

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,	:	CASE NO. CA2015-03-008
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- VS -	:	7/27/2015
	:	
LARRY W. CHAMBERLAIN, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2011CR2250

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 510 East State Street, Suite 2, Georgetown, Ohio 45121, for plaintiff-appellee

Gary A. Rosenhoffer, 313 East Main Street, Batavia, Ohio 45103, for defendant-appellant

S. POWELL, J.

{¶ 1} Defendant-appellant, Larry W. Chamberlain, Jr., appeals from the decision of the Brown County Court of Common Pleas denying his petition for postconviction relief after a jury found him guilty of four counts of rape of a minor. For the reasons outlined below, we affirm.

{¶ 2} Following a jury trial, Chamberlain was convicted of four counts of rape involving S.R., the 12-year-old daughter of L.R., his then live-in girlfriend. This court affirmed

Chamberlain's conviction and lifetime prison sentence on direct appeal in *State v. Chamberlain*, 12th Dist. Brown No. CA2013-04-004, 2014-Ohio-4619. As part of that decision, this court summarized L.R.'s trial testimony as follows:

* * * [L.R.] testified as to her firsthand knowledge of Chamberlain's sexual encounters with S.R. Prior to trial, [L.R.] had entered a plea deal with the state wherein in exchange for her truthful testimony against Chamberlain, the state would accept her guilty plea to one count of gross sexual imposition and drop five counts of complicity to rape she faced for her involvement in Chamberlain's encounters with S.R. At trial, [L.R.'s] testimony reflected some initial reluctance to incriminate either Chamberlain or herself. However, after the trial court took a short recess to remind her that the plea deal she received would be withdrawn without her truthful testimony, [L.R.] proved much more forthcoming.

[L.R.] testified to an encounter in which Chamberlain performed cunnilingus on S.R. in [L.R.'s] presence. She also recalled a time that she entered the apartment and found Chamberlain zipping up his pants while leaving S.R.'s room, followed by S.R. who was straightening up her pants. She remembered telling Chamberlain on that occasion that the encounters had to stop or the state would take her kids away. Finally, [L.R.] testified about the night that she passed out drunk and awoke to find S.R. face down on the bed with Chamberlain penetrating her from behind. [L.R.] stated that S.R. came to her after this encounter with complaints of vaginal bleeding.

It is undisputed the trial court had previously joined Chamberlain's case with L.R.'s without objection from either party.

{¶ 3} While his appeal was pending, Chamberlain filed a petition for postconviction relief, which he later amended, alleging he received ineffective assistance of trial counsel. Chamberlain also alleged that he was denied due process because L.R. had since recanted her trial testimony against him. As part of his petition, Chamberlain incorporated an affidavit from L.R., wherein she stated, in pertinent part, the following:

Yes it is true that I am recanting my testimony that I gave at [Chamberlain's] trial.

The part I am changing is mostly all of it. Larry Chamberlain did

not ever touch my daughter in any way shape, or form. He always actually helped me with my children. If it wasn't for him I may have lost my children all together.

I took the words in my discovery pack that my daughter said and put it in my own words. Made it believable put tears behind it and took the plea deal they was offering.

{¶ 4} After the state filed a motion for summary judgment, the trial court issued its decision dismissing Chamberlain's petition for postconviction relief. As part of that decision, the trial court explicitly stated that it had "thoroughly complied with the requirements of Ohio Revised Code Section 2953.21(C)." The trial court also stated that L.R.'s affidavit was "neither credible nor reliable" and that she "has an interest in the outcome of the petition and that her affidavit contradicts her testimony at Trial which the trier of fact and this Court found to be reprehensible but believable." Chamberlain now appeals from the trial court's decision dismissing his petition for postconviction relief, raising three assignments of error for review.

{¶ 5} Before addressing Chamberlain's assignments of error, we note that a postconviction proceeding is not an appeal of a criminal conviction, but rather, a collateral civil attack on a criminal judgment. *State v. Bayless*, 12th Dist. Clinton Nos. CA2013-10-020 and CA2013-10-021, 2014-Ohio-2475, ¶ 8. Petitions for postconviction relief are governed under R.C. 2953.21, which provides three methods for adjudicating the petition. Specifically, when a criminal defendant challenges his conviction through postconviction relief, the trial court may: (1) summarily dismiss the petition without holding an evidentiary hearing pursuant to R.C. 2953.21(C); (2) grant summary judgment on the petition to either party who moved for summary judgment pursuant to R.C. 2953.21(D); or (3) hold an evidentiary hearing on the issues raised by the petition pursuant to R.C. 2953.21(E). *State v. Francis*, 12th Dist. Butler No. CA2014-09-187, 2015-Ohio-2221, ¶ 10.

{¶ 6} "In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard." *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and

CA2012-10-106, 2013-Ohio-1490, ¶ 10, citing *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 15. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 34. A decision is unreasonable when it is "unsupported by a sound reasoning process." *State v. Abdullah*, 10th Dist. Franklin No. 07AP-427, 2007-Ohio-7010, ¶ 16, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990).

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT CONSIDERED MATERIALS NOT SET FORTH IN THE PCR STATUTE(S) AND OUTSIDE THE PURVIEW OF CIV.R. 56.

{¶ 9} In his first assignment of error, Chamberlain argues the trial court erred by considering materials that were outside the record when reviewing the state's motion for summary judgment on his petition for postconviction relief; namely, (1) an audio recording of L.R.'s pretrial statement she provided to the state that was later used to refresh her recollection at Chamberlain's trial; (2) plea and sentencing entries issued by the trial court for L.R.'s role in Chamberlain's sexual abuse of her daughter; (3) transcripts of L.R.'s plea and sentencing hearings; and (4) a letter L.R. sent to the Brown County prosecutor two days after Chamberlain was found guilty in which she apologized for contacting Chamberlain's trial counsel seeking advice on how she could recant her trial testimony in order to help Chamberlain. We find no merit to this claim.

{¶ 10} After a thorough review of the trial court's decision, it is clear the trial court never mentioned – let alone relied upon – the letter L.R. sent to the prosecutor in issuing its decision, thereby rendering any error in regards to the letter, at worst, harmless. Moreover,

as it relates to the remaining materials, we also find the trial court did not specifically rely upon these materials in reaching its decision dismissing Chamberlain's petition, thereby rendering any error in regards to these additional materials likewise harmless. Pursuant to Crim.R. 52(A), any error, defect, irregularity or variance that does not affect the accused's substantial rights shall be disregarded as harmless error. *State v. Tucker*, 12th Dist. Butler No. CA2010-10-263, 2012-Ohio-139, ¶ 17.

{¶ 11} Rather, although acknowledging these items were made available to it, the record is clear that the trial court instead relied on the fact that it "personally had the opportunity to assess the credibility of [L.R.] on at least four occasions," namely, during her trial testimony at Chamberlain's jury trial, during her plea and sentencing hearings, as well as through her submitted affidavit. The trial court also relied upon the fact that L.R. had an interest in the outcome of the proceedings, and that her submitted affidavit contradicted her trial testimony, something which "the trier of fact and this Court found to be reprehensible but believable." Therefore, because we find the trial court did not rely upon these disputed materials in reaching its decision, we find no error in the trial court's decision.

{¶ 12} In so holding, we further note that although the trial court ultimately found the state's motion for summary judgment was well-taken, the trial court explicitly referenced R.C. 2953.21(C) in issuing its decision. As a result, we interpret the trial court's decision as one that summarily dismissed Chamberlain's petition under R.C. 2953.21(C), and not one that granted summary judgment to the state under R.C. 2953.21(D). See *State v. Francis*, 12th Dist. Butler No. CA2013-05-078, 2014-Ohio-443, ¶ 12; see also *State v. Blankenburg*, 12th Dist. Butler No. CA2013-11-197, 2014-Ohio-4621, ¶ 24-25. As stated by the Ohio Supreme Court in *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus, pursuant to 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." That is exactly what the trial court did here. Accordingly, Chamberlain's first assignment of error is without merit and overruled.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WITH REGARD TO ASSESSING THE CREDIBILITY OF [L.R.'S] AFFIDAVIT.

{¶ 15} In his second assignment of error, Chamberlain argues the trial court erred by finding L.R.'s affidavit recanting her trial testimony lacked credibility. We disagree.

{¶ 16} Although a trial court should generally give deference to an affidavit filed in support of a petition for postconviction relief, "the trial court is entrusted, based on the sound exercise of discretion, to judge an affiant's credibility in determining whether to accept an affidavit submitted in support of a [petition for postconviction relief] as true." *Blankenburg* at ¶ 31. In turn, "[t]he trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." *Calhoun*, 86 Ohio St.3d at 284. "That conclusion is supported by common sense, the interests of eliminating delay and unnecessary expense, and furthering the expeditious administration of justice." *Id.*

{¶ 17} In determining the credibility of a supporting affidavit in a postconviction relief proceeding, the trial court should consider all relevant factors, including: (1) whether the judge reviewing the petition also presided at the trial; (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person; (3) whether the affidavits contain or rely on hearsay; (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts; and (5) whether the affidavits contradict evidence proffered by the defense at trial. *Id.* at 285, citing *State v.*

Moore, 99 Ohio App.3d 748 (1st Dist.1994). "Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility." *Id.*

{¶ 18} In finding L.R.'s affidavit lacked credibility, the trial court noted that S.R., the victim, had not recanted her trial testimony, wherein she provided detailed accounts of anal intercourse, vaginal intercourse, fellatio and cunnilingus that Chamberlain committed against her. In addition, as noted above, the trial court also noted that it had several opportunities to personally assess L.R.'s credibility, most notably during her trial testimony at Chamberlin's jury trial, as well as her own plea and sentencing hearings. The trial court further noted that L.R. had an interest in the outcome of Chamberlain's petition, and that her affidavit contradicted her previous trial testimony, testimony the trial court found "reprehensible but believable."

{¶ 19} Based upon these factors, the trial court determined L.R.'s affidavit recanting her trial testimony was "neither credible nor reliable." After a thorough review of the record, we find no error in the trial court's decision. In so holding, we note that "'Ohio courts have consistently held that affidavits from interested parties such as defendants, co-defendants, and family members are self-serving and may be discounted.'" *State v. Robinson*, 12th Dist. Butler No. CA2013-05-085, 2013-Ohio-5672, ¶ 17, quoting *State v. Nicholson*, 8th Dist. Cuyahoga No. 97873, 2012-Ohio-4591, ¶ 19. Therefore, because we find no error in the trial court's decision finding L.R.'s affidavit lacked credibility, Chamberlin's second assignment of error is also with merit and overruled.

{¶ 20} Assignment of Error No. 3:

{¶ 21} THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING THAT CHAMBERLAIN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS BARRED BY RES JUDICATA.

{¶ 22} In his third assignment of error, Chamberlain argues the trial court erred by finding his ineffective assistance of counsel claim was barred by the doctrine of res judicata. However, Chamberlain's ineffective assistance of counsel claim raises the exact same three issues this court already rejected as part of Chamberlain's direct appeal. *See Chamberlain*, 2014-Ohio-4619 at ¶ 41-63. Chamberlain even concedes that "no new information has been developed as to this claim since [his] direct appeal." Therefore, just as the trial court found, the doctrine of res judicata applies to bar Chamberlain's ineffective assistance of counsel claim and we decline Chamberlain's invitation to reconsider our prior decision on this matter. Accordingly, because the trial court properly determined that the doctrine of res judicata applied, Chamberlain's third assignment of error is likewise without merit and overruled.

{¶ 23} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.