

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2014-A-0026</b>
NATHANIEL J. GREGA,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CR 080.

Judgment: Affirmed.

*Nicholas A. Iarocci*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

*Nathaniel J. Grega*, pro se, PID: A631-140, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Nathaniel J. Grega, appeals from the judgment of the Ashtabula County Court of Common Pleas, denying his petition for postconviction relief without a hearing. We affirm.

{¶2} Appellant was indicted on one count of robbery, in violation of R.C. 2911.02, a felony of the second degree, and one count of petty theft, in violation of R.C. 2913.02, a misdemeanor of the first degree. Appellant pleaded not guilty and a jury trial

commenced. Appellant was found guilty of both charges. He was sentenced to a three-year term of imprisonment for robbery and a six-month jail term for petty theft. The sentences were ordered to be served concurrently.

{¶3} Appellant appealed his conviction and, in *State v. Grega*, 11th Dist. Ashtabula No. 2012-A-36, 2013-Ohio-4094 (“*Grega I*”), this court affirmed in part, reversed in part, and remanded the matter for resentencing. This court concluded robbery and theft offenses should have been merged for sentencing. On remand, the trial court merged the two convictions and the state elected to proceed to sentencing on the robbery charge. The trial court again imposed a three-year term of imprisonment for the robbery conviction and gave appellant credit for time served.

{¶4} During the pendency of the foregoing appeal, appellant filed multiple pleadings seeking various forms of relief. Several of the pleadings were filed pursuant to R.C. 2953.21, Ohio's post-conviction relief statute. In a July 2013 judgment, the trial court determined it lacked jurisdiction to consider all of the pleadings due to appellant's pending appeal. The motions were consequently denied. Appellant appealed and, in *State v. Grega*, 11th Dist. Ashtabula No. 2013-A-0045, 2014-Ohio-1346 (“*Grega II*”), this court concluded the trial court erred in ruling it lacked jurisdiction. The matter was therefore reversed and remanded.

{¶5} The trial court subsequently resentenced appellant pursuant to this court's remand order in *Grega I*. Appellant appealed that judgment and, in *State v. Grega*, 11th Dist. Ashtabula No. 2014-A-0002, 2014-Ohio-5179 (“*Grega III*”), this court affirmed the trial court's judgment on sentence.

{¶6} Finally, on remand from this court's judgment in *Grega II*, the trial court considered the merits of appellant's petition for postconviction relief. In his petition, appellant asserted the following four claims: (1) his constitutional rights under the Fifth and Fourteenth Amendments were violated when no bill of particulars was filed; (2) his constitutional rights under the Confrontation Clause of the Sixth Amendment were violated when unidentified favorable witnesses were not called to testify; (3) his constitutional rights under the Fifth Amendment were violated because of an alleged defect in the indictment; and (4) his constitutional rights under the Fifth and Fourteenth Amendments were violated when the court failed to find that robbery and theft are allied offenses of similar import.

{¶7} On April 15, 2014, the court dismissed the matter without a hearing. In its judgment entry, the court determined the first three issues raised by appellant could have been raised on direct appeal and were therefore barred by the doctrine of res judicata. The court further found the fourth issue appellant raised in his petition was, in fact, raised and addressed in *Grega I*. Appellant now appeals the trial court's judgment and assigns one error for our review. Appellant's assigned error provides:

{¶8} "[The] [t]rial court abused its discretion by not granting the defendant an evidentiary hearing."

{¶9} In postconviction matters, a trial court is the gatekeeper regarding whether a defendant should receive a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶51. A court is not required to hold a hearing unless the petitioner advances evidence demonstrating a cognizable claim of constitutional error. R.C. 2953.21(C); see also *State v. Adams*, 11th Dist. Trumbull No. 2003-T-0064, 2005-Ohio-348, ¶36. In

other words, a petitioner must put forth evidence 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 \* \* \*.” R.C. 2953.21(A)(1)(a).

{¶10} “Pursuant to R.C. 2953.21(C), a defendant’s petition may be denied without a hearing when the petition, supporting affidavits, documentary evidence, files, and records do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *Adams, supra*, citing *Calhoun, supra*, at 281. Generally, an appellate court reviews the dismissal of a petition for postconviction relief for an abuse of discretion. *State v. Hendrix*, 11th Dist. Lake No. 2012-L-080, 2013-Ohio-638, ¶7. If, however, a trial court denies a petition by operation of law, e.g., by application of the doctrine of res judicata, this court’s review is de novo. *State v. Butcher*, 11th Dist. Portage No. 2013-P-0090, 2014-Ohio-4302, ¶6.

{¶11} The trial court in this matter found the arguments asserted in appellant’s petition were barred by the doctrine of res judicata. The purpose of Ohio’s postconviction relief statute is to afford criminal defendants with a method by which they may raise claims of denial of federal rights. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999), citing *Young v. Ragen*, 337 U.S. 235, 239 (1949). A petition for postconviction relief does not, however, permit a defendant a second opportunity to litigate his conviction or argue issues that could have been or were previously raised. *Hendrix, supra*, at ¶8. Pursuant to the doctrine of res judicata,

{¶12} “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 trial, which resulted in that judgment of conviction, or *on an appeal* from that judgment.””(Emphasis sic.) *Hendrix*, *supra*, quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), syllabus.

{¶13} “Where a defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant’s petition for postconviction relief.” *State v. Cole*, 2 Ohio St.3d 112 (1982); see also *State v. Mike*, 11th Dist. Trumbull No. 2007-T-0116, 2008-Ohio-2754, ¶11. This principle applies with equal force to any alleged constitutional error. *State v. Jones*, 11th Dist. Ashtabula No. 2000-A-0083, 2002 Ohio App. LEXIS 1981, \*3 (Apr. 26, 2002). In this matter, appellant was represented by new counsel on direct appeal; accordingly, res judicata would preclude any issue in the underlying petition that was or could have been raised on direct appeal from his judgment of conviction.

{¶14} Appellant, in his brief, asserts that the trial judge erred in dismissing the underlying petition without a hearing because the record demonstrated that: (1) the state’s witness, Melody Rayell, perjured herself and (2) appellant was not able to confront all witnesses. We discern no error.

{¶15} Preliminarily, appellant concedes that *the record* revealed the alleged deficiencies in the criminal proceedings leading to his conviction. To the extent the matters at issue were within the record, they were available for litigation on direct

appeal. In this regard, the trial court was correct in dismissing the petition without a hearing based upon the doctrine of res judicata.

{¶16} Further, appellant does not argue the trial court committed error in failing to grant a hearing on the remaining issues that formed the basis of his petition. Without asserting a specific argument contesting the trial court's determination, appellant has, in effect, conceded these issues.

{¶17} Even had these issues been challenged, however, appellant's contention relating to the alleged lack of a bill of particulars as well as the issue relating to the alleged defective indictment were matters that could have been addressed on the direct appeal from his conviction. They were not argued at that point and, as a result, the trial court was correct in concluding they are barred by res judicata. Furthermore, the trial court was also correct in finding the merger issue was actually raised in appellant's direct appeal. In *Grega I*, this court found merit to the merger argument, which was the basis of this court's remand order. Accordingly, even if that challenge were not res judicata, it would be moot. We therefore hold the trial court did not err in dismissing the appellant's petition for postconviction relief without a hearing.

{¶18} Appellant's sole assignment of error is without merit.

{¶19} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.