

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-53
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2003-CR-715
v.	:	
	:	(Criminal Appeal from
KOREY BAKER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 25th day of June, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Korey Baker appeals from an order overruling his motion for a new trial, without a hearing. Baker contends that the trial court erred in finding that his motion was barred by res judicata, since the grounds urged in support of the motion, based upon matters outside the record, could not have been urged in a direct appeal from his conviction and sentence.

{¶ 2} We conclude that Baker misconstrues the basis for the trial court's ruling. The trial court had recently overruled a previous motion for a new trial, upon the ground that it was not timely filed. In its order overruling Baker's second motion for a new trial, from which this appeal is taken, the trial court noted that Baker's second motion raised nothing that had not been raised in support of his first motion, which the trial court had already overruled. Thus, the trial court correctly applied the doctrine of res judicata, and overruled Baker's second motion, without a hearing. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Baker, a juvenile, was tried as an adult in 2004 on two counts of Attempted Murder and two counts of Felonious Assault, each with a firearm specification. He was acquitted on one count of Attempted Murder, and convicted on the other count of Attempted Murder, and the firearm specification, and on both Felonious Assault counts, and the firearm specifications. It appears that one of the Felonious Assault convictions was merged into the other, as an allied offense of similar import. Baker was sentenced to 9 years imprisonment for Attempted Murder, to 6 years imprisonment for Felonious Assault, and to 3 years imprisonment for each of the firearm specifications. The firearm-specification sentences were ordered to be served concurrently with one another, but the sentences were otherwise ordered to be served consecutively, for an aggregate sentence of 18 years.

{¶ 4} Baker's appeals to this court and to the Supreme Court of Ohio were unsuccessful.

{¶ 5} On April 27, 2009, Baker filed a “Delayed Motion for a New Trial.” This was overruled in an entry filed June 8, 2009, wherein the trial court held that Baker had failed to establish satisfactory grounds for the untimely filing of his motion.

{¶ 6} On June 25, 2009, Baker filed a motion for a new trial. This motion was overruled in an entry filed June 29, 2009, wherein the trial court held that Baker’s claim for relief was barred by res judicata, the grounds for his new motion being essentially the same as the grounds he urged in support of his earlier motion.

{¶ 7} On July 28, 2009, Baker filed a notice of appeal, invoking the jurisdiction of this court. His notice of appeal, in its entirety, is as follows:

{¶ 8} “Comes Now Defendant/Appellant, pro se and pursuant to Rule 3 of the Ohio Rules of Appellant [sic] procedure and hereby gives Notice of his Appeal in the Denial of his Motion for New trial herein.”

II

{¶ 9} Baker’s First Assignment of Error is as follows:

{¶ 10} “IT CONSTITUTED ERROR WHEN TRIAL COURT DENIED DEFENDANT’S POST CONVICTION MOTION FOR NEW TRIAL ON RES JUDICATA GROUNDS.”

{¶ 11} Baker appears to argue that he could not have raised, in his direct appeal, the issue he now wishes to raise – that his trial counsel was “ ‘not competent’ at all” – because the issue relies upon matters outside the record of the direct appeal. In this, he appears to be misconstruing the trial court’s application of res judicata to his motion for a new trial. Both Baker’s first motion for a new trial and his

second motion for a new trial expressly invoke Crim. R. 33, which provides for a motion for a new trial, in contradistinction to petitions for post-conviction relief, which are provided for at R.C. 2953.21, et seq.

{¶ 12} The order overruling Baker's second motion for a new trial reads, in its entirety, as follows:

{¶ 13} "The Defendant has filed a Motion for New Trial on June 25, 2009.

{¶ 14} "He essentially is rehashing the issue he raised, in part, in his motion for new trial filed April 27, 2009.

{¶ 15} "On June 8, 2009 the Court denied his earlier motion.

{¶ 16} "The Defendant offers nothing new. His motion is untimely, the complaints raised were public record years ago, and his request is barred by res judicata. He has not satisfied his burden under the law.

{¶ 17} "Motion of June 25, 2009 is DENIED without a hearing."

{¶ 18} The trial court's invocation of res judicata was expressly based upon its denial of Baker's prior motion for a new trial, not upon the outcome of the direct appeal.

{¶ 19} In his brief, Baker asserts that his two motions for a new trial raise different issues, but we have read them, and we agree with the trial court that the issues raised in his two motions are the same.

{¶ 20} Baker's claim, in support of both motions, is that his trial counsel was preoccupied with a pending assault charge filed against the attorney by the attorney's secretary, as a result of which trial counsel misadvised him to pursue the defense of self-defense, which did not really fit the facts of the case, rather than to seek an

instruction upon the lesser offense of Aggravated Assault, which more plausibly fits the facts.

{¶ 21} As an aside, we agree with Baker that the facts in this case better fit a theory that he was guilty merely of Aggravated Assault, than they fit a theory of self-defense. The principal victim evidently struck Baker with a golf club, after which Baker ran to his car, some 80 to 100 yards away, retrieved a semi-automatic handgun, returned to where the victim was standing, with several friends, all with their backs turned to Baker, and opened fire upon them. That is not to say that a jury would likely have found Baker guilty of Aggravated Assault, had it been instructed on that offense. We merely agree that an Aggravated Assault conviction would have been a more plausible outcome than a self-defense acquittal.

{¶ 22} The following excerpts from Baker's first motion for a new trial show the nature of his argument:

{¶ 23} "In Nov 2003 my trial attorney was charged with Assault and a civil protection order barring him from having any contact with her.

{¶ 24} "During this time he was representing me in my case. I the Defendant Korey L. Baker should have been notified immediately by the prosecution or the court should have been notified of the situation, but the prosecutor knowingly chose to withhold this evidence and/or vital information from the Defendant that his trial Attorney is possitably [sic] ineffective.¹

{¶ 25} "The fact that Mr. Hamilton continued to harass his secretary during my

¹By affidavit, the trial prosecutor has averred that she was unaware of the situation involving Baker's trial attorney.

trial shows he was only focused on one thing his 'secretary' and 'not my case.'

{¶ 26} "Had the Defendant know [sic] about this, Mr. Hamilton would have been fired and Defendant would have requested the court to appoint new counsel and his trial would have had a different outcome.

{¶ 27} "The Defendant would have been advised by new counsel that all the evidence against him do [sic] not support the Self Defense Theory that Mr. Hamilton advised him was the proper way to go.

{¶ 28} "** * * *

{¶ 29} "As stated before Defendant would obtain new counsel a more functioning counsel would have entered a jury instruction for Aggravated Assault and the Defendant would have avoided the Attempted Murder conviction along with the Felonious Assault conviction."

{¶ 30} In his second motion for a new trial, Baker essentially raises the same issue. The only new information offered is Baker's claim that before trial, his trial counsel was admitted to the Wright Patterson Air Force Base Medical Center for a mental evaluation. He does not allege what the outcome of that mental evaluation was.

{¶ 31} We agree with the trial court that Baker was essentially "rehashing" his claim of ineffective assistance of counsel in his second motion for a new trial, so that it was barred by res judicata.

{¶ 32} In reaching this conclusion, we have assumed that Baker's appeal is taken from the June 29, 2009 order denying his second motion for a new trial. We assume this because Baker not only has failed to seek leave to file an untimely

notice of appeal from the June 8, 2009 order denying his first motion for a new trial, he has asserted, in his appellate brief, that: “A timely notice of appeal was filed herein.” That statement can only be true if Baker’s notice of appeal “in the Denial of his Motion for New trial herein” is referring to the June 29, 2009 order denying his second motion for a new trial.

{¶ 33} Even if we were to construe this appeal to include, within its scope, the June 8 order denying Baker’s first motion for a new trial, we would still affirm. In that order, the trial court notes that, because the motion for a new trial is untimely:

{¶ 34} “The Court must determine whether or not the Defendant has established by clear and convincing evidence that he was unavoidably prevented from discovering the evidence. In this case, the Defendant makes general allegations that the prosecution, trial attorney, and/or judge withheld evidence vital to his case. However in his own motion he states ‘a few months later I received the evidence I needed to prove the prosecution, trial attorney, and/or judge withheld evidence and/or vital information...’ The Defendant however fails to articulate exactly what the evidence is he claims was withheld from him. He generally indicates that his attorney had legal difficulties in another court. The Defendant’s general allegations do not rise to the level of evidence which would change the outcome of his case as required by the rule and case law.”

{¶ 35} We agree with the trial court that the information Baker cites concerning his trial counsel’s mental state is not “evidence” within the contemplation of Crim. R. 33(A)(6). That part of the Rule speaks of “new evidence material to the defense.” Baker’s trial counsel’s legal difficulties and mental state is not evidence material to

the defense. It would have had no relevance to the issues at trial, being obviously not probative of Baker's guilt or innocence of the charged offenses, and would not have been admissible at trial. It would more appropriately be fodder for a petition for post-conviction relief.

{¶ 36} Because we agree with the trial court that Baker's first motion for a new trial failed to identify newly discovered "evidence" that could not, with reasonable diligence, have been discovered before trial, we agree with the trial court's overruling of that motion. Thus, even if the June 8, 2009 order denying Baker's first motion for a new trial were within the scope of this appeal, we would not disturb it.

{¶ 37} Baker's First Assignment of Error is overruled.

III

{¶ 38} Baker's Second Assignment of Error is as follows:

{¶ 39} "THE TRIAL COURT ERRORED [sic] WHEN IT DENIED APPELLANT'S MOTION FOR POSTCONVICTION RELIEF WITHOUT A HEARING."

{¶ 40} Although this assignment of error refers to a "motion for postconviction relief," no petition for post-conviction relief has been filed in this record. The only motions, being the motions already cited, filed on April 27, 2009, and June 25, 2009, are both expressly denominated as motions for a new trial, and both expressly invoke Crim. R. 33, which provides for motions for a new trial.

{¶ 41} It is true that the trial court overruled both of Baker's motions for a new trial without a hearing. But the trial court could correctly determine, on the face of

each motion, that Baker was not entitled to relief. As noted in Part II, above, the trial court correctly determined that Baker had failed, in his first motion, to identify any “evidence,” within the contemplation of Crim. R. 33, that could not, with reasonable diligence, have been discovered before trial. Indeed, the motion fails to identify any “evidence,” within the contemplation of the Rule, at all.

{¶ 42} Also, as noted in Part II, above, the trial court correctly determined, from the face of Baker’s second motion for a new trial, that it raised nothing new, that had not already been raised in Baker’s first motion for a new trial, and was therefore barred by res judicata. The only additional fact set forth in Baker’s second motion was that his trial counsel had been referred for a mental evaluation. If that has any significance, in the absence of some indication of the result of the evaluation, it is still not evidence pertaining to Baker’s guilt or innocence, within the contemplation of Crim. R. 33(A)(6), so Baker has still failed to identify any newly discovered evidence, and this can be determined from the face of Baker’s motion.

{¶ 43} In neither of his motions for a new trial did Baker assert facts that, if true, would entitle him to relief. Therefore, there was no need for a hearing, and the trial court did not err in denying either motion without a hearing.

{¶ 44} Baker’s Second Assignment of Error is overruled.

IV

{¶ 45} Both of Baker’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH and DONOFRIO, JJ., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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