

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106982

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID D. ERCOLI, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-602684-A

BEFORE: Blackmon, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: January 10, 2019

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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PATRICIA ANN BLACKMON, J.:

{¶1} Defendant-appellant, David D. Ercoli, Jr. (“Ercoli”), appeals from the denial of his petition to vacate his convictions for two aggravated robberies and other offenses. He assigns the following errors for our review:

- I. The trial court erred when failing to grant an evidentiary hearing regarding [Ercoli’s claim of fabrication of a photo array].
- II. The trial court erred when failing to grant an evidentiary hearing regarding [Ercoli’s claim of forgery of a police officer’s name on photo array instructions].
- III. The trial court erred when adopting, verbatim, the findings and conclusions prepared by the state.
- IV. The trial court erred by denying [Ercoli’s] motion to strike the state’s brief.
- V. The trial court erred when allowing this conviction to stand after [it was] obtained by the use of false evidence.

VI. The trial court erred in denying an evidentiary hearing [on the issue of] tampering with police reports and search and seizure violations.

VII. The trial court erred by failing to grant an evidentiary hearing [on exculpatory surveillance video evidence].

VIII. The trial court erred in failing to grant an evidentiary hearing [on R.R.'s identification].

IX. The trial court erred in failing to grant an evidentiary hearing on [Ercoli's allegations that the videos were fabricated].

X. The trial court erred in failing to grant an evidentiary hearing regarding ineffective assistance of counsel and the state's failure to amend the indictment.

XI. Trial court erred in refusing to grant [handwriting and video surveillance] expert assistance.

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} In 2016, Ercoli was charged in a ten-count indictment in connection with two aggravated robberies at McDonald's restaurants in Cleveland. The charges proceeded to a jury trial. In relevant part, the evidence established:

[O]n December 13, 2015, * * * a car pulled up to the drive-thru where [Memphis Avenue McDonald's crew member Mikki] Jeffreys was working and the driver placed an order. He pulled around to her window, got out of the car, and said that his car window did not roll down. * * * [The driver handed a note] to Jeffreys [demanding] all the "5s and 10s and 20s out of the drawer." The man was also holding a gun, which he pointed at her. Jeffreys complied with his demands.

* * * Jeffreys gave the police a description of the suspect and later was able to select a suspect, identified as Ercoli, out of a photo array [with 97% certainty].

Jeffreys also identified Ercoli in court and testified she was 100% confident he was the man who robbed the McDonald's on December 13, 2015. The restaurant manager [also] identified Ercoli from the surveillance footage of the robbery and again in court. The manager recognized Ercoli as a previous customer who had been to the McDonald's many times.

[Following an armed robbery at a McDonald's on Clark Avenue, the owner] drove to the store and looked at the surveillance video from the robbery. He observed

a man in the drive-thru lane exit a silver car, holding a gun. The man approached the drive-thru window and stuck his gun through the window pointing it at the crew member working inside.

[R.R.] was working second shift [and testified] that * * * a man came through the drive-thru, got out of his car, and approached the window. [R.R.] saw the man stick a black gun through the window; he had a gun in his right hand and a note in his left hand. [R.R.] immediately ran away from the window. She did not see the man's face and could not identify him.

Michael Pisano, the owner of Diversified Automotive, [was watching the news and] * * * recognized the car as one on his lot, a 2007 silver Hyundai Sonata[.] Pisano checked his lot and found the Sonata missing. * * *

[Mike McKay, owner of a detailing company where Ercoli was employed,] drove by Ercoli's house and found the Sonata parked one street over from Ercoli's house * * * and saw Ercoli get in the car, drive to a gas station, park the car, and walk to work. * * *

After Ercoli's arrest, Detective [Elliott] Landrau interviewed him. The interview was recorded and played for the jury. Ercoli told detective that he had used the 2007 Sonata but that he had his boss's permission to use the car.

See State v. Ercoli, 8th Dist. Cuyahoga No. 104578, 2017-Ohio-5571, ¶ 3-16. Four of the charges were dismissed before the matter was submitted to the jury, and Ercoli was convicted of two counts of aggravated robbery, two counts of improperly handling firearms in a motor vehicle, and one count each of theft and receiving stolen property, with one- and three-year firearm specifications. He was sentenced to fourteen years of imprisonment. *Id.* at ¶ 2, 18.

{¶4} Immediately following his convictions, Ercoli filed a motion for a new trial pursuant to Crim.R. 33(A)(6), which was denied.

{¶5} In a direct appeal of his conviction, Ercoli asserted that his convictions were against the manifest weight of the evidence and unsupported by sufficient evidence. He maintained that no one identified him as the assailant. This court rejected the assigned errors and affirmed. *Id.*

{¶6} Ercoli also filed a motion to reopen his direct appeal, arguing that appellate counsel failed to secure a “complete and adequate record of trial proceedings,” and should have challenged the exhibits as “fabricated.” In rejecting Ercoli’s claims, this court stated,

our review of the appellate record belies Ercoli’s claim. Contrary to Ercoli’s assertion, the appellate record contains all of the exhibits that were admitted at trial. Moreover, there is no basis to conclude that these exhibits were “fabricated,” and Ercoli’s bald accusation does not support a claim for ineffective assistance of counsel. * * *

Ercoli argues that his appellate counsel should have raised an ineffective assistance of trial counsel claim based on his trial counsel’s failure to challenge the “forged and fabricated photo array documents,” which are missing from the record. But as stated above, these documents are not missing from the record. Nor is there any basis to conclude that they were forged or fabricated. The witnesses themselves testified at trial and acknowledged identifying Ercoli from the photo array presented. Further, Ercoli cannot complain regarding the exclusion of a surveillance video that he moved to exclude at trial. * * *

The record reflects that Det. Elliot Landrau was not present for the administration of the photo array and therefore could not answer questions outside of his knowledge. Similarly, because the trial court excluded the admission of the third video-camera footage (upon defense counsel’s request), the trial court properly cautioned the witness not to talk about that camera angle. Again, this admonition was done because of Ercoli’s request to exclude the evidence. His purported claim of ineffective assistance of counsel is not supported by law or facts.

Ercoli, 2018-Ohio-1384, ¶ 10, 12, 16.

{¶7} In July 2017, Ercoli filed a motion to vacate his conviction under R.C. 2953.21. In relevant part, Ercoli asserted that he had been deprived effective assistance of counsel due to his trial counsel’s failure to file a motion to suppress the photo array identifications, and that the photo arrays were “fraudulent.” He maintained that he should have been given funds for expert handwriting analysis. He also argued that his due process rights were violated when witnesses were permitted to testify regarding surveillance video, after the actual video was deemed inadmissible due to late discovery. Additionally, he asserted that his due process rights were violated when the trial court momentarily mentioned kidnapping charges that had been

dismissed, then issued a curative instruction. On March 1, 2018, the trial court denied the petition. In a nine-page opinion, the trial court determined that Ercoli's claims were barred by res judicata because the claims could have been raised in his direct appeal.

Petition to Vacate Conviction

{¶8} In each of the assigned errors, Ercoli argues that his petition sets forth meritorious claims that support the vacation of his convictions. We shall address each in turn and combine the claims where it is appropriate to do so.

{¶9} We review a trial court's decision on a petition for postconviction relief for an abuse of discretion. *State v. White*, 8th Dist. Cuyahoga No. 90544, 2008-Ohio-4228, ¶ 19, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281 1999-Ohio-102, 714 N.E.2d 905.

{¶10} Under R.C. 2953.21, a prisoner may obtain postconviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution of the United States Constitution." *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994); *State v. Smith*, 8th Dist. Cuyahoga No. 93534, 2010-Ohio-1869, ¶ 11. Rather, it is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record. *Id.* at ¶ 12.

{¶11} Pursuant to R.C. 2953.21(C), a trial court may deny a 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*, 86 Ohio St.3d at 281. Res judicata is a proper basis upon which to dismiss, without a hearing, an R.C. 2953.21

petition. *Smith*, 2010-Ohio-1869 at ¶ 23, quoting *State v. Banks*, 10th Dist. Franklin No. 08AP-722, 2009-Ohio-1667, ¶ 10.

{¶12} “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*. A petition for postconviction relief may be denied on the basis of res judicata if the trial court “finds that the petitioner could have raised the issues in the petition at trial or on direct appeal without resorting to evidence beyond the scope of the record.” *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 16, citing *State v. Scudder*, 131 Ohio App.3d 470, 475, 722 N.E.2d 1054 (10th Dist.1998).

- 1. Fabrication of the Photo Array Evidence**
- 2. Forgery on the Photo Array Instructions**

{¶13} In these assigned errors, Ercoli argues that his conviction is void because the instructions and the identifications from photo arrays presented to two witnesses were false and fraudulent.

{¶14} As noted by the trial court, although Ercoli maintained that a handwriting analysis supported these claims, it was not presented in support of the petition. In any event, these claims were previously considered and rejected in the opinion denying Ercoli’s motion to reopen his direct appeal. Moreover, R.R. was unable to identify Ercoli, but Jeffrey’s witness identified Ercoli in trial with certainty and stated that Ercoli was a frequent customer at the restaurant. Therefore, these claims do not afford Ercoli relief under R.C. 2953.21.

{¶15} The first and second assigned errors lack merit.

- 3. The “Adoption” of the State’s Findings and Conclusions**

{¶16} Ercoli next argues that the trial court simply adopted the arguments presented in the state’s brief in opposition and did not conduct its own analysis of his claims for relief.

{¶17} Our review of the record does not support this claim. Rather, the trial court conducted a thorough analysis of each claim and did not simply adopt the state’s assertions.

{¶18} The third assigned error is without merit.

4. Denial of Ercoli’s Motion to Strike State’s Brief

{¶19} Ercoli next argues that the trial court erred in denying his motion to strike the state’s brief in opposition because some of the supporting documentation contained redactions. Ercoli also complains that the state’s brief was untimely because it was filed seven months after his petition.

a. Redactions

{¶20} We review this claim for an abuse of discretion. *A.M. v. Miami Univ.*, 10th Dist. Franklin No. 17AP-156, 2017-Ohio-8586, ¶ 20-21. We find no abuse of discretion herein because the court stated that “the court viewed a complete and unredacted copy of the motion.”

b. Untimely Response from the State

{¶21} Pursuant to R.C. 2953.21(D), if the state responds to a petition for postconviction relief, it must do so within ten days after the petition is filed or obtain leave of court to respond after that time. *State v. West*, 8th Dist. Cuyahoga No. 98680, 2013-Ohio-826, ¶ 14, citing *State v. Slagter*, 8th Dist. Cuyahoga No. 78658, 2001 Ohio App. LEXIS 4656 (Oct. 18, 2001), citing *State v. Wiles*, 126 Ohio App.3d 71, 77, 709 N.E.2d 898 (11th Dist.1998).

{¶22} Here, the state’s brief was filed months after the ten-day period, and without leave of court. Therefore, the trial court erred in considering it. However, we find the trial court’s error to be harmless because regardless of the untimely state’s filing, it remained incumbent upon Ercoli to provide evidence of sufficient operative facts to demonstrate a cognizable claim of a

constitutional error. *West*, citing *State v. Kapper*, 5 Ohio St.3d 36, 37-38, 448 N.E.2d 823 (1983).

{¶23} The fourth assigned error is without merit.

6. Tampering With Police Reports and Search and Seizure Violations

{¶24} In his sixth assigned error, Ercoli argues that his conviction is void because he was arrested on January 11, 2016, but his felony arrest warrant was not signed by the issuing judge until January 14, 2016.

{¶25} Ercoli acknowledges that at the time of his arrest, the officers mentioned an outstanding *misdemeanor* warrant, and not the felony warrant. In any event, Ercoli has failed to provide evidence to support the claim that his arrest was unlawful and he has failed to establish that the trial court was without jurisdiction over him. Moreover, this claim could have been raised in Ercoli's direct appeal so it is barred by res judicata. *State v. Stallings*, 8th Dist. Cuyahoga No. 63147, 1993 Ohio App. LEXIS 3517 (July 15, 1993).

{¶26} The sixth assigned error lacks merit.

5. Conviction Based Upon Allegedly False Evidence

7. Failure to Grant Hearing on "Exculpatory" Surveillance Video

8. Failure to Grant an Evidentiary Hearing on R.R.'s Identification

9. Failure to Grant Hearing on "Fabricated" Surveillance Video

{¶27} In the fifth, seventh, eighth, and ninth assigned errors, Ercoli asserts that the evidence does not support his convictions because the video of the robbery fails to depict a distinctive sticker on the vehicle, R.R. could not identify him as the assailant, and a witness briefly testified regarding a video that was not admitted into evidence.

{¶28} Insofar as these claims seek to relitigate the trial and the weight and sufficiency of the state's evidence, they have previously been determined and are barred by res judicata.

These claims do not support vacating the conviction. The fifth, seventh, eighth and ninth assigned errors are overruled.

10. Mention of Dismissed Kidnapping Charges

{¶29} Ercoli next asserts that his conviction is void because the trial court briefly mentioned kidnapping charges to the jury after they had already been dismissed by the state.

{¶30} This claim could have been raised in direct appeal so it is barred by res judicata. In any event it was extremely de minimis and was followed by a curative instruction, so it was not prejudicial.

{¶31} The tenth assigned error lacks merit.

11. Failure to Grant Expert Assistance for Handwriting and Video

{¶32} Ercoli next argues that the trial court erred in refusing to grant him expert assistance for handwriting and video analysis.

{¶33} R.C. 2953.21 “does not provide for appointment of experts or investigators.” *State v. Jackson*, 8th Dist. Cuyahoga No. 104132, 2017-Ohio-2651, ¶ 10, quoting *State v. Monroe*, 10th Dist. Franklin No. 04AP-658, 2005-Ohio-5242, ¶ 15. In any event, this claim could have been raised on direct appeal, and essentially reasserts claims that have already been rejected.

{¶34} This assigned error lacks merit.

{¶35} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
SEAN C. GALLAGHER, J., CONCUR

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