

[Cite as *State v. Everson*, 2017-Ohio-898.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 16 MA 0120
V.	)	
	)	OPINION
REGINALD EVERSON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2008 CR 429

JUDGMENT: Affirmed

APPEARANCES:  
For Plaintiff-Appellee Paul Gains  
Prosecutor  
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Assistant Prosecutor  
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JUDGES:  
  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: March 7, 2017

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DONOFRIO, J.

{¶1} Defendant-appellant, Reginald Everson, appeals from a Mahoning County Common Pleas Court judgment dismissing his petition for postconviction relief.

{¶2} This case was first before this court on appellant's direct appeal from his convictions for aggravated murder and having a weapon while under a disability. *State v. Everson*, 7th Dist. No. 12 MA 128, 2016-Ohio-87. The charges arose from a drive-by shooting that resulted in the death of Terrell Roland. The aggravated murder charge and an accompanying firearm specification were tried to a jury. The having weapons under a disability charge went to a bench trial. Appellant was convicted on both charges and sentenced to 38 years to life in prison.

{¶3} On appeal, this court affirmed appellant's conviction and sentence for aggravated murder and the accompanying firearm specification. But we reversed appellant's conviction and sentence for having a weapon while under a disability, finding that appellant did not waive his right to a jury trial on that charge.

{¶4} Appellant, acting pro se, filed a petition for postconviction relief on July 12, 2013, claiming ineffective assistance of trial counsel. He also filed two amended petitions to which he attached the affidavit of alleged witness Carlos Valentin. According to his affidavit, Valentin stated that on the day of the murder, he saw Mickele Glenn and Roland standing in Roland's driveway. Valentin then went inside his own house. He heard gunshots. He then looked outside and saw Glenn standing over Roland pointing a gun at him. Valentin then saw Glenn run off behind Roland's house. Valentin further averred that he told the prosecutor what he witnessed and that the prosecutor tried to convince him to say that he saw appellant or a black car at the time of the shooting. And he stated that the prosecutor offered him judicial release if he would testify that he saw appellant or a black car in the area at the time of the shooting. Finally, Valentin averred he told the same information to appellant's defense attorney, but the attorney never contacted him to testify.

{¶5} The trial court denied appellant's petition without considering his amended petitions, finding that appellant's pleadings and affidavit failed to

demonstrate that trial counsel was ineffective. Appellant appealed the trial court's ruling.

{¶16} On appeal, this court reversed and remanded the matter. *State v. Everson*, 7th Dist. No. 14 MA 0072, 2016-Ohio-3419, appeal not allowed, 146 Ohio St.3d 1492, 2016-Ohio-5585, 57 N.E.3d 1171. We found the trial court erred in ruling on appellant's petition without considering the two amended petitions that included Valentin's affidavits. *Id.* at ¶ 35. We instructed the trial court on remand to consider appellant's two amended postconviction petitions and to issue findings of fact and conclusions of law regarding the amended petitions. *Id.*

{¶17} On remand, plaintiff-appellee, the State of Ohio, filed a motion for summary judgment asserting appellant failed to present competent, credible evidence that his trial counsel was ineffective. The state attached a transcript of a prior proffer by Valentin that contradicted his affidavit. It also attached the affidavit of prosecuting attorney Martin Desmond. Appellant did not file a response to this motion.

{¶18} The trial court found that Valentin's affidavit lacked credibility based upon Valentin's earlier proffer and Atty. Desmond's affidavit. Therefore, the court found appellant failed to support his postconviction petition with competent, credible evidence de hors the record to warrant postconviction relief. Consequently, the court granted the state's motion for summary judgment and dismissed appellant's postconviction petition.

{¶19} Appellant filed a timely notice of appeal on August 5, 2016. He now raises four assignments of error.

{¶110} An appellate court reviews a trial court's denial of a petition for postconviction relief under an abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. Abuse of discretion connotes more than an error of law; it implies the trial court acted arbitrarily, unreasonably, unconscionably. *Blakemore v. Blakemore*, 5 Ohio St .3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} Appellant's first assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S MOTION FOR SUMMARY JUDGMENT AND DISMISSED DEFENDANT'S PETITION FOR POST CONVICTION RELIEF ON REMAND FROM THIS HONORABLE COURT, THEREBY VIOLATING DEFENDANT'S DUE PROCESS RIGHTS UNDER THE V AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION.

{¶12} Appellant argues the trial court should not have found that he failed to support his petition with competent, credible evidence. He claims Valentin's affidavit and his own affidavit supported his petition. Appellant points to Valentin's affidavit in which he stated the following: (1) from his home across the street from where the shooting took place, he saw a van drive by; (2) he went inside and then heard gun shots; (3) when he looked out from his door he saw Mickele Glenn standing over the victim with a gun pointed at the victim; (4) he saw Glenn run behind the house; and (5) he told appellant's counsel he would testify as to what he witnessed but counsel never contacted him. Appellant contends that nothing in Valentin's proffer contradicts these statements in his affidavit.

{¶13} Appellant goes on to argue that Valentin's credibility should be subject to cross-examination as was Mickele Glenn's testimony at trial. He points out that Glenn's trial testimony contained several inconsistencies

{¶14} For these reasons, appellant asserts the trial court should have held a hearing on his postconviction petition.

{¶15} When reviewing a postconviction petition, a trial court should give due deference to sworn affidavits filed in support of the petition, but in the sound exercise of discretion, the court may judge their credibility in determining whether to accept the affidavits as true statements of fact. *State v. Calhoun*, 86 Ohio St.3d 279, 284, 1999-Ohio-102, 714 N.E.2d 905.

{¶16} In assessing the credibility of an affidavit, the court should consider: (1) whether the judge reviewing the postconviction petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or 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 are otherwise interested in the outcome of the petition, and (5) whether the affidavits contradict evidence proffered by the defense at trial. *Id.* at 285, citing *State v. Moore*, 99 Ohio App.3d 748, 754-756, 651 N.E.2d 1319 (1st Dist. 1994).

{¶17} As to the *Calhoun* factors, the same judge reviewed the postconviction proceeding also presided at trial. Valentin's affidavit is the only affidavit at issue, so there is no issue with multiple affidavits. Valentin's affidavit does not rely on hearsay. As far as we know, Valentin is not a relative of appellant or other interested party. And Valentin's affidavit does not appear to contradict evidence proffered by the defense at trial. Thus, at first glance, the *Calhoun* factors might seem to weigh in appellant's favor.

{¶18} But the *Calhoun* court further held that:

a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony. To hold otherwise would require a hearing for every postconviction relief petition. Because the statute clearly calls for discretion in determining whether to grant a hearing, accepting all supporting affidavits as true is certainly not what the statute intended.

*Calhoun*, 86 Ohio St.3d at 284.

{¶19} In his sworn proffer, Valentin stated that at the time of the shooting, he lived on East Avondale, which is across the street and a few houses down from where Roland was shot. (Valentin Proffer Tr. 3-4). On the day of the shooting, Valentin stated that he saw Roland outside in his driveway with another individual

that Valentin recognized but did not know his name. (Valentin Proffer Tr. 4). Valentin then left to go to Uptown Beverage. (Valentin Proffer Tr. 4-5). When he returned to his front porch, he saw a car coming from Southern Boulevard. (Valentin Proffer Tr. 5). The car stopped and then proceeded slowly down East Avondale. (Valentin Proffer Tr. 5). Valentin went into his house. (Valentin Proffer Tr. 5). Next, he heard two gunshots. (Valentin Proffer Tr. 5-6). Valentin looked outside and saw the car driving away at a faster speed. (Valentin Proffer Tr. 6). Valentin thought he also saw the unnamed person with Roland run away. (Valentin Proffer Tr. 7). At that time, Valentin did not realize that anyone had been shot. (Valentin Proffer Tr. 7). He went back into his house. (Valentin Proffer Tr. 7). Valentin then heard commotion, looked outside, and realized someone had been shot. (Valentin Proffer Tr. 7-8). But he did not go back outside. (Valentin Proffer Tr. 8). Valentin stated there was nothing else to add or clarify about these events. (Valentin Proffer Tr. 9).

**{¶20}** Numerous inconsistencies are apparent when reading Valentin's proffer along with his affidavit.

**{¶21}** First, in his affidavit, Valentin averred that he saw Mickle Glenn outside with Roland. (Valentin Aff. ¶ 2). But in his proffer, Valentin testified that while he recognized the person standing with Roland, he did not know his name. (Valentin Proffer Tr. 4).

**{¶22}** Second, in his affidavit, Valentin stated that while he was on his porch, he saw several cars drive by and the last "car" to drive by was a van. (Valentin Aff. ¶ 5). He then went into his house. (Valentin Aff. ¶ 5). But in his proffer, Valentin testified that he saw a car, not a van, drive slowly down East Avondale. (Valentin Proffer Tr. 5). He then went into his house. (Valentin Proffer Tr. 5).

**{¶23}** Third, in his affidavit, Valentin averred that he heard "a few" gunshots. (Valentin Aff. ¶ 6). He then looked outside and saw Glenn standing over Roland with a gun pointed at Roland. (Valentin Aff. ¶ 7). Yet in his proffer, Valentin testified that he heard two gunshots and looked outside to see the car that had been driving down the street now driving away at a faster speed. (Valentin Proffer Tr. 5-6).

{¶24} Fourth, in his affidavit, Valentin stated that he then saw Glenn run away. (Valentin Aff. ¶ 8). Again in his proffer, Valentin stated that it was the unnamed man who ran away. (Valentin Proffer Tr. 7).

{¶25} Fifth, in his affidavit, Valentin averred that he spoke to Atty. Desmond and appellant's attorney and told both of them what he witnessed including the facts that he saw Glenn pointing a gun at Roland and that he never saw a black car driving by. (Valentin Aff. ¶ 9). He further averred that Atty. Desmond tried to force him to say that he saw appellant or a black car at the time of the shooting. (Valentin Aff. ¶ 10). Yet in his proffer, Valentin was asked if there was any other information he wished to add or clarify and Valentin stated there was nothing else to add or clarify about the events. (Valentin Proffer Tr. 9).

{¶26} There are at least five inconsistencies between Valentin's affidavit and his proffer. Of particular importance is the fact that in his proffer, he did not know who Glenn was but then in his affidavit he specifically named Glenn. Also of significant importance is the fact that in his proffer, Valentin testified that he saw a car driving slowly down the street and then speed away after he heard the gunshots. Yet in his affidavit, Valentin made no mention of seeing this car and instead stated that after he heard the gunshots, he saw Glenn standing over Roland pointing a gun at him.

{¶27} Given the inconsistencies between Valentin's affidavit and his proffer, the trial court acted within its discretion in finding that Valentin's affidavit lacked credibility and, therefore appellant failed to support his petition with competent, credible evidence.

{¶28} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶29} Appellant's second assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A HEARING PURSUANT TO ORC 2953.21(C) TO REVIEW DEFENDANT'S SUBSTANTIVE ASSIGNMENTS OF ERROR

IN VIOLATION OF THE V AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION.

{¶30} Here appellant contends he was entitled to a hearing on his postconviction petition because he supported his petition with competent, credible evidence. He contends the court should have held an evidentiary hearing to resolve the contradictions between Valentin's affidavit and his earlier proffer. He further asserts that all of the factors for assessing the credibility of an affidavit in postconviction proceedings adopted by the Ohio Supreme Court in *Calhoun*, 86 Ohio St.3d 279, weigh in his favor. He contends the trial court should have examined the *Calhoun* factors.

{¶31} A postconviction petitioner is not automatically entitled to a hearing. *State v. Cole*, 2 Ohio St.3d 112, 443 N.E .2d 169 (1982). Before granting an evidentiary hearing on the petition, the trial court shall determine whether there are substantive grounds for relief. R.C. 2953.21(C). The trial court's decision of whether to hold an evidentiary hearing in postconviction matters is reviewed for abuse of discretion. *State v. Haschenburger*, 7th Dist. No. 08-MA-223, 2009-Ohio-6527, ¶ 43.

{¶32} As discussed in detail in appellant's first assignment of error, the court acted within its discretion in finding that appellant did not support his petition with competent, credible evidence. Without some competent, credible evidence to support the petition, the trial court acted within its discretion in determining not to hold a hearing on appellant's petition.

{¶33} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶34} Appellant's third assignment of error states:

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE VI AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN COUNSEL: 1) FAILED TO SUBPOENA MATERIAL WITNESS(ES); 2) FAILED TO CONSTRUCT



AN ALIBI DEFENSE; AND 3) DENIED APPELLANT'S RIGHT TO TESTIFY AT TRIAL IN HIS OWN DEFENSE.

{¶35} In this assignment of error, appellant asserts his trial counsel was ineffective for (1) failing to subpoena material witnesses to testify in response to police officers' testimony, (2) failing to put on a case to corroborate his alibi, and (3) denying him his right to testify on his own behalf at trial.

{¶36} The doctrine of res judicata provides that any issue that could have been raised on direct appeal, and was not, is barred in later proceedings and not subject to review. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16.

{¶37} A claim of ineffective assistance of trial counsel should be raised in a direct appeal. *State v. Dillard*, 7th Dist. No. 12 JE 29, 2014-Ohio-439, ¶ 21, 27; *State v. Delgado*, 7th Dist. No. 15 MA 26, 2015-Ohio-5006, ¶ 18. Thus, this argument is barred by the doctrine of res judicata.

{¶38} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶39} Appellant's fourth assignment of error states:

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT AND AFFIRMATIVELY MISLED THE JUDGE BY PROVIDING FALSE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE PROSECUTOR KNEW OR SHOULD HAVE KNOWN TO BE FALSE DUE TO THE COMMISSION OF A BRADY VIOLATION, VIOLATING APPELLANT'S DUE PROCESS RIGHTS.

{¶40} In his final assignment of error, appellant argues the prosecutor failed to divulge exculpatory statements to his second trial counsel. Appellant claims the prosecutor failed to disclose a statement Valentin made to him that he did not see a black car on the day in question and that appellant was not the man who shot

Roland. Appellant further claims that the prosecutor threatened and intimidated Valentin.

{¶41} Due process requires that the prosecution provide the defendant with any evidence that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L .Ed.2d 215 (1963). A *Brady* violation occurs when evidence that was not disclosed “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *State v. Ketterer*, 126 Ohio St.3d 448, 935 N.E.2d 9, ¶ 23, quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

{¶42} This argument goes back to the credibility of Valentin’s affidavit.

{¶43} In his affidavit, Valentin averred that he saw Glenn and Roland standing in Roland’s driveway. Valentin then went inside his own house. He heard gunshots. He then looked outside and saw Glenn standing over Roland pointing a gun at him. Valentin also averred that he told the prosecutor what he witnessed and that the prosecutor tried to convince him to say that he saw appellant or a black car at the time of the shooting. Finally, Valentin averred that he told the same information to appellant’s defense attorney, but the attorney never contacted him to testify.

{¶44} But in his sworn proffer, Valentin testified that he witnessed a car proceeding slowly down East Avondale. Valentin testified that he then went into his house. Next, he testified that he heard two gunshots. He testified that he looked outside and saw the car driving away at a faster speed. Valentin did not immediately realize that anyone had been shot. Valentin testified that he had no other information regarding the shooting.

{¶45} As determined above, the trial court did not abuse its discretion in finding Valentin’s affidavit was not credible due to its inconsistencies with his previous proffer. Moreover, even if Valentin’s affidavit was found to be credible, then appellant’s counsel would have already had the information directly from Valentin

since Valentin stated that he told this information to appellant's counsel. And therefore, it could not be said that the alleged undisclosed evidence could reasonably place the whole case in such a different light so as to undermine confidence in the verdict. Therefore, there is no evidence that a *Brady* violation occurred in this case.

{¶46} Accordingly, appellant's fourth assignment of error is without merit and is overruled.

{¶47} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.