[Cite as *State v. Bush*, 2019-Ohio-4082.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Respondent-Appellee,

v.

ZARYL G. BUSH,

Defendant-Petitioner-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0105

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2013 CR 294

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Respondent-Appellee and

Atty. G. Michael Goins, 13609 Shaker Boulevard, Suite 3-A, Cleveland, Ohio 44120, for Defendant-Petitioner-Appellant.

Dated: September 26, 2019

D'Apolito, J.

{¶1} Appellant Zaryl Bush appeals the judgment entry of the Mahoning County Court of Common Pleas dismissing his second petition for postconviction relief, filed pursuant to R.C. R.C. 2953.23(A), in which he alleges that the ineffective assistance of his trial counsel constitutes a violation of his constitutional right to due process of law. Appellant contends that previously unavailable testimony implicating another perpetrator establishes the jurisdiction of the trial court to consider the merits of his second petition.

{¶2} The trial court concluded that the facts on which Appellant relies were known to him during the pre-trial phase of his case. In the alternative, the trial court concluded that Appellant's constitutional claim was barred by res judicata, based upon Appellant's failure to raise the claim in his original postconviction petition.

{¶3} Because the affidavits of Appellant, his son, N.B. and Appellant's mother, Karen Bush plainly state that the facts contained in the affidavits attached to the second petition were known to Appellant in February of 2013, we find that the trial court did not have jurisdiction to entertain the second petition. Assuming arguendo that the trial court had the jurisdiction, we affirm the judgment of the trial court that Appellant's claims are barred by res judicata.

PROCEDURAL HISTORY

{¶4} This Court provided the following summary of the facts and procedural history of this case in Appellant's direct appeal, *State v. Bush*, 7th Dist. Mahoning No. 13 MA 110, 2014-Ohio-4434:

> Forty-three-year-old Bush was in a relationship with Shain Widdershaim, who had three sons, fourteen-year-old T.F. and ten-year-old twins. From a period beginning in December 2011 through Bush's arrest in January 2013, Bush inflicted serious physical and emotional abuse upon all three children.

The abuse reached lethal proportions on January 21, 2013. While the children were at Bush's residence, he punched T.F. in the face. (Sentencing Tr. 24–25.) T.F. was knocked unconscious. (Sentencing Tr. 25). As T.F. lay on the ground, Bush kicked him in the head, then picked him up and slammed his head into a wall. (Sentencing Tr. 25). One of the twins was present in the room and witnessed Bush's assault on his older brother (Sentencing Tr. 8). He attempted to intervene but was pushed away by Bush. (Sentencing Tr. 8). Bush wiped up T.F.'s blood, and took the bloody rags to Widdershaim's residence nearby to fake a crime scene to make it look like T.F. slipped in the shower and had a seizure. (Sentencing Tr. 8-9). Further, T.F.'s other twin brother witnessed Bush as he washed his hands with bleach and took the bloody rags from his residence to Widdershaim's residence to stage the crime as an accident. (Sentencing Tr. 9.)

The attack resulted in T.F. suffering blunt force injuries of the head, contusion to the eyelids, contusion within the mouth, abrasions of the scalp, subdural hemorrhages, subdural and subarachnoid hemorrhages and brain contusions. (Sentencing Tr. 23-24). A few days later, T.F. died as a result of blunt force injuries to the head. (Sentencing Tr. 24). In the two years leading up to T.F.'s murder, Bush's abuse of T.F. included but was not limited to, forcing him to walk on hot coals and run outside in extreme weather. (Bill of Particulars.) In addition, Bush's abuse of the twin boys included but was not limited to forcing one of them to take cold showers and stand nude in front of a fan, slamming their head into a wall, hitting one of them with a pool stick and belt, and kicking another down the stairs, and forcing one of them to stand outside in extreme weather conditions. (Bill of Particulars.)

On March 7, 2013, a Mahoning County grand jury issued an eighteen-count indictment against Bush and Widdershaim. Bush was named in thirteen of those counts.

Of the thirteen counts with which Bush was charged, eight of those counts stemmed from Bush's abuse and murder of T.F. The first four counts and the eighteenth count addressed the offenses surrounding Bush's January 21, 2013 murder of T.F.: count 1 – murder for purposely causing the death of T.F. in violation of R.C. 2903.02(A)(D), a fifteen-years-to-life felony; count 2 – felony murder for causing the death of T.F. (as a proximate result of child endangering or felonious assault) in violation of R.C. 2903.02(B)(D), a fifteen-years-to-life felony; count 3 – felonious assault of T.F. in violation of R.C. 2903.11(A)(1)(D), a second-degree felony; count 4 – endangering children as to T.F. in violation of R.C. 2919.22(B)(1)(E)(2)(D), a second-degree felony; and count 18 – involuntary manslaughter of T.F. in violation of R.C. 2903.04(A), a first-degree felony.

The fifth, sixth, and seventh counts concerned Bush's abuse of T.F. from December 2011 leading up to the murder: count 5 – endangering children as to T.F. in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; count 6 endangering children as to T.F. in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; and count 7 – endangering children in violation of R.C. 2919.22(B)(4)(E)(3), a third-degree felony. The remaining counts with which Bush was charged (the eighth, ninth, tenth, and twelfth counts) stemmed from Bush's abuse of the ten-year-old twin boys, his threats to them in the wake of his assault and murder of their older brother, and his attempt to stage the murder as an accident at Widdershaim's residence: count 8 – endangering children as to one of the twin boys, in violation of R.C. 2919.22(A)(E)(2)(C), a third-degree felony; count 9 – endangering children as to the other twin boy, in violation of R.C 2919.22(A)(E)(2)(C), a third-degree felony; count 10 – intimidation of one of the twin boys in violation of R.C. 2921.04(B)(D), a third-degree felony; count 11 – intimidation of the other twin boy in violation of R.C. 2921.04(B)(D), a

> third-degree felony; and count 12 – tampering with evidence in violation of R.C. 2921.12(A)(1)(B), a third-degree felony.
>
> Bush pleaded not guilty, the trial court appointed him counsel, and the matter proceeded to discovery and other pretrial matters.
>
> On June 19, 2013, the parties reached a Crim.R. 11 plea agreement. Bush pleaded guilty to count 1 (murder), count 4 (second-degree felony endangering children), counts 7, 8, and 9 (third-degree-felony endangering children), counts 10 and 11 (intimidation), and count 12 (tampering with evidence). The state moved to dismiss count 2 (felony murder), count 3 (felonious assault), counts 5 and 6 (third-degree-felony endangering children), and count 18 (involuntary manslaughter). In addition, the state agreed to recommend a term of imprisonment of twenty-two years to life.
>
> The trial court conducted a sentencing hearing on June 28, 2013. The court sentenced Bush to fifteen-years to life in prison for count 1 (murder) and found that Bush's conviction on count 4 (second-degree-felony endangering children) merged with his conviction in count 1 (murder) for purposes of sentencing. (Sentencing Tr. 27.) For the remaining counts to which Bush pleaded guilty, the court sentenced Bush to terms of imprisonment as follows: three years each for counts 7, 8, and 9 (third-degree-felony endangering children); three years each for counts 10 and 11 (intimidation); and three years for count 12 (tampering with evidence). Further, the court ordered that all of the sentences be served consecutively, for an aggregate sentence of thirty-three years to life in prison.

Id. at ¶ 2-11.

{¶5} In Appellant's direct appeal, appointed counsel filed a brief pursuant to this Court's dictates in *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970), which identified two potential issues for appeal: (1) whether the plea colloquy complied

with Crim. R. 11; and (2) whether the sentence was an abuse of discretion. We concluded that the trial court complied with Crim. R. 11 at the plea hearing and that the plea was freely and voluntarily entered. We further concluded that the sentence imposed did not demonstrate an abuse of discretion by the trial court, and that the sentence was not clearly and convincing contrary to law, pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26.

{¶6} On May 5, 2014, new counsel filed the original petition for postconviction relief pursuant to R.C. 2953.21. In the three and a half-page petition, Appellant asserted that the state violated his right to due process by withholding exculpatory evidence, and that his trial counsel provided ineffective assistance by failing to undertake a thorough investigation of the facts prior to recommending the guilty plea. There were no specific factual allegations in the petition, and no evidence dehors the record was cited or attached to the petition. However, the petition reads, "Petitioner expressly and respectfully reserves the right to supplement his Petition with Affidavits and other relevant Exhibits." (Petition, p. 4). On May 27, 2014, the State filed a motion for summary judgment. The trial court dismissed the original petition on June 4, 2014, because no evidence de hors the record was offered to support the allegations therein.

{¶7} According to the appellate brief in the above-captioned appeal, postconviction counsel, who was retained to file the petition by Karen, failed to notify Karen and Appellant that the petition had been filed or dismissed. As a consequence, no appeal was taken. Although postconviction counsel's failure to provide a copy of the judgment entry dismissing the petition is alleged in the appellate brief, the allegation is not contained in the affidavits of Appellant and Karen attached to the second petition. Karen's affidavit reads, in pertinent part, "neither I nor [Appellant] received a copy of the filed petition from [postconviction counsel]." (Karen Bush Aff. ¶ 37.)

{¶8} On December 8, 2015, Appellant, acting pro se, filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1, and a motion for new trial. Appellant argued that the trial court erred in failing to: (1) address the issue of allied offenses of similar import during the plea colloquy; and (2) advise him on the issue of postrelease control. Appellant further argued that trial counsel was constitutionally ineffective due to their failure to raise

the issue of allied offenses. Both motions were denied by the trial court on January 12, 2016.

{¶9} On appeal, we found the claims advanced in the motion for new trial were barred by res judicata because Appellant had failed to raise them in his postconviction petition. In the alternative, we found that Appellant failed to establish plain error occurred at his plea and sentencing hearings. *State v. Bush*, 7th Dist. Mahoning No. 16 MA 0016, 2017-Ohio-4450, ¶ 1, appeal not allowed, 151 Ohio St.3d 1455, 2017-Ohio-8842, 87 N.E.3d 223, ¶ 1 (2017).

{¶10} On February 25, 2016, Appellant, acting pro se, filed a motion for leave to file a delayed motion for withdrawal of his guilty plea and a motion for new trial. In the motion, Appellant argued for the first time, but did not attach, new evidence existed to prove his innocence. Both motions were denied on March 21, 2016. No appeal was taken.

{¶11} On August 24, 2018, Appellant, acting pro se, filed his second petition for postconviction relief currently before us on appeal. Fourteen exhibits are appended to the eighteen-page petition. The trial court dismissed the petition on September 10, 2018, finding that it could not entertain the petition because the information on which the petition is predicated was available to Appellant when he filed his original petition. As a consequence, the trial court concluded that the petition was barred by res judicata. Appellant, represented by counsel, filed this timely appeal.

{¶12} In order to establish the trial court's jurisdiction over his second petition, Appellant contends that the affidavit of N.B., an eye-witness to the events leading to T.F.'s death, was previously unavailable. Appellant asserts that a restraining order issued by the Mahoning County Common Pleas Court, Domestic Relations Division, put in place on March 6, 2015, was modified on November 14, 2017, and permitted Appellant contact with his son.

{¶13} With respect to his substantive constitutional claim, Appellant argues that his constitutional right to due process of law was violated because of ineffective assistance provided by his trial counsel. Appellant contends that his trial counsel coerced him into a guilty plea with the threat of a life sentence, and failed to interview vital witnesses and to adequately prepare for trial.

LAW

{¶14} Postconviction relief allows a petitioner to collaterally attack his criminal conviction by filing a petition to set aside the judgment, where the petitioner's constitutional 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*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph four of the syllabus. A common pleas court may grant relief from a conviction under R.C. 2953.21 et seq., the postconviction statutes, upon proof of a constitutional violation during the proceedings resulting in the conviction. *See* R.C. 2953.21(A)(1).

{¶15} The petitioner bears the initial burden of demonstrating, through the petition and supporting affidavits and the files and records of the case, "substantive grounds for relief." *See* R.C. 2953.21(C). A postconviction petition presents substantive grounds for relief if it presents a prima facie claim of a constitutional violation. In presenting those claims, the petition must contain factual allegations that cannot be determined by an examination of the trial record. *See State v. Milanovich*, 42 Ohio St.2d 46, 50, 325 N.E.2d 540 (1975).

{¶16} In order to resolve a postconviction petition, a trial court has three options:

> The first is to deny the petition without hearing, in accordance with the law as set forth in R.C. 2953.21 and the Ohio Supreme Court's decision in *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999). The second is to act on the state's motion for summary judgment by applying the standards set forth in Civ.R. 56. The third is to schedule an evidentiary hearing on [the defendant's] petition, at which time the trial court, as the trier of fact, is authorized to weigh the evidence and enter judgment.

State v. Paige, 7th Dist. Mahoning No. 17 MA 0146, 2018-Ohio-2782, ¶ 16.

{¶17} "It is well settled that a court is not required to hold an evidentiary hearing on every petition for postconviction relief." *Id.* at ¶ 17, citing *State ex rel. Jackson v. McMonagle*, 67 Ohio St.3d 450, 619 N.E.2d 1017 (1993); *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). "[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." *Calhoun*, paragraph two of the syllabus (1999). In this analysis, the trial court is limited to weighing the evidence proffered in support of the defendant's petition, and focuses on the evidence proffered in support of the petition, rather than the evidence proffered in the state's response. *See Williams*, supra at ¶ 22.

{¶18} "A postconviction petition may also be dismissed without a hearing where the claims are barred by res judicata." *State v. West*, 7th Dist. Jefferson No. 07 JE 26, 2009-Ohio-3347, ¶ 24. Res judicata bars any claim or defense that was raised or could have been raised in an earlier proceeding:

> Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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.

Perry, 10 Ohio St.2d at 180-181.

{¶19} Relevant to the current appeal, when a postconviction petition is a second or successive petition, R.C. 2953.23(A) prohibits the court from entertaining the petition absent a showing by the petitioner that he was unavoidably prevented from discovering the facts upon which his claim for relief is based. R.C. 2953.23(A)(1)(a). The petitioner must further show by clear and convincing evidence that, "but for constitutional error at trial, no reasonable fact finder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b). Unless the defendant fulfills the statutory requirements in R.C. 2953.23(A), the trial court lacks jurisdiction to consider a second or successive petition for postconviction relief. *State v. Staffrey*, 7th Dist. Mahoning No. 18 MA 0061, 2018-Ohio-4916, ¶ 14.

{¶20} Likewise, "[t]he doctrine of res judicata excludes subsequent actions or postconviction petitions involving the same legal theory of recovery as the previous action

or petition, as well as claims which could have been presented in the first action or postconviction petition." *Paige*, *supra*, ¶ 19, citing *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169, syllabus (1982). In other words, res judicata bars claims that could have been raised on direct appeal or any previous post judgment motions.

{¶21} The dismissal of a petition for postconviction relief is reviewed for abuse of discretion. *State v. Lett*, 7th Dist. Mahoning No. 09 MA 131, 2010-Ohio-3167, ¶ 16, citing *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 (1980).

FACTS

{¶22} Appellant relies on fourteen attachments to his second petition to fulfill the R.C. 2953.23(A)(1)(a) requirement, as well as to establish his substantive constitutional claim, which include his affidavit, as well as the affidavits of N.B., Karen, Lois Stambul, and Appellant's brother, Zel Bush. Also attached to the second petition are transcribed audio recordings of a conversation between Karen and Debbie Terry, transcribed voice recordings of a child services' home visit at 28 Creed Street, a conversation between Widdershaim, Appellant, and Widdershaim's mother, Sara Foltz, a conversation between Widdershaim, Appellant, and Widdershiem's cousin, Shandy, and a conversation between Widdershaim and the Hubbard Municipal Water Department. A transcript of a domestic relations proceeding, a modified order of protection, the undated and unsworn statement regarding the events of January 21, 2013, by Appellant's daughter, K.B., and a mobile telephone video recorded in the fall of 2011, are likewise attached to the second petition.

{¶23} According to Appellant's affidavit, he learned that one of the then-ten-year-old twins, D.W. had hit T.F. "with something", and six stitches were needed to close the wound over T.F's left eye in August of 2010. (Appellant Aff. ¶ 2-4). Appellant further avers that he was in the kitchen on the day that T.F. was fatally beaten, and he heard raised voices from the living room, including N.B. crying out for Appellant. When Appellant entered the living room, he witnessed D.W. "jumping on T.F.'s head* * * heard

T.F.'s head bounce off the floor it happened two times before [Appellant] got D.W. off of T.F. [sic]" (*Id.* ¶ 17). Appellant further avers that he overheard N.B. telling Widdershaim that D.W. attacked T.F.

{¶24} According to N.B.'s affidavit, D.W. hit T.F. with a log from a woodpile in 2012. T.F.'s toes were frostbitten in December of that same year because Widdershaim forced him to shovel snow from her driveway and a neighbor's driveway while he was wearing dress shoes.

{¶25} N.B.'s affidavit further reads, in pertinent part, "That the following is an account of what happened on the day of January 21, 2013, that I being present, witnessed first-hand, and detailed in a written statement that I later provided to my father's court appointed attorney [ ] at his request in February of 2013 but was never submitted to this court." (N.B. Aff. at ¶ 20). N.B further attests that, on January 21, 2013, D.W. stepped on T.F.'s bad foot, which knocked T.F. to the ground, then D.W. "stomped" on T.F.'s head. (*Id.* at ¶ 26).

{¶26} Relevant to the current appeal, N.B. avers that he "made three statements" in February 2013, as requested by Appellant's trial counsel: "1 about [January 21, 2013], 1 on frostbite, and 1 on stitches." (*Id.* at ¶ 37). According to N.B.'s affidavit, two or three months after Appellant's arrest, N.B. mailed the same three statements to the trial court, but received no reply.

{¶27} According to Karen's affidavit, she took D.W. to her home after T.F. was taken to the hospital on January 21, 2013. D.W. sat in the back seat and wept stating that he should not have fought with T.F. A while later, D.W. asked Karen, "Why does my mom want me to lie?" Karen was confused and told D.W. to ask his mother that question. (Karen Aff. ¶ 17).

{¶28} Karen further attests that Appellant's trial counsel asked her to collect detailed statements from anyone with information regarding the infliction of the injury above T.F.'s left eye, his frostbite, and the infliction of his fatal injuries. At a meeting with Appellant's trial counsel, Karen provided six statements, including two statements from Kate, three statements from N.B., and one statement from K.B., as well as two tape recorders. The two tape recorders contained recorded conversations between: (1) Shain and the water department, to establish that Widdershaim's mother, Sarah Foltz, instructed

the water department to discontinue service in order to render Shain and the children homeless (recorded in 2010); and (2) Widdershaim, Appellant, and Sarah, to establish that Sarah had no problem with Appellant except for the "way he talks" (recorded in 2010); (3) Widdershaim, Appellant, and Shandy, to establish that Shandy made a false report to children's services at Sarah's behest (recorded in 2011 or 2012); and (4) Widdershaim, Appellant, D.W., and the other twin boy, and a caseworker from children's services, to establish that a neighbor had made a false report to children's services that Widdershaim had no water in her house and that her children were being abused (recorded July 2012). (*Id.* at ¶ 30.)

{¶29} Karen further avers that she gave the same materials to Appellant's postconviction counsel on December 31, 2013, in addition to cellular telephone video provided by N.B. of D.W. beating T.F. and the other twin boy, two statements from Appellant, and newspaper articles. On April 9, 2014, Karen sent postconviction counsel three additional statements, as well as an audiotaped recording of a conversation between Karen and Terry on March 17, 2014, in which Terry admits that Widdershaim confessed to her that "one of the twins" caused T.F.s death.

ASSIGNMENT OF ERROR NO 1

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED BUSH'S PETITION FOR POST-CONVICTION RELIEF IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO 2

THE TRIAL COURT ERRED IN DENYING BUSH'S POST-CONVICTION RELIEF PETITION WHERE HE PRESENTED SUFFICIENT EVIDENCE OF DEHORS THE RECORD TO MERIT AN EVIDENTIARY HEARING.

{¶30} Appellant asserts two assignments of error, which challenge the dismissal of the petition on the merits. However, the trial court dismissed the petition based on procedural grounds without reaching Appellant's substantive constitutional claims. As a

consequence, we review the dismissal of the petition by the trial court on procedural grounds for an abuse of discretion.

{¶31} As a threshold matter, in order to establish the jurisdiction of the trial court to entertain the second petition, Appellant was required to demonstrate that he was "unavoidably prevented from discovering the facts upon which his claim for relief is based." R.C. 2953.23(A)(1)(a). The affidavits of Appellant, N.B., and Karen attached to the second petition demonstrate just the opposite, that Appellant had been aware of the facts on which his constitutional claim is based prior to the direct presentment of the indictment on March 7, 2013. Moreover, the affidavits of N.B. and Karen establish that their statements, the contents of which comprise their 2018 affidavits, were reduced to writing in February of 2013. Accordingly, Appellant has failed to demonstrate that he was unavoidably prevented from discovering the facts upon which his claim for relief is based until he filed his second petition.

{¶32} At oral argument, Appellant's counsel asserted that Appellant was unable to acquire the executed affidavits until June of 2018. However the jurisdictional requirement to entertain a second petition is the awareness of facts, not the availability of the evidence establishing those facts.

{¶33} Appellant's counsel further asserted at oral argument that the domestic violence order of protection prevented Appellant from timely acquiring N.B.'s affidavit. The order of protection was issued on March 16, 2015. Appellant could have acquired N.B.'s affidavit during the two years between the direct presentment of the indictment and the issuance of the order of protection. Furthermore, the order of protection prohibited contact with N.B. by Appellant, not his counsel. Therefore, Appellant's trial counsel and postconviction counsel could have contacted N.B. at any time since 2013.

{¶34} Based on a review of the record, we find that Appellant was aware of the facts provided in support of the trial court's jurisdiction prior to the direct presentment of the indictment in 2013. Accordingly, we find that the trial court did not abuse its discretion in concluding that it did not have jurisdiction to entertain the petition.

{¶35} The trial court further found that Appellant's substantive constitutional claims were barred by res judicata. The trial court reasoned that Appellant could have raised his ineffective assistance of counsel claim in his original petition on May 5, 2014.

Because we have concluded that Appellant was aware of the facts provided in support of his substantive constitutional claim in 2013, we find that the trial court did not abuse its discretion in concluding that Appellant's claim is barred by the doctrine of res judicata.

CONCLUSION

{¶36} For the foregoing reasons, we find that both of Appellant's assignments of error, which assert error related to his substantive constitutional claims, are moot. We affirm the dismissal of the petition on procedural grounds, because the trial court did not have jurisdiction to entertain the petition, and the second petition is barred by the doctrine of res judicata.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.