

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-73
 : (C.P.C. No. 10CR-03-1333)
 :
 Gianna Y. Cochran, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 6, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Sarah M. Schregardus, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Gianna Y. Cochran, appeals from the judgment of the Franklin County Court of Common Pleas dismissing her 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 April 26, 2010, appellant was indicted on 18 counts of child endangering, in violation of R.C. 2919.22. The indictment involved five different children and ten separate incidents that were alleged to have occurred at appellant's apartment

between August 18 and September 25, 2009. Appellant waived her right to a jury trial and the matter was tried to the court. The facts underlying the charges presented herein were adduced at trial as follows.

{¶ 3} During the timeframes stated in the indictment, appellant resided in an apartment with her two children, M.B. and L.B., and J.B., the children's father. To earn money, appellant babysat children at the apartment. Concerned that appellant was administering excessive discipline to M.B., J.B. set up a hidden webcam to record video of the apartment's living room area. According to J.B., the relationship between him and appellant ended in November 2009, and coincided with his seeking a civil protection order from the domestic relations court against appellant on behalf of M.B. and L.B. After viewing the contents of the video recordings, J.B. forwarded them to the attorney representing him in the domestic proceedings concerning the children. Shortly thereafter, children's services and police were notified and alerted to the video's contents. The video depicted multiple incidents of alleged abuse being inflicted by appellant upon five different children.

{¶ 4} At the conclusion of the evidence, including the video and appellant's testimony on her own behalf, the trial court found appellant guilty of seven misdemeanor counts of child endangering and five third-degree felony counts of child endangering, but not guilty of six counts of child endangering. Subsequently, the trial court imposed an aggregate term of incarceration consisting of 25 years. Appellant's direct appeal is currently pending before this court.

{¶ 5} After filing a direct appeal, appellant filed, on December 9, 2011, a petition for postconviction relief pursuant to R.C. 2953.21. In this petition, appellant asserted her counsel was ineffective for failing to present the testimony of the judge who presided over the domestic proceedings concerning appellant's two children. According to appellant, the video recording presented by the state during its case-in-chief was also presented at the domestic proceedings, and the domestic judge, had he been called, would have testified that he concluded the video was not clear enough to determine by a preponderance of the evidence that the video depicted abuse.

{¶ 6} Finding, however, that appellant failed to present an affidavit from the domestic judge stating what his testimony would have been, the trial court denied

appellant's petition. Further, the trial court concluded that because only one misdemeanor conviction involved either of appellant's own children, the testimony of the domestic judge would have been largely irrelevant with no likelihood of changing the result in the criminal trial. Therefore, because appellant presented no evidentiary documentation setting forth specific operative facts to support the postconviction relief petition, the trial court denied the petition without an evidentiary hearing.

II. ASSIGNMENTS OF ERROR

{¶ 7} This appeal followed, and appellant brings the following assignment of error for our review:

The trial court erred in dismissing Ms. Cochran's postconviction petition when she presented sufficient operative facts to merit relief or, at a minimum, an evidentiary hearing.

III. STANDARD OF REVIEW

{¶ 8} The postconviction 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 (1994). "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). Postconviction 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*.

{¶ 9} 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 postconviction 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.

{¶ 10} "[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 postconviction relief "'statute clearly calls for discretion in determining whether to grant a hearing'").

{¶ 11} The most significant restriction on Ohio's statutory procedure for postconviction 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 ¶ 25. "'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 postconviction 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 ¶ 27, citing *Murphy*; *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996) (noting res judicata applies "in all postconviction relief proceedings").

{¶ 12} Appellant contends she is entitled to postconviction relief because she was denied her constitutional right to effective assistance of trial counsel. To prevail on her 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 appellant, depriving her of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668,

687 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, cert. denied, 497 U.S. 1011 (1990).

{¶ 13} In order to secure a hearing on her claim for postconviction 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 postconviction 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* at 689; *Bradley* at 142.

IV. DISCUSSION

{¶ 14} According to appellant, her trial counsel was ineffective for failing to call the judge that presided over the domestic proceeding as a witness in her criminal trial. In support of her contention, appellant attached excerpts from the domestic relations proceedings held on December 30, 2009 and January 4, 2010. These proceedings were being held pursuant to the request of J.B. who sought a civil protection order against appellant for himself, M.B., and L.B. At the January 4, 2010 proceeding, the domestic judge granted the requested protection order against appellant. However, the domestic judge clarified that he was not granting the protection order due to anything observed in the video because, though "disturbing," the actions in the video "just weren't clear enough" to enable him to find by a preponderance of the evidence that the video depicted "the actions that were characterized by [J.B.]."

{¶ 15} Although these transcript portions constitute evidence outside the record, we find they were insufficient to entitle appellant to a hearing on her petition. Initially, we note that counsel's decision about whether to call a witness generally "falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001), cert. denied, 533 U.S. 904 (2001); *Campbell* at ¶ 38, citing *Hessler* at ¶ 42 (noting decisions regarding what "witnesses to call [at trial]

falls within the purview of trial strategy and, absent prejudice, generally will not constitute ineffective assistance of counsel").

{¶ 16} Secondly, appellant did not attach an affidavit from the domestic judge detailing what his testimony would have been had he been called as a witness at appellant's criminal trial. Absent information concerning the substance of the domestic judge's proposed trial testimony, the trial court could not determine whether said testimony would have benefitted appellant. In other words, "[w]ithout such an affidavit, it is pure speculation to conclude that the result of appellant's trial would have been different had the witness testified." *State v. Hoover-Moore*, 10th Dist. No. 07AP-788, 2008-Ohio-2020, ¶ 20, citing *State v. Thorne*, 5th Dist. No. 2003CA00388, 2004-Ohio-7055, ¶ 70; *see also State v. Messer-Tomack*, 10th Dist. No. 10AP-847, 2011-Ohio-3700, ¶ 33 (because the defendant failed to attach evidence of proposed witnesses' testimony, the defendant failed to explain how counsel was deficient or how she was prejudiced); *State v. McKinney*, 10th Dist. No. 07AP-868, 2008-Ohio-1281, ¶ 13, discretionary appeal not allowed, 118 Ohio St.3d 1510, 2008-Ohio-3369 (pointing out that to support his claim three witnesses would have testified favorably to him, "defendant needed to submit affidavits from those with personal knowledge about their potential testimony: the witnesses themselves").

{¶ 17} Moreover, appellant's postconviction petition does not explain how the failure to call the domestic judge as a witness either fell below an objective standard of reasonable representation or prejudiced her case. The focus of the domestic proceedings was appellant's two children, M.B. and L.B.; however, only one of the 18 indicted charges concerned appellant's own children as the remaining 17 charges concerned other children left in appellant's care. Not only does this record contain no evidence regarding whether the domestic judge considered appellant's actions with respect to children other than her own, but, also, the record contains no evidence regarding what portions of the video the domestic judge viewed or whether he viewed portions of the video depicting children other than appellant's. With only excerpts of the domestic judge's statement made during a hearing on a civil protection order and without an affidavit from the domestic judge setting forth to what he would testify, it is pure speculation that his testimony would have

been beneficial to appellant at her criminal trial such that she was prejudiced by her counsel not calling him as a witness.

{¶ 18} Because appellant failed to present sufficient operative facts that her trial counsel provided ineffective assistance, she failed to establish substantive grounds for a hearing or for relief on her claim of ineffective assistance of counsel based on trial counsel not calling the domestic judge as a witness. Therefore, we do not find the trial court abused its discretion in dismissing appellant's petition for postconviction relief without a hearing. Accordingly, we overrule appellant's assignment of error.

V. CONCLUSION

{¶ 19} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
