial to discover if JCCSB had records of false accusations made by the victim of sexual misconduct against anyone other than the defendant. No such records were found. Appellant's assignment of error is without merit and is overruled.

Assignments of Error No. 1 & 3

{¶18} "Timothy West was deprived of his right to the effective assistance of trial counsel. Sixth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution."

{¶19} "The trial court erred in overruling Timothy West's post-conviction petition without an evidentiary hearing."

{¶20} These two assignments deal with the trial court's decision to overrule Appellant's petition for postconviction relief, and to do so without holding an evidentiary hearing. In both assignments of error Appellant contends that the trial court should have either held an evidentiary hearing or allowed additional discovery

to establish the basis of his ineffective assistance of counsel claim. Although Appellee sets forth twelve separate arguments why the trial court correctly overruled Appellant's petition without a hearing, Appellee's primary argument is that we should affirm the trial court on the basis of res judicata.

{¶21} R.C. 2953.21 through 2953.23 sets forth the means by which a convicted defendant may seek to have a conviction set aside. Postconviction relief allows a petitioner to collaterally attack his criminal conviction by filing a petition to set aside the judgment. The statute affords relief from judgment where the petitioner's rights were denied to such an extent the conviction is rendered void or voidable under the Ohio or United States Constitutions. R.C. 2953.21(A); *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph four of the syllabus.

{¶22} "Absent a showing of an abuse of discretion, a reviewing court will not overrule a trial court's findings on a petition for postconviction relief that are supported by competent and credible evidence." *State v. Davis* (1999), 133 Ohio App.3d 511, 515, 728 N.E.2d 1111. An " 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 404 N.E.2d 144.

{¶23} The trial court may dismiss a petition for postconviction relief without a hearing, "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative

facts to establish substantive grounds for relief.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, paragraph two of the syllabus.

{¶24} A postconviction petition may also be dismissed without a hearing where the claims are barred by res judicata. The doctrine of res judicata precludes a hearing where the claim raised in the petition was raised or could have been raised at trial or on direct appeal. *Perry*, supra, at paragraph nine of the syllabus. To overcome the res judicata bar, a petitioner must present cogent, material evidence found outside of the record on appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169.

{¶25} The basis of Appellant’s petition for postconviction relief is ineffective assistance of counsel. This argument is normally barred in postconviction relief proceedings unless it is based on evidence *dehors* the record: “Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant’s petition for postconviction relief.” *Cole*, supra, at syllabus.

{¶26} In order to demonstrate ineffective assistance of counsel, a defendant must show, first, that counsel’s performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶27} To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶28} The petitioner has the burden of proof in proving ineffectiveness because in Ohio, a properly licensed attorney is presumed competent. *Calhoun*, 86 Ohio St.3d at 289, 714 N.E.2d 905.

{¶29} In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance. *Davis*, supra, 133 Ohio App.3d at 516, 728 N.E.2d 1111.

{¶30} Appellee is correct that res judicata bars Appellant's argument. Appellant filed a direct appeal and argued eleven separate reasons why his trial counsel was ineffective, in his opinion. Appellant failed to raise the issue that he raises here, namely, that his counsel should have demanded an in camera inspection of the JCCSB records to determine if Ms. McGhee filed prior charges of sexual misconduct against anyone. In raising such an argument, we would have dealt with the matter of the privileged nature of the records, which may have resolved the matter. R.C. 5153.17 provides in relevant part:

{¶31} “The public children services agency shall prepare and keep written records of investigations \* \* \*. Such records shall be confidential \* \* \*.”

{¶32} Failure to keep children services board records confidential is a criminal offense. R.C. 2151.421(H)(2) and 2151.99.

{¶33} We are aware that some courts have found that privileged records from a children services board may be discoverable and admissible in certain circumstances. See, e.g., *Davis v. Trumbull Cty. Children Serv. Bd.* (1985), 24 Ohio App.3d 180, 24 OBR 270, 493 N.E.2d 1011. Nevertheless, in one of the primary cases cited by Appellant, the Sixth District Court of Appeals held that a criminal defendant should not be given access to privileged records from a children services board simply to attack the credibility of witnesses. “[T]he record indicates that the requested records were not to be used for a particular aspect of the defense, but were slated to be used as an attack upon the general credibility of the victim. Such use of juvenile records has been precluded in situations similar to the case *sub judice*. See, e.g., *State v. Hale* (1969), 21 Ohio App.2d 207, 50 O.O.2d 340, 256 N.E.2d 239, and *Corbett v. Bordenkircher* (C.A.6, 1980), 615 F.2d 722, 727.” *Hart*, *supra*, 57 Ohio App.3d at 7, 566 N.E.2d 174. It is abundantly clear from Appellant’s petition for postconviction relief and his argument on appeal that he seeks access to JCCSB records to attack the credibility of Dee Dee McGhee, and possibly by extension, the credibility of the victim. Appellant’s own caselaw establishes that he is not entitled to the relief he seeks.

{¶34} Appellant’s ineffective assistance of counsel argument could have been raised on direct appeal and could have been resolved by reference to evidence in the record. It is immaterial that JCCSB may have some record that Ms. McGhee made

prior unfounded charges of sexual misconduct against one or more persons. Appellant wanted to use the evidence to support a general attack on the credibility of the state's witnesses, and such a use of privileged JCCSB records is not permitted. Since Appellant could have raised this argument on direct appeal and did not, the matter is res judicata and cannot be raised in postconviction relief.

{¶35} The record shows that Appellant's counsel withdrew a request for an in camera inspection of the JCCSB records. Instead, he requested that the prosecutor perform a limited search of the records when it became likely that the trial court would deny Appellant's request in its entirety. Appellant's counsel was therefore able to obtain a partial search of the records when, in fact, the trial court could have refused to allow any search at all given that the purpose of the search was merely to find impeachment evidence. As noted above in the *Hart* case, the trial court was not required to search JCCSB records for general impeachment evidence. Appellant's counsel engaged in successful trial strategy, asking for more evidence than he was entitled, and then settling for a partial search of the records. Trial tactics, particularly successful trial tactics, are not a basis for establishing ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶45.

{¶36} Regarding the trial court's decision to overrule Appellant's petition without first conducting an evidentiary hearing, it is well-established that the petition may be summarily dismissed without a hearing if there is no interpretation of the facts that would warrant relief, if res judicata bars relief, or if the petitioner does not allege or prove prejudice. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, at

syllabus; *State v. Williams*, 162 Ohio App.3d 55, 832 N.E.2d 783, 2005-Ohio-3366, ¶23. “In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶51. It has already been shown that Appellant’s argument is barred by res judicata because it could have been raised on direct appeal. There was no need to have a futile evidentiary hearing because Appellant did not set forth any reasonable grounds for relief.

{¶37} It is clear from the record that the trial court did not abuse its discretion in summarily overruling Appellant’s petition without a hearing because the argument that was being proffered was barred by res judicata. Therefore, Appellant’s first and third assignments of error are without merit and are overruled.

{¶38} In conclusion, Appellant was not entitled to additional discovery as part of his postconviction relief proceedings because, in Ohio, there is no such right. The trial court acted within its discretionary power to overrule the petition for postconviction relief without a hearing because the claim of ineffective assistance of counsel contained in the petition was barred by res judicata. Appellant’s three assignments of error are overruled and the judgment of trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.