[Cite as *State v. Vinson*, 2009-Ohio-3751.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-163 (C.P.C. No. 07CR-09-6859)
v.	:	(REGULAR CALENDAR)
Ella B. Vinson,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 30, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Ella B. Vinson, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Ella B. Vinson, from a judgment of the Franklin County Court of Common Pleas, denying appellant's petition to vacate or set aside a judgment of conviction.

{¶2} On September 20, 2007, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11. Appellant waived her right to a jury trial, and the

case was tried to the bench. On February 29, 2008, the trial court found appellant guilty of the charge of felonious assault.

{¶3} Represented by new counsel, appellant appealed the judgment, arguing that her conviction was against the manifest weight of the evidence, and that she received ineffective assistance of counsel.[1] In *State v. Vinson,* 10th Dist. No. 08AP-381, 2008-Ohio-6430, this court overruled appellant's assignments of error and affirmed the judgment of the trial court.

{¶4} On December 15, 2008, appellant filed a petition, pursuant to R.C. 2953.21, to vacate or set aside her judgment of conviction or sentence. The trial court denied appellant's petition by entry filed January 16, 2009.

{¶5} On appeal, appellant sets forth the following assignment of error for this court's review:

> The "trier of fact" violated Ella Vinson's rights to *due process and a fair trial,* the 'trier of fact was *not impartial* and the "trier of fact willfully and knowing allowed known perjured testimony to influence his decision in this case.

(Sic passim.)

{¶6} Appellant's pro se brief raises five "claims" under her single assignment of error. Specifically, appellant argues: (1) the trial court made "deceitful statements" regarding the number of 911 calls that were to be entered into evidence; (2) the trial court allowed witnesses to commit perjury; (3) the trial court engaged in "promulgating falsehoods" as to the number of stitches the victim received; (4) evidence regarding blood

[1] At trial, appellant was represented by an assistant county public defender. Following her conviction, the trial court appointed private counsel to represent appellant on appeal.

drops on appellant's porch was withheld; and (5) "[i]t is conceivable that my transcript testimony would be change[d]."

{¶7} Post-conviction relief is governed by R.C. 2953.21, which provides in part:

> (A)(1)(a) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶8} The Supreme Court of Ohio has noted that "a petition for postconviction relief 'is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment' * * * in which a claimant asserts that either actual innocence or deprivation of constitutional rights renders the judgment void." *State v. Silsby,* 119 Ohio St.3d 370, 2008-Ohio-3834, ¶16, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. A criminal defendant seeking to challenge his or her conviction through a petition for post-conviction relief is not automatically entitled to a hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 113. Prior to granting a hearing, "the court shall determine whether there are substantial grounds for relief." R.C. 2953.21(C). Pursuant to the provisions of 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." *Calhoun*, paragraph two of the syllabus. An appellate court reviews a trial court's decision to deny

a post-conviction petition without a hearing under the abuse of discretion standard. *State v. Banks,* 10th Dist. No. 08AP-722, 2009-Ohio-1667, ¶10.

{¶9} Res judicata is a proper basis upon which to dismiss, without a hearing, an R.C. 2953.21 petition. Id. at ¶9. A petition for post-conviction relief may be dismissed without a hearing, based upon the doctrine 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. Scudder* (1998), 131 Ohio App.3d 470, 475.

{¶10} Under appellant's first "claim," she argues that the trial court made "deceitful statements" at trial regarding the number of 911 calls placed at the time of the incident. By way of background, during the testimony of the state's first witness, defense counsel made a request with the trial court to review a witness statement. At that time, the prosecutor discussed other witness statements, as well as 911 calls. The trial court then engaged in the following colloquy with the prosecutor and defense counsel regarding 911 records:

> THE COURT: Were there two 911 calls, I have the impression?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> [PROSECUTOR]: Correct.
>
> THE COURT: Are those going to be entered in to evidence, both of them, one of them, none of them? What's the plan on that?
>
> [PROSECUTOR]: It was not my intention.
>
> [DEFENSE COUNSEL]: I wasn't planning on it, Your Honor.

THE COURT: All right.

[PROSECUTOR]: So there's --

THE COURT: Two or three.

[PROSECUTOR]: -- two or three.

(Tr. 34.)

{¶11} Appellant contends that the trial court's reference to "[t]wo or three" 911 calls (as opposed to two 911 calls) was a "deceitful" statement, apparently made to "get one to believe that there were witnesses." (Appellant's brief, at 4.) Appellant also argues that her phone records should have been introduced at trial.

{¶12} In addressing the merits of appellant's post-conviction claim regarding these records, the trial court noted that "telephone records and witness statements * * * were available at trial," and the court held that "[a]ny complaints as to whether this evidence was excluded at trial after its admission was offered should have been raised on direct appeal." We agree. As noted above, the existence of the 911 calls was a matter of record, and the trial transcript indicates that the prosecution and defense counsel discussed whether either side planned to enter those records into evidence. Further, any claim that the trial court's reference during the bench trial to "[t]wo or three" 911 calls somehow evinced deceit on the part of the court could have been raised on direct appeal, and, therefore, is barred by the doctrine of res judicata.

{¶13} Appellant contends in her second "claim" that the trial court permitted witnesses, including a police officer, to commit perjury. Appellant has attached to her appellate brief a copy of an informational summary prepared by Officer Anthony C. Roberts. This summary, however, was not part of the materials submitted to the trial

court in the petition to vacate or set aside the conviction, and appellant never raised the issue of perjury by a police officer before the trial court. Accordingly, appellant has waived review of that claim for purposes of appeal. *State v. Lariva,* 10th Dist. No. 08AP-413, 2008-Ohio-5499, ¶21 (a petitioner's failure to raise claims in petition for post-conviction relief before the trial court constitutes a waiver of those claims on appeal).

{¶14} Appellant argues under her third "claim" that the trial court was not impartial and promulgated falsehoods during the bench trial regarding the victim's injuries. Specifically, appellant cites the court's reference to the victim having received 15 stitches as a result of the incident.

{¶15} A review of the trial transcript indicates the victim was asked during direct examination whether she knew "approximately how many stitches you received?" (Tr. 29.) The witness responded: "I thought they told me 15." (Tr. 29.) The trial court later noted this witness's testimony in a discussion with counsel during closing arguments. Appellant maintains that medical records of the victim, not introduced at trial, indicated the victim only received five stitches.

{¶16} In her post-conviction petition before the trial court, however, appellant did not raise the issue of a discrepancy between the trial testimony and medical records regarding the number of stitches the victim received, nor did appellant argue that the trial court acted in a less than impartial manner in citing the victim's testimony that she received 15 stitches. This claim, therefore, not having been raised by appellant in her post-conviction petition, is waived for purposes of appeal.

{¶17} Appellant did contend, in her post-conviction petition, that the medical records of the victim were pertinent in the context of the victim's purported voluntary

intoxication; appellant also alleged a due process violation because the victim's blood alcohol content was not disclosed in the victim's medical records.

{¶18} Regarding the latter claim, the trial court noted that medical records were "devoid of any laboratory analysis as to the victim's blood alcohol content," and that appellant "presented no evidence or documentation to show that an analysis of the victim's blood alcohol content was even performed." Further, the court observed, evidence as to the victim's purported intoxication "was thoroughly examined during the trial," and the trial court "was fully aware of that issue, and the possible impact it had on not only [the victim's] overall credibility as a witness but also its potential importance given the self-defense position taken by [appellant]." The trial court thus found that this claim was barred by res judicata.

{¶19} Upon review we find no error by the trial court. We construe appellant's third claim as raising an ineffective assistance of counsel argument based upon appellant's citation to *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. As noted by the trial court, even though defense counsel did not seek admission of the victim's medical records, the trier of fact was aware of defense counsel's theory that the victim's memory of the events was clouded by alcohol consumption. In appellant's direct appeal, this court cited "testimony concerning [the victim's] consumption of alcohol that evening." *Vinson* at ¶36. That evidence included the testimony of Columbus Police Officer Anthony Roberts, who stated that the victim "appeared to be intoxicated." Id. at ¶17. Further, this court rejected appellant's contention that she received ineffective assistance of counsel based upon her claim that "her counsel should have presented more evidence concerning [the victim's] intoxication." *Vinson* at ¶44. This court declined

to second-guess defense counsel's decisions about whether to call medical personnel, and overruled appellant's assignment of error alleging ineffective assistance of trial counsel.

{¶20} In considering claims of ineffective assistance of counsel in the context of post-conviction relief, the Supreme Court of Ohio has observed "it is not unreasonable to require the defendant to show in his petition for postconviction relief that such errors resulted in prejudice before a hearing is scheduled." *Calhoun* at 283, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 112. In the instant case, even assuming res judicata did not bar the issue of whether counsel's performance was deficient in failing to seek admission of the victim's medical records, appellant cannot demonstrate prejudice as evidence of the victim's purported intoxication was presented at trial and evaluated by the trier of fact.

{¶21} Appellant argues, under her fourth "claim," that photographic evidence depicting blood drops on her porch was withheld. We initially note that it is not entirely clear whether appellant contends such photographs were actually taken. In her post-conviction petition, appellant argued that blood drops on her porch "should" have been photographed. Appellant further argued, however, that exculpatory photographs had not been turned in by the prosecutor. In support of her claim of an alleged violation under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, appellant submitted with the petition her statement that she had "witnessed 3 blood drops on my porch" following the incident. In addressing appellant's claim, the trial court concluded that this evidence would have been available at the time of trial, citing appellant's notarized statement that she personally observed blood drops following the incident.

{¶22} In order to establish a violation under *Brady,* "the defendant must prove that the prosecution suppressed evidence, the evidence was favorable to the defense, and the evidence was material." *United States v. Erickson* (C.A.10, 2009), 561 F.3d 1150, 1163. A *Brady* claim fails, however, "if the existence of favorable evidence is merely suspected." Id. Further, a defendant must also show that the favorable evidence was in the possession or control of the prosecution, and "a defendant is not denied due process by the government's nondisclosure of evidence if the defendant knew of the evidence anyway." Id. See also *Carter v. Bell* (C.A.6, 2000), 218 F.3d 581, 601, quoting *United States v. Mullins* (C.A.6, 1994), 22 F.3d 1365, 1371 (" '*Brady* is concerned only with cases in which the government possesses information which the defendant does not' [and] "there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source"). Id.

{¶23} In the present case, as noted by the trial court, appellant was aware of the evidence she contends was withheld, as reflected in her statement attached to the petition. We note that appellant also testified during the bench trial to observing three blood drops on her porch. While appellant contends that she observed three blood drops on her porch, she has not submitted any operative facts to support her argument that evidence was withheld. This court has previously held that res judicata precludes a petitioner "from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶37. Inasmuch as appellant was aware of this purported evidence prior to trial, we find no error with the trial court's determination that

this claim is barred by the doctrine of res judicata. *State v. Gau,* 11th Dist. No. 2008-A-0030, 2008-Ohio-6988 (appellant's claim of due process violation barred by res judicata where appellant was aware at time of trial of existence of photos and state's alleged failure to provide them to his attorney).

{¶24} Appellant's fifth "claim" summarily asserts: "[I]t is conceivable that my transcript testimony would be change[d]." (Appellant's brief, at 6.) This claim, however, was not raised before the trial court, and is therefore waived for purposes of appeal. *Lariva* at ¶21.

{¶25} Based upon the foregoing, appellant's single assignment of error is without merit and is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.

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