

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-007
- vs -	:	<u>OPINION</u> 5/21/2012
GENE WAGERS, JR.,	:	
Defendant-Appellant.	:	

APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10247

Martin P. Votel, Preble County Prosecuting Attorney, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Colleen Egan, 6506 Glen Ivy Drive, Huber Heights, Ohio 45424, for defendant-appellant

POWELL, P.J.

{¶ 1} A criminal defendant appeals the denial of his postconviction relief petition that claimed his trial counsel was ineffective. We affirm the decision because the issues concerning ineffective assistance of trial counsel were raised or could have been raised in defendant's direct appeal and his allegation that he was unaware of a plea offer is unsupported by the record.

{¶ 2} Gene Wagers, Jr. was convicted in Preble County Common Pleas Court in

2009 on five counts of rape, four counts of sexual battery, and one count of disseminating material harmful to juveniles. He was also found guilty of nine sexually violent predator (SVP) specifications. The trial court imposed five concurrent terms of life imprisonment without parole. Wagers' conviction was affirmed by this court in *State v. Wagers*, 12th Dist. No. CA2009-06-018, 2010-Ohio-2311.

{¶ 3} Wagers petitioned the trial court for postconviction relief, arguing that his trial counsel was ineffective for failing to call numerous witnesses or introduce evidence he claimed would impeach state witnesses, not objecting when witnesses testified that Wagers was in prison, not permitting Wagers to testify, and not communicating a plea offer to Wagers. Several affidavits, letters, and photographs were attached to the petition. The state moved to dismiss the petition.

{¶ 4} The trial court noted that Wagers argued ineffective assistance of counsel in his direct appeal and raised several issues that were rejected by this court. The trial court dismissed Wagers' postconviction petition without a hearing, finding all of Wagers' claims barred by res judicata because they were raised or could have been raised in his direct appeal. The trial court added that if the claim of failure to communicate a plea offer that involved a ten-year prison term would not be considered res judicata, the record indicates Wagers was aware of the plea offer because he discussed a ten-year sentence with his mother in recorded phone calls from jail, and those recordings were provided as part of discovery and available before trial.

{¶ 5} Wagers appeals the trial court's decision, raising two assignments of error. We address the two assignments of error together, for ease of discussion.

{¶ 6} Assignment of Error No. 1:

{¶ 7} APPELLANT'S POST-CONVICTION RELIEF PETITION WAS NOT BARRED BY RES JUDICATA. [sic]

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S POST-CONVICTION RELIEF PETITION WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING BECAUSE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION. [sic.]

{¶ 10} With his first assignment of error, Wagers challenges the finding that res judicata applied. With 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. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus.

{¶ 11} Res judicata is a proper basis for dismissing a defendant's petition for postconviction relief when the defendant, represented by new counsel on direct appeal, fails to raise therein the issue of competent trial counsel and the issue could fairly have been determined without resort to evidence outside of the record. *See State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus; *see State v. Perry*, 10 Ohio St.2d 175, 182 (1967).

{¶ 12} In other words, there is an exception to the res judicata bar when the petitioner presents competent, relevant, and material evidence outside the record that was not in existence and available to the petitioner in time to support the direct appeal. *State v. Lawson*, 103 Ohio App.3d 307, 315 (12th Dist.1995). Evidence offered outside of the record must demonstrate petitioner could not have appealed the constitutional claim based upon information in the original record, and such evidence must not have been in existence and available to the petitioner at the time of the plea hearing or trial. *Id.*

{¶ 13} Further, the evidence offered dehors or outside of the record must be genuinely relevant, and it must materially advance petitioner's claim that there has been a denial or infringement of his or her constitutional rights. *State v. Sopjack*, 11th Dist. No. 96-G-2004, 1997 WL 585904 (Aug. 22, 1997). The petitioner may not simply attach as exhibits evidence that is only marginally significant and does not advance the petitioner's claim beyond a mere hypothesis and a desire for further discovery. *Id.*

{¶ 14} Wagers' second assignment of error challenges the trial court's failure to hold a hearing on his petition. An evidentiary hearing is not automatically required for every petition seeking postconviction relief, and, for that reason, a petitioner must show there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits, and the files and records in the case. *State v. Jackson*, 64 Ohio St.2d 107, 110 (1980); see R.C. 2953.21.

{¶ 15} In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard in determining whether the trial court erred in denying the petitioner's motion without a hearing. *State v. Clark*, 12th Dist. No. CA2008-09-113, 2009-Ohio-2101, ¶ 7. A reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58.

{¶ 16} For ineffective assistance of counsel claims, counsel's performance will not be deemed ineffective unless counsel's performance is proved to have fallen below an objective standard of reasonable representation and prejudice arises from counsel's performance. *State v. Bradley*, 42 Ohio St.3d 136, 137 (1989), paragraph two of the syllabus, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To show prejudice, the defendant must prove there exists a reasonable probability that, were it not for counsel's error, the result of the trial would have been different. *Bradley*, paragraph three of the

syllabus.

{¶ 17} Wagers asserts that his ineffective assistance of counsel claim is based upon evidence outside of the record. Specifically, Wagers argues that any settlement discussions would have been outside of the record and the pertinent testimony of the witnesses counsel failed to call was not in the record because the witnesses did not testify. Wagers also maintains that he demonstrated sufficient operative facts to establish substantive grounds for relief and he was entitled to a hearing to consider his assertion that he was unaware of the state's plea offer.

{¶ 18} As the trial court noted, all the witnesses Wagers offers now by affidavit or otherwise were disclosed by the state or the defense in discovery. Wagers knew the identity of the witnesses, including Wagers' mother, sister, stepson, and a minor relative, and the likely content of their testimony before trial. Therefore, trial counsel's failure to call those witnesses or introduce certain evidence on these issues could have been raised in Wagers' direct appeal. Further, a review of the decision issued in Wagers' direct appeal reveals that one of his arguments was raised and rejected in that appeal; specifically, Wagers previously raised as an alleged error the fact that there was trial testimony that he was in prison.

{¶ 19} In reference to the plea offer – which is the only point the trial court found would arguably not be barred by res judicata – the trial court found Wagers had not raised grounds for relief and was not entitled to a hearing.

{¶ 20} The trial court stated that Wagers "does not claim that he was not aware of a plea offer. Rather, he claims that he 'has not seen the case settlement proposal until today.'" The trial court said there was "ample evidence in the record (via the State's response to Defendant's discovery request) that the Defendant was aware of a plea offer involving a ten-year sentence." [parenthetical in original.] The court said, "in the face of the evidence in the record, the claim that Defendant had not seen the settlement proposal, even if true, does not

mean that he was not advised of the proposal. Clearly he was and clearly he decided to 'take it to the box,' meaning take it to trial."

{¶ 21} The record indicates the trial court reviewed Wagers' arguments in making its determination both that the claims were barred by res judicata and that Wagers failed to state substantive grounds for relief warranting a hearing for the argument concerning the communication of the plea offer. See R.C. 2953.21. Wagers failed to show his trial counsel was ineffective. See *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399 (2012). We find no abuse of discretion by the trial court as the record supports its conclusions. Wagers' first and second assignments of error are overruled.

{¶ 22} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.