

[Cite as *State v. Smith*, 2017-Ohio-7770.]

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

STATE OF OHIO)	
)	
PLAINTIFF-APPELLEE)	
)	CASE NO. 17 MA 0041
VS.)	
)	OPINION
SAMMIE SMITH)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas, Mahoning County, Ohio
Case No. 09 CR 1197

JUDGMENT: Affirmed

APPEARANCES:
For Plaintiff-Appellee Attorney Paul Gains
Mahoning County Prosecutor
Attorney Ralph Rivera
Assistant Prosecutor
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503-1426

For Defendant-Appellant Sammie Smith, Pro se
#604-140
16149 State Rt. 104
P.O. Box 7010
Chillicothe, Ohio 45601

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 21, 2017

[Cite as *State v. Smith*, 2017-Ohio-7770.]
DeGENARO, J.

{¶1} Appellant Sammie Smith appeals the trial court's judgment dismissing his pro se petition for post-conviction relief without a hearing. Smith contends that his counsel was ineffective and that the trial court should have held a hearing on his post-conviction petition. As Smith failed to demonstrate substantive grounds for relief, the trial court properly denied the petition without a hearing and the judgment is affirmed.

{¶2} Smith was convicted of multiple counts of aggravated burglary, robbery and rape with attached repeat violent offender specifications. The indictment and convictions arose from a home invasion lasting over an hour wherein Smith dragged the victim from her bed where she had been sleeping with her two year old child and subjected her to multiple sex acts, locking her in a closet for a time, stealing money from the victim and her son, and then forcing her to bathe before he left. *State v. Smith*, 7th Dist. No. 11 MA 0120, 2013-Ohio-756, ¶ 3-15 (*Smith I*).

{¶3} In his direct appeal, Smith's convictions were upheld as well as parts of his sentence. His sentences for two repeat violent offender specifications were reversed and the concurrent sentences imposed on the merged aggravated burglary and robbery counts were reversed and remanded for a limited resentencing hearing for the state to elect which offense it would ask the trial court to impose a sentence. *Id.*, ¶ 150. Smith's appeal to the Ohio Supreme Court was dismissed as having been improvidently granted.

{¶4} While his direct appeal was pending, Smith, through the office of the public defender, filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence" and attached two affidavits. Smith, pro se, supplemented this petition five times. Together, these pleadings asserted multiple grounds and in general argued ineffective assistance of counsel regarding the questioning of State witnesses Michael Cariola and Brenda Gerardi and the inability to speak with representatives from Bode Technology. The State opposed Smith's petition with a motion for judgment on the pleadings, contending Smith failed to support the petition with competent, credible evidence dehors the record. Noting it had not been served with

Smith's petition as required by statute, the State conceded the petition was timely.

{¶15} The public defender's office filed a response to the State's motion for judgment on the pleadings, conceding that Smith's Confrontation Clause claims had been rejected by this court in his direct appeal in *Smith I*. Subsequently the public defender's office moved to withdraw from representation due to irreconcilable differences with Smith on how to proceed.

{¶16} The trial court denied the petition and pro se supplements noting that Smith did not demonstrate a denial or infringement of his Constitutional rights or assert facts that provide substantive grounds for relief.

{¶17} As Smith's two assignments of error are interrelated they will be discussed together for clarity of analysis:

THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION PETITION WITHOUT A HEARING CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL.

THE TRIAL COURT ABUSED ITS DISCRETION FINDING THAT ISSUES CONCERNING EXHIBITS (B) AND (D) IN THE SUPPLEMENTAL MOTION HAD ALREADY BEEN ADDRESSED IN THE APPEAL OR IN THE JUDGMENT ENTRY OF THE POSTCONVICTION PETITION.

{¶18} Post-conviction relief is a collateral civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. R.C. 2953.21 through R.C. 2953.23 govern petitions for post-conviction and provide that "any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to vacate or set aside to the judgment and sentence." *State v. Martin*, 7th Dist. No. 12 MA 167, 2013-Ohio-2881, ¶ 13.

{¶19} We apply an abuse of discretion standard when reviewing a trial court's

decision to deny a post-conviction relief petition without a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58. “Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough.” *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶10} “[P]ursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary 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*, 86 Ohio St.3d 279, 291, 1999-Ohio-102, 714 N.E.2d 905. Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable. *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002–Ohio–5177, ¶ 25.

{¶11} Smith attached two affidavits to his petition. The first affidavit was from his trial counsel who stated that he had intended to make a confrontation clause objection but due to oversight, he did not. Further, he noted that he had no strategic reason not to object. The second affidavit was from John Lee, a criminal investigator with the Ohio Public Defender's Office. He stated that he attempted to talk to two employees at Bode Technology and neither would talk to him without permission of the prosecutor's office. There was no affidavit of Smith attached to the initial petition or to any of the pro se supplements.

{¶12} Neither the petition, nor the affidavits, contain substantive grounds for relief. Smith argues in his petition that he was denied effective assistance because his trial attorney failed to object to the testimony of Michael Cariola, and his testimony would have been excluded under *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.E.2d 610 (2011) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). We rejected this argument in Smith's direct appeal, reasoning this contention "does not fall under the rubric of the *Bullcoming* and

Melendez-Diaz cases." *Smith I*, ¶ 24.

{¶13} Smith, pro se, supplemented and amended his original post-conviction petition numerous times with documents which were all unsupported by affidavit. Smith asserts that he was denied effective assistance because his lawyer did not introduce DNA results that were generated by an independent laboratory that had conducted a review of his DNA and because his lawyer did not object when his post-conviction petition was overruled.

{¶14} These arguments are barred by *res judicata* as they were capable of being raised in Smith's direct appeal. "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." *State v. Reynolds*, 79 Ohio St.3d 158, 161, 1997-Ohio-304, quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), at paragraph nine of the syllabus.

{¶15} As Smith's petition was not supported with competent, credible evidence dehors the record and these issues were or could have been resolved on direct appeal, the trial court did not err in denying Smith's post-conviction petition and supplements.

Donofrio, J., concurs.

Waite, J., concurs.