[Cite as *State v. Clinkscale*, 2012-Ohio-2868.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-980
v.	:	(C.P.C. No. 97CR-09-5339)
David B. Clinkscale,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 26, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Eric J. Allen, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, David B. Clinkscale, appeals from the judgment of the Franklin County Court of Common Pleas dismissing his petition to vacate or set aside judgment of conviction pursuant to R.C. 2953.21 without a hearing. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 29, 1997, appellant was indicted with three counts of aggravated murder, one count of attempted aggravated murder, one count of aggravated burglary, two counts of aggravated robbery, and one count of kidnapping. Each count of

the indictment included an associated firearm specification. Additionally, each of the aggravated murder counts included death penalty specifications. The charges pertained to a September 1997 shooting that injured Todne Williams and killed her husband, Kenneth Coleman.

{¶ 3} Following a jury trial in 1998, appellant was acquitted of the aggravated murder by prior calculation and design, but convicted on all other counts and accompanying specifications. Appellant was sentenced to a term of life imprisonment without the possibility of parole. This court affirmed, and the Supreme Court of Ohio declined review. *State v. Clinkscale*, 10th Dist. No. 98AP-1586 (Dec. 23, 1999) ("*Clinkscale I*"); *State v. Clinkscale*, 88 Ohio St.3d 1482 (2000). The United States Sixth Circuit Court of Appeals, however, granted appellant federal habeas relief. *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir.2004). Specifically, the Sixth Circuit Court of Appeals concluded appellant's trial counsel provided ineffective assistance by failing to timely file a notice of alibi which prevented the admission of evidence tending to support appellant's alibi defense. *Id*. at 443-45. The three witnesses listed on the untimely notice of alibi were Bryan Fortner, Rhonda Clark, nka Rhonda Parker, and appellant's father, Arthur Clinkscale. *Id*.

{¶ 4} In 2006, during the retrial, both Arthur Clinkscale and Parker testified. The jury found appellant guilty on all counts and specifications on which he was previously convicted in *Clinkscale I*. This court affirmed appellant's convictions in *State v. Clinkscale*, 177 Ohio App.3d 294, 2008-Ohio-1677 (10th Dist.) ("*Clinkscale II*"). However, the Supreme Court of Ohio reversed the convictions after concluding: (1) a deliberating juror was replaced with an alternate juror in violation of former Crim.R. 24(G)(2), and (2) the trial court erred in failing to make a record of the proceedings that resulted in the deliberating juror's dismissal and replacement. *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746.

{¶ 5} In 2010, a third jury trial was held on the counts and specifications on which appellant was previously convicted in the second trial. The jury found appellant guilty of all charges and specifications. Appellant's convictions were upheld by this court in *State v. Clinkscale*, 10th Dist. No. 10AP-1123, 2011-Ohio-6385 ("*Clinkscale III*"). The facts underlying the charges presented herein are taken from that decision.

{¶ 6} As set forth in *Clinkscale III*, Williams testified during appellant's third trial as follows. In September 1997, Williams and Coleman were living at 1261 Mooberry Street in Columbus, Ohio. Coleman kept a dog for dog-fighting, cash in a bedroom safe, and he also gambled large amounts of money. Appellant, whose nickname is "Silk," and Coleman met and became friends while growing up in Youngstown, Ohio. *Clinkscale III* at ¶ 6.

{¶ 7} During the weekend of September 6, 1997, Coleman and a group of people including appellant went to Kentucky for a dog fight. Coleman, appellant, and another man, later known to Williams as Darry Woods ("Darry"), returned to the Mooberry house on September 7, 1997 around 11:00 p.m. The men played video games, and Williams went upstairs to be with her children. At one point, Coleman came upstairs to get some money because he was gambling on a video game. Later, Williams heard a gunshot and, within seconds, appellant came to her bedroom with a 9 mm gun, which had "smoke coming out of it." (Oct. 13, 2010 Tr. Vol. I, 122.) Appellant was in a rage and demanded money. Williams told appellant to talk to Coleman, but appellant said he could not do that. Next, Darry came into the room and held the gun on Williams while appellant carried out a safe from the closet. Appellant returned and told Williams to go downstairs. Appellant ordered Williams to lie next to Coleman, but Williams tried to escape and then began struggling with appellant. Appellant fired three shots at Williams. Williams tried to block the shots with her arms, and one of the shots shattered a bone in one of her arms. Williams called 911 after appellant and Darry left. When the 911 operator asked who the shooter was, Williams said, " 'I don't know.' " (Oct. 13, 2010 Tr. Vol. I, 195.) But Williams explained at trial that she was scared and focused on getting help. *Clinkscale III* at ¶ 7.

{¶ 8} Detective Timothy Huston testified that when he and Officer Brian Kaylor arrived at the scene, Williams said that the attackers were two black males and that she had previously seen one of them with Coleman. Kaylor testified that Williams was hysterical when he and Huston arrived at the scene. He also said, "I recall her saying * * * she did not know the shooter." (Oct. 18, 2010 Tr. Vol. IV, 726.) *Clinkscale III* at ¶ 8.

{¶ 9} Detective Robert Viduya testified Williams told him that the shooter's first name was David and that Coleman's mother would know his full name. Viduya called Coleman's mother, and she told him that David Clinkscale was the name of her son's

friend. Viduya showed Williams a photograph of appellant, and Williams said, " 'Hey, that's the shooter. That's David.' " (Oct. 18, 2010 Tr. Vol. IV, 662.) Williams identified Darry in a photo array as appellant's accomplice. She had previously identified other individuals as appellant's accomplice, but she was not as certain about those other identifications as she was with the one she made of Darry. She said she was " 'a hundred percent sure' " of her identification of Darry. (Oct. 18, 2010 Tr. Vol. IV, 702.) *Clinkscale III* at ¶ 9.

{¶ 10} The prosecution also introduced appellant's testimony from his first trial in which he testified that he and a man he referred to as Jerome Woods drove from Youngstown to Columbus in September 1997 to visit Coleman. During that visit, the group went to Kentucky for a dog fight. After the fight, appellant drove back to Columbus with Jerome. Coleman was in a separate car, and appellant never saw him again. It was now September 7, 1997, and appellant and Jerome spent some time in Columbus before returning to Youngstown later that day. In Youngstown, appellant went to the home of his cousin, Bryan Fortner, to watch a football game. Appellant slept with his girlfriend, Rhonda Parker, at Fortner's house. He went to his parents' home around 5:30 a.m. the next morning. Appellant verified that his nickname is "Silk." (Oct. 19, 2010 Tr. Vol. V, 900.) He also admitted that the blue ball cap found at the scene was his. He claimed that he left it in Kentucky, and Coleman must have brought it to Columbus. *Clinkscale III* at ¶ 12-13.

{¶ 11} Parker testified she had dated appellant before she married another man. According to Parker, she was not with appellant on September 7 or 8, 1997, as she did not even meet him until a couple of weeks later. Nevertheless, appellant asked Parker to tell police that she was with him watching football and sleeping together on the night of the shooting, and she conveyed that story to an investigator for the defense. When a police detective interviewed her later, however, she said that she was not with appellant on the night of the shooting and did not even know him then. She also refused to support the alibi in 2000 when a defense attorney contacted her. She told the attorney that she would not lie. *Clinkscale III* at ¶ 14.

{¶ 12} After the prosecution rested its case-in-chief, the defense called Arthur Clinkscale, appellant's father, who testified that appellant came to his home at 5:45 a.m.

on September 8, 1997, and that at some point in 1998, an investigator for the defense interviewed Parker and Fortner. Next, Darry testified as follows on appellant's behalf. Appellant referred to Darry by the name "Jerome." (Oct. 20, 2010 Tr. Vol. VI, 1207.) Appellant and Darry lived in Youngstown, and they visited Coleman in Columbus during the early part of September 1997. After the visit, on September 7, 1997, they were back in Youngstown around 6:00 or 6:30 p.m. Later that night, Darry went to Fortner's house to watch a football game, and appellant was at the house, too. Darry left the house around 9:30 or 10:00 p.m. Although Darry maintains his innocence, he pleaded guilty to a charge pertaining to the shooting. He wrote a letter to a judge seeking judicial release. In the letter, he said that his family and the victim's family had suffered because of his inability to " 'make the proper decision at the proper time.' " (Oct. 20, 2010 Tr. Vol. VI, 1260.) Lastly, Darry testified that, although he did not know of Fortner's whereabouts, Fortner's mother has seen him. *Clinkscale III* at ¶ 16.

{¶ 13} After deliberation, the jury found appellant guilty of the charges and specifications. Appellant filed a motion for a new trial, arguing, inter alia, that the trial court erred by not providing funding for a private investigator to find Fortner. Appellant attached to his motion an affidavit of Gary Phillips, an investigator. Phillips noted that he started providing investigative services, at the request of appellant's private counsel, until the court denied funding. Phillips claimed that a search for Fortner would have required more time and expense. The prosecution objected to appellant's motion. Regarding appellant's claim that he needed a publicly-funded investigator to help him find Fortner, the prosecutor noted that Fortner's mother was in the courtroom and that the investigator retained by the defense had been present for the whole trial. The court said that appellant failed to show a need for an investigator and that it was "pretty unlikely" there would be any witnesses who had not already testified in the previous two trials. (Nov. 8, 2010 Tr. Vol. VIII, 1472.) The court also recognized that the defense hired an investigator. The court denied appellant's motion for a new trial and sentenced him to prison. *Clinkscale III* at ¶ 20.

{¶ 14} On appeal, appellant raised seven assignments of error. As is relevant here, appellant argued the trial court erred in failing to provide funds for a private investigator to find Fortner. *Clinkscale III* at ¶ 22. This court overruled all of appellant's asserted

assignments of error and affirmed appellant's convictions on December 13, 2011. *Clinkscale III*. The Supreme Court of Ohio denied review on April 4, 2012. *State v. Clinkscale*, 131 Ohio St.3d 1500, 2012-Ohio-1501.

{¶ 15} In the interim, appellant filed on July 8, 2011, a petition for post-conviction relief pursuant to R.C. 2953.21. In this petition, appellant asserted four grounds for relief: (1) his counsel was ineffective for failing to locate Bryan Fortner; (2) his counsel was ineffective for failing to call Bryan Fortner as an exculpatory witness; (3) admission of Williams' testimony was in error due to her marijuana use prior to the 1997 incident; and (4) he is being imprisoned despite his actual innocence. The trial court concluded appellant's petition had no basis in law or fact and denied the same on October 13, 2011.

II. ASSIGNMENTS OF ERROR

{¶ 16} This appeal followed and appellant brings the following two assignments of error for our review:

> [I.] PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO LOCATE BRYAN FORTNER AND PRESENT HIS TESTIMONY TO THE JURY.
>
> [II.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED APPELLANT'S PETITION WITHOUT AN EVIDENTIARY HEARING.

{¶ 17} Appellant's assignments of error are interrelated and will be addressed together. Collectively, they assert the trial court erred in denying, without a hearing, appellant's petition for post-conviction relief based on appellant's claims that defense counsel was ineffective.

III. STANDARD OF REVIEW

{¶ 18} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994), cert. denied, 513 U.S. 895, 115 S.Ct. 248. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained" in the trial court record. *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000), discretionary appeal not allowed, 92 Ohio St.3d 1441 (2001). Post-conviction review is not a constitutional right but rather a narrow remedy that affords a

petitioner no rights beyond those the statute grants. *State v. Calhoun*, 86 Ohio St.3d 279 (1999). It does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 32, discretionary appeal not allowed, 97 Ohio St.3d 1423, 2002-Ohio-5820; *Murphy*.

{¶ 19} A defendant is not automatically entitled to an evidentiary hearing on the petition. *State v. Jackson*, 64 Ohio St.2d 107, 110 (1980). To warrant an evidentiary hearing, the defendant bears the initial burden of providing evidence to demonstrate a cognizable claim of constitutional error. R.C. 2953.21(C); *Hessler* at ¶ 33. A trial court may deny a defendant's petition for post-conviction relief without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun* at paragraph two of the syllabus.

{¶ 20} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; 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; *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 14, discretionary appeal not allowed, 102 Ohio St.3d 1470, 2004-Ohio-2830, quoting *Calhoun* at 284 (the post-conviction relief " 'statute clearly calls for discretion in determining whether to grant a hearing' ").

{¶ 21} The most significant restriction on Ohio's statutory procedure for post-conviction relief is the doctrine of res judicata. It "requires that the evidence presented in support of the petition come from outside, or 'dehors,' the record" of the direct criminal proceedings. *Hessler* at ¶ 34. " '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 or conviction, or on an appeal from that judgment.' " (Emphasis omitted.) *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. Res judicata, applicable in all post-conviction proceedings, thus "implicitly bars 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." *Hessler* at ¶ 37, citing *Murphy; State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996) (noting res judicata applies "in all postconviction relief proceedings").

{¶ 22} Appellant contends he is entitled to post-conviction relief because he was denied his constitutional right to effective assistance of trial counsel. To prevail on his claim, appellant must demonstrate: (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving her of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, cert. denied, 497 U.S. 1011, 110 S.Ct. 3258 (1990).

{¶ 23} In order to secure a hearing on his claim for post-conviction relief, appellant had the initial burden of submitting evidentiary documents that together contain sufficient operative facts which, if believed, would establish: (1) counsel substantially violated at least one of the attorney's essential duties to his or her client, and (2) defendant was prejudiced as a result. *Cole* at 114; *Jackson* at syllabus; *Calhoun* at 289 (noting a post-conviction relief petitioner has the burden of proving counsel's ineffectiveness, since in Ohio a properly licensed attorney is presumed to be competent). "Judicial scrutiny of counsel's performance must be highly deferential [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Bradley* at 142.

IV. DISCUSSION

{¶ 24} According to appellant, while counsel in his first trial was ineffective for failing to provide a timely notice of an alibi, counsel in his third trial was ineffective for failing to locate and subpoena alibi witness, Bryan Fortner. In support of his contention, appellant attached an affidavit from Fortner, stating in pertinent part:

> 8. Affiant states that he has never been called to testify in the matter of State of Ohio versus David Clinkscale.

> 9. Affiant states that he has been willing to testify on behalf of David Clinkscale.

(Fortner Affidavit at 1.)

{¶ 25} Problematic for appellant is that this affidavit fails to demonstrate sufficient operative facts establishing counsel substantially violated at least one of the attorney's essential duties to his client and that he was prejudiced as a result. *State v. Messer-Tomak*, 10th Dist. No. 10AP-847, 2011-Ohio-3700, ¶ 12, citing *Cole* at 114.

{¶ 26} After the jury's verdict was read in open court and the jury was dismissed, the trial court made a record of the reasons it denied appellant's request for investigative fees at state expense. Appellant's counsel stated, "we asked the Court for funds because we knew critical importance to us was the location of Br[y]an Fortner. *Mr. Fortner has apparently made significant efforts to either avoid us or avoid both sides. And we went through records. We went through transcripts. We went through all the discovery. Tried to obtain every address possible for him*." (Emphasis added.) (Oct. 22, 2010 Tr. Vol. VII, 1407-08.) Thus, the record reflects that not only was appellant's trial counsel aware of Fortner, but also, that counsel tried to locate Fortner so that Fortner could be called as a witness in appellant's third trial.

{¶ 27} Though Fortner's affidavit states despite his willingness, he was not called to testify in any of appellant's trials, the affidavit does not demonstrate any operative facts to support appellant's claim that his *counsel* was ineffective in failing to locate and call Fortner as a witness. As indicated, the record reflects that counsel made efforts to locate Fortner and that it was counsel's belief that Fortner was intentionally making efforts to be elusive. Significantly, Fortner's affidavit does not identify any reasonable steps appellant's trial counsel could or should have taken that would have resulted in Fortner being located. Nor does Fortner's affidavit indicate he made himself available during appellant's third trial so that he could be called as a witness. In light of this record, to warrant the requested relief, appellant must provide some example with supporting evidence of reasonable efforts, beyond those already taken by counsel, that would have resulted in counsel having the ability to locate Fortner and call him as a witness. "By failing to present sufficient operative facts indicating the extent of investigation counsel

undertook, defendant failed to present sufficient facts that her trial court's investigation of the case was deficient." *Messer-Tomak* at ¶ 15.

{¶ 28} Because appellant failed to present sufficient operative facts that his trial counsel provided ineffective assistance, he failed to establish substantive grounds for a hearing or for relief on his claim of ineffective assistance of counsel based on counsel's inability to locate and call Fortner as a witness. Therefore, we do not find the trial court abused its discretion in dismissing appellant's petition for post-conviction relief without a hearing.

{¶ 29} At oral argument, appellant's appellate counsel also challenged the trial court's decision denying appellant's request for funding for an investigator. On direct appeal to this court, appellant argued the trial court erred in denying his request for a publicly-funded investigator. In concluding that the record does not support said claim, this court stated:

> When appellant filed the August 11, 2010 motion, he made a general claim that "[t]here are several witnesses that need to be interviewed and likely will be called at trial." It was reasonable for the trial court to deny that motion because appellant already had the benefit of two publicly-funded investigators for his first two trials and one publicly-funded investigator for his third trial. This is in addition to appellant having received assistance from eight former attorneys.
>
> Although appellant subsequently claimed that he needed a publicly-funded investigator to help him find his alibi witness, Fortner, he did not make this assertion in his August 11, 2010 motion. In any event, the record does not support that claim. The defense could have talked to Fortner's mother, who was in the courtroom during trial, and who, according to Darry, had seen Fortner. Appellant's privately-retained investigator was in the courtroom during the trial, so he was available to the defense at that time. And, even if Fortner were called to provide alibi testimony for appellant, the jury easily could have rejected that testimony because Parker indicated that the alibi was fabricated.
>
> For all these reasons, we conclude that the trial court did not abuse its discretion when it denied appellant's August 11, 2010 request for a publicly-funded investigator.

Clinkscale III at ¶ 26-28.

{¶ 30} Thus, to the extent appellant suggested at oral argument that he is challenging the trial court's denial of fees for an investigator, said issue is barred by res judicata. *Hessler* at ¶ 37; *Murphy*; *Cole*.

{¶ 31} For the foregoing reasons, we find appellant's arguments to be without merit, and we overrule appellant's two assignments of error.

V. CONCLUSION

{¶ 32} Having overruled appellant's two assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.
