

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-A-0052
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 dismissing a successive 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} On remand from this court's judgment in *Grega II*, the trial court considered the merits of appellant's petition for postconviction relief. And, on April 15, 2014, the court dismissed the matter without a hearing. Appellant appealed that judgment and that matter is currently pending with this court.

{¶7} On June 23, 2014, appellant filed a successive petition for postconviction relief. In the petition, appellant asserted he received ineffective assistance of trial counsel because a favorable witness was not called to testify. On July 22, 2014, the trial court dismissed the petition without a hearing. Appellant now appeals, assigning the following two errors for this court's review:

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

{¶9} "[2.] [The] [t]rial court did not rule on petitioner's post-conviction petition with findings of facts [sic] and conclusion[s] of law pursuant to O.R.C. 2953.21(5)(C)(G)."

{¶10} For ease of discussion, we shall first address appellant's second assignment of error. Under that error, appellant argues the trial court erred in failing to render findings of fact and conclusions of law. We do not agree.

{¶11} R.C. 2953.21(C) provides, in relevant part, that "[i]f the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal." When rendering its findings and conclusions, "[a] trial court need not discuss every issue raised by appellant or engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law." *State v. Calhoun*, 86 Ohio St.3d 279, 291 (1999). Rather, "[t]he findings need only be sufficiently comprehensive

and pertinent to the issue to form a basis upon which the evidence supports the conclusion.” *Id.*

{¶12} In this matter, the trial court, in its July 22, 2014 judgment, set forth the procedural history of appellant’s case and incorporated by reference its April 15, 2014 judgment entry that addressed appellant’s previous petition for postconviction relief. The court expressly stated appellant’s petition was premised on arguments that it had previously rejected; namely, positions related to the ineffective assistance of trial counsel. The petition was accordingly dismissed.

{¶13} A review of the April 15, 2014 judgment demonstrates appellant’s previous arguments relating to ineffective assistance of trial counsel were dismissed by operation of res judicata. That judgment was entered only three months before the judgment under consideration and was part of the proceedings in the matter sub judice. A trial court may take notice of prior proceedings so long as the proceedings occurred in the immediate case. *State v. Blaine*, 4th Dist. Highland No. 03CA9, 2004-Ohio-1241, ¶17. This practice is countenanced because the parties, as well as an appellate court, may reference the immediate record and thus review the proceeding noticed. *Id.* Under the circumstances, we hold the incorporation of the prior judgment was sufficient to form a basis for the trial court’s decision and provide the parties guidance regarding the court’s legal conclusion. Appellant’s second assignment of error is without merit.

{¶14} Next, appellant contends the trial court erred by failing to hold an evidentiary hearing.

{¶15} 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).

{¶16} “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.

{¶17} The trial court in this matter found that three of the four 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,

{¶18} “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.

{¶19} “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 successive petition that was or could have been raised on direct appeal from his judgment of conviction.

{¶20} In his successive petition, appellant claimed he was entitled to relief because trial counsel failed to subpoena one Kizzy Holley as an alibi witness. This argument could have been asserted on direct appeal and, as a result, it is barred by the doctrine of res judicata. Because appellant is precluded from asserting this argument in a petition for postconviction relief, he failed to set forth sufficient operative facts to

establish substantive grounds for relief. Thus, appellant was not entitled to an evidentiary hearing. His first assignment of error lacks merit.¹

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

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.

1. It bears noting that, pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed no later than 180 days after the filing of the trial transcript with the court of appeals, except as provided for in R.C. 2953.23(A)(1). The trial transcript in this case was filed on November 19, 2012. The underlying petition was filed well outside this timeframe, on June 23, 2014; moreover, the underlying petition was not filed pursuant to the mandates of R.C. 2953.23(A)(1). Thus, even though the trial court did not use this as a basis for dismissing the underlying petition *and* the state did not file a cross assignment of error, this point nevertheless serves as an additional basis to support the trial court's ultimate ruling.