[Cite as *State v. Dudley*, 2010-Ohio-4152.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23613
v.	:	T.C. NO. 05CR3565
RONALD E. DUDLEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 3rd day of September, 2010.

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RONALD E. DUDLEY, #449-195, P. O. Box 57, Marion, Ohio 43302
Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Ronald E. Dudley, pro se, appeals a decision of the Montgomery County Court of Common Pleas, General Division, denying his motion for a

new trial, his motion for post-conviction relief, and his motion objecting to the imposition of fines upon his conviction. On December 16, 2008, Dudley filed a motion for new trial pursuant to Crim. R. 33. Dudley filed his motion objecting to the imposition of fines on April 29, 2009. Dudley filed his motion for post-conviction relief on June 17, 2009. On August 7, 2009, the trial court denied all of Dudley's motions in a single written decision. Dudley filed a timely notice of appeal with this Court on August 31, 2009.

I

{¶ 2} We initially note that the instant case has already been the subject of an appeal before this Court in *State v. Dudley*, Montgomery App. No. 22931, 2010-Ohio-3240 (hereinafter *"Dudley I"*). Thus, we set forth the history of the case in *Dudley I*, and repeat it herein in pertinent part:

{¶ 3} "The alleged crimes in the case before us took place in the early morning hours of November 28, 1994. The victim, B.C., was sixteen years old, and was a high school student in Dayton, Ohio. B.C. had been born to a drug and alcohol-dependent mother, who lost custody when B.C. was eleven years old. After her mother lost custody, B.C. lived with her maternal aunt for five years, but ran away a day or two before Thanksgiving, 1994, due to repeated physical and emotional abuse by her aunt and cousins.

{¶ 4} "B.C. stayed for several days with her friend, Melissa, and Melissa's father. However, on Sunday evening, Melissa's father told B.C. that she had to return home. He was unaware of the abuse. Instead of returning home, B.C. went to the home of another friend, Shannon. The plan was for B.C. to stay overnight with Shannon and return to Melissa's house after Melissa's father left for

work on Monday morning. B.C. planned to shower and dress at Melissa's house, and ride the bus to school.

{¶ 5} "Because Shannon's mother did not have a car, B.C. had to walk between the two homes, which were some distance apart. The walk would have taken between a half-hour and an hour. On that morning, B.C. got up around 4:00 or 5:00 a.m., and left for Melissa's house. B.C. was wearing jeans as well as a dress that she had borrowed from Melissa the night before. B.C. was somewhat familiar with the area, but had not previously walked from one house to the other. She intended to walk to Main Street, and go down Ridge Avenue, to figure out the bridge she needed to take to cross the river and go towards Parkside Homes, which she knew as a landmark.

{¶ 6} "As B.C. walked down Ridge, she heard someone yelling for her to wait. A man (later determined to be Ronald Dudley), approached, and apologized for yelling. Dudley stated that B.C. was not the person he had thought she was. B.C. asked Dudley if this particular bridge was the correct one to take to go to Parkside Homes. Dudley affirmed that the bridge was the correct one, and stated that he was actually going that way.

{¶ 7} "B.C. and Dudley walked up Ridge Avenue and crossed the bridge. Dudley began making remarks that concerned B.C., and she also noticed that she had not seen Parkside Homes yet. When she inquired about this, Dudley offered to show her a shortcut through the woods. B.C. refused. Having realized that she was going in the wrong direction, B.C. decided to turn around. Just then, Dudley lunged at her, tackling her like a football player. They went over a guard rail and

fell down a hill. When they landed, they were at the corner of a tennis court, and Dudley was on top of B.C. Dudley picked up a bottle and held it over B.C. He also pulled something from his pocket and held it to her throat.

{¶ 8} "Dudley put his hand over B.C.'s mouth, and told her before he removed it that he would kill her if she screamed. B.C. asked Dudley what she wanted, and he said she knew what he wanted. B.C. gave Dudley two rings, but he kept threatening her. Dudley decided that he wanted to walk to the woods, but B.C. told him that her ankle had been hurt during the fall. Dudley then grabbed B.C. by the hair and dragged her to the edge of the woods, about 50 or 60 feet away, where they would not be seen. When they got to the woods, Dudley told B.C. to take her pants down. She begged him not to do anything, but he told her to do as he said, or he would kill her. When B.C. did not act quickly enough, Dudley ripped off her left pants leg. He then crawled on top of her and tried to force his penis into her vagina. He was not successful, and then tried again. Dudley was still not successful, and told B.C. to put it in. B.C. put his penis in front of her vagina, and Dudley thrust very hard. He told B.C. to do it right or he would 'fucking kill her.' Dudley then thrust inside B.C.'s vagina and continued to do so. During the rape, Dudley put his hand up B.C.'s dress and fondled her nipple.

{¶ 9} "Eventually, Dudley got up, took B.C.'s pants and a shoe away, and told her she could have her pants back once he got his hat, which had apparently fallen off. Dudley told B.C. that if she had even moved an inch when he came back, he would just kill her and get if over with. Dudley then left. B.C. sat on the cold ground for some time, but Dudley did not return. B.C. started walking back toward

the bridge on Ridge Avenue, holding one shoe. B.C. crossed the bridge and the river, and ended up on Riverside Drive. When B.C. approached the Helena Street Bridge, she was spotted by Bruce Butt, a firefighter, who was on his way to work. B.C. initially rebuffed Butt's attempts to help, because she was afraid. Butt parked his car in the Box 21 parking lot and approached B.C. on foot. Butt told B.C. that he was a fireman, and that he could see that something was not right. B.C. was crying, and said she had been raped. Butt took B.C. to Box 21, which is a rescue unit. One of the volunteers described B.C. as extremely distraught, shaking tremendously, and totally incoherent at times. 911 was called, and paramedics arrived shortly thereafter, to take B.C. to the hospital.

{¶ 10} "Lisa Ward was the emergency room physician at Grandview Hospital that day. Ward had no independent recollection of the event, and all the medical records other than the sexual assault examination form had been destroyed by the time of the trial. Ward conducted a physical exam and noted signs of injury, including scratches on the posterior left shoulder, tenderness and swelling of the right ankle, bright red blood stains in the genital area, swollen and tender labia, an abrasion and laceration on the left vaginal wall, and tenderness of the uterus. The injuries were traumatic and not usually associated with consensual intercourse. Dr. Ward collected vaginal swabs, vaginal smears, and a vaginal aspirate and put these items into a sexual assault kit. Pursuant to standard rape exam protocol, the hospital personnel then either turned over the evidence directly to the police, or placed the material in a locked cabinet until the police arrived. The hospital also collected B.C.'s clothing and turned those materials over to the police.

{¶ 11} "After B.C. was taken to the hospital, the police went to the location of the incident and located various items, including B.C.'s hairbrush and shoe, and a dark blue baseball cap, which fit B.C.'s description of her assailant. The police also took photos of the area.

{¶ 12} "B.C. was able to describe her assailant only in general terms. She indicated that he was a medium-build African-American man between the ages of twenty and fifty, and was six to eight inches taller than she was. B.C. was shown photo spreads after the incident, but could not make an identification.

{¶ 13} "In 1994, the Miami Valley Regional Crime Lab (MVRCL) was not conducting DNA testing. When the lab received B.C.'s sexual assault kit, the samples tested positive for the presence of seminal fluid and sperm. The lab also conducted blood typing and polymorphic enzyme testing. After the testing was finished, the lab retained samples in its freezer.

{¶ 14} "B.C. had no further contact with the police until 2005, when she was contacted by Detective Olinger. The case had been an inactive cold case, due to the lack of a suspect. In 2003, however, MVRCL had submitted the samples in a number of cases, including B.C.'s, to a private lab for DNA testing. A male profile was obtained from the sperm fraction of the vaginal swabs, and was put into a database. Subsequently, in June 2005, MVRCL received notice that an individual, Ronald Dudley, matched the sperm fraction from B.C.'s vaginal swab.

{¶ 15} "Detective Olinger verified the results, and then tried to obtain the old files. He found that the property room had destroyed the clothing and other crime scene items in 1997. Olinger located B.C., and reviewed the case with her. He

also showed B.C. a photo-spread of six individuals, one of whom was Dudley. B.C. was unable to positively identify her assailant, but indicated that it looked like pictures one and three. Dudley's picture was number three.

{¶ 16} "Olinger subsequently interviewed Dudley. Olinger told Dudley about the subject of the interview, and showed Dudley two photographs of the victim. One was a photo of B.C. when she was 16, and the other was a copy of B.C.'s current driver's license. Dudley immediately stated that he did not know the person, and had not done anything. At this point, Olinger advised Dudley of his rights. Dudley then waived his rights, and agreed to speak with Olinger. Dudley again stated he did not know the person in the photograph, and denied having any type of sexual relations with her. Dudley picked up the photograph and commented that she was not his type of girl. He explained that he did not have sex with white girls, because he had no interest in them. The girl in the photograph also looked like a kid. Dudley stated a number of times that he did not know B.C., had no knowledge of Parkside Homes, had never been to that area, and had done nothing. The interview ended when Olinger asked Dudley for a DNA sample. Dudley refused to provide a sample.

{¶ 17} "Dudley was indicted in October 2005, on six charges, including Rape, Aggravated Robbery, Kidnapping, two counts of Attempted Rape, and Gross Sexual Imposition. In November 2005, the trial court ordered Dudley to submit a saliva sample. After performing a DNA analysis, MVRCL concluded that Dudley was the sperm donor on B.C.'s vaginal swabs. MVRCL conducted further analysis in March 2008, and again concluded within a reasonable degree of scientific

certainty that Dudley was the sperm donor. The forensic scientist who conducted the tests explained the standard applied in his lab for this degree of certainty is approximately one in 6.8 trillion individuals. All the tests performed regarding Dudley rose to this degree of certainty.

{¶ 18} "After hearing the evidence, the jury found Dudley guilty of Rape, Kidnapping, two counts of Attempted Rape, and Gross Sexual Imposition. The jury found Dudley not guilty of Aggravated Robbery."

{¶ 19} In *Dudley I*, we reversed Dudley's convictions for GSI and attempted rape, holding that the two charges were allied offenses of similar import with the rape charge. We remanded the case for re-sentencing, "at which the State [could] elect which allied offense it [would] pursue against Dudley."

{¶ 20} While *Dudley I* was still pending, Dudley filed a motion for new trial, a motion objecting to the fines imposed at his sentencing, and a motion for post-conviction relief. After reviewing the arguments contained in Dudley's motions, the trial court issued a single written decision denying each motion on August 7, 2009.

{¶ 21} It is from this judgment which Dudley now appeals.

II

{¶ 22} Because they are interrelated, assignments of error one through five will be discussed together:

{¶ 23} "DEFENDANT ARGUES THAT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED DUE TO HIS COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS AND SECURE HIS *MIRANDA* RIGHTS AS

GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 24} "TRIAL COURT ERRED BY FAILING TO HOLD A MERGER HEARING AS REQUIRED PURSUANT TO R.C. 2941.25, WHEN ALLIED OFFENSES ARE IN QUESTION, RISING FROM A SINGLE INCIDENT."

{¶ 25} "DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO DUE PROCESS WHEN THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE DURING TRIAL AND BEFORE TRIAL."

{¶ 26} "TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO OBJECTION OF FINES PURSUANT TO R.C. 2947.23, NOT BEING RETROACTIVELY APPLIED WITH CASE, PER SENATE BILL 2 IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT."

{¶ 27} "DEFENDANT WAS DENIED HIS RIGHT TO FAIR TRIAL AS PROVIDED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, WHEN THE TRIAL COURT FAILED TO DISMISS HIS PRE-INDICTMENT MOTION."

{¶ 28} "[A]buse of discretion is the most prevalent standard [of review] for reviewing the dismissal of a petition for post-conviction relief without a hearing." *State v. Hicks*, Highland App. No. 09CA15, 2010-Ohio-89, at ¶10 (surveying other Ohio courts). "Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than

decisions that are unconscionable or arbitrary.

{¶ 29} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶ 30} Initially, we note that a post-conviction proceeding is not an appeal of a criminal conviction, but a collateral civil attack on a criminal judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. "Indeed, post-conviction state collateral review itself is not a constitutional right, even in capital cases." *Id*., citing *Murray v. Giarratano* (1989), 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1. Post-conviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal. *Id*. Accordingly, in a post-conviction proceeding, a convicted defendant has only the rights granted him by the legislature. *State v. Moore* (1994), 99 Ohio App.3d 748, 751.

{¶ 31} "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 * * * 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 of conviction, or on an appeal from that judgment." *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus. In *Dudley I*, Dudley argued that he received ineffective assistance of counsel because his trial attorney failed to file a

motion to suppress statements made by him to police while incarcerated and failed to object when the trial court sentenced him without first merging the kidnapping conviction with the sex offenses, or without merging the sex offenses with each other, as required pursuant to R.C. 2941.25(A). We held in *Dudley I* that Dudley did not receive ineffective assistance when his counsel failed to file a motion to suppress his statements. Regarding Dudley's merger argument, we reversed his convictions for GSI and attempted rape, holding that the two charges were allied offenses of similar import with the rape charge, and we remanded the case for re-sentencing.

{¶ 32} In the instant appeal, Dudley's first and second assignments of error are mere restatements of the arguments that he advanced in *Dudley I*. Neither assignment contains any claims which involve matters outside the record which could not have been raised in his direct appeal. Both arguments are, therefore, barred by the doctrine of res judicata.

{¶ 33} In his third assignment, Dudley argues that he was denied due process by the State's alleged destruction of exculpatory evidence prior to trial and failure to disclose the existence of certain evidence, as well as the State's late disclosure of DNA results prior to trial. Upon review, Dudlley has failed to present any evidence which could not have been raised in his direct appeal, and res judicata serves to bar his claim.

{¶ 34} In regards to his fourth assignment, Dudley contends that R.C. 2947.23 was applied retroactively by the trial court and resulted in an unconstitutional order that he pay the costs of prosecution in this case. The court's

order that Dudley pay the costs of his prosecution was contained in the termination entry filed immediately after his trial and sentencing. Thus, Dudley could have raised this issue in his direct appeal, which he did not, and the matter is barred by res judicata.

{¶ 35} Dudley argues in his fifth assignment that the trial court erred when it overruled his motion to dismiss the indictment because the pre-indictment delay violated his due process rights. Dudley's argument in this regard is clearly barred by the doctrine of res judicata. A motion for post-conviction relief is not the proper venue to argue the denial of a pre-trial motion to dismiss. In light of the foregoing, we conclude that the trial court did not abuse its discretion when it denied Dudley's motion for post-conviction relief. Dudley has failed to advance any arguments which involve any matters outside the record or that could not have been raised in his direct appeal.

III

{¶ 36} Dudley's sixth assignment of error is as follows:

{¶ 37} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING MR. DUDLEY'S MOTION FOR NEW TRIAL BECAUSE NEW EVIDENCE IN THE FORM OF A BLOOD TEST DISCLOSES A STRONG POSSIBILITY THAT IT WILL CHANGE THE RESULT IF A NEW TRIAL IS GRANTED."

{¶ 38} In his sixth assignment, Dudley contends that the trial court abused its discretion when it overruled his motion for a new trial pursuant to Crim. R. 33(A)(2) & (3). Specifically, Dudley argues that he should have been able to introduce his blood type as evidence during trial. Dudley asserts that evidence of his blood type

constitutes strong exculpatory evidence that should have been introduced during trial. Dudley argues that he repeatedly asked his trial counsel to present evidence of his blood type, but his counsel refused. Dudley also contends that the State withheld evidence of his blood type. We note that the evidence used to convict Dudley consisted of DNA taken from the victim that was a match to Dudley.

{¶ 39} Crim. R. 33(A)(2) & (3) state in pertinent part:

{¶ 40} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶ 41} "(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶ 42} "(3) Accident or surprise which ordinary prudence could not have guarded against."

{¶ 43} Crim. R. 33(C) states that the causes enumerated in sections (A)(2) and (3) must be supported by affidavits. Dudley filed his motion for a new trial on December 16, 2008. On January 15, 2009, the court granted Dudley until February 20, 2009, in which to procure and file the necessary affidavits to support his motion for new trial. The court noted that as of August 7, 2009, Dudley failed to file the affidavit(s) to support his motion for new trial pursuant to Crim. R. 33(A)(2) and (3), and the court denied his motion. A trial court does not abuse its discretion by denying a motion or hearing on such motion for new trial on Crim. R. 33(A)(2) and (3) grounds if no affidavits are submitted with the motion. *State v. Tolliver*, Franklin App. No. 02AP-811, 2004-Ohio-1603. Thus, the trial court did not abuse its discretion when it denied Dudley's motion for a new trial.

{¶ 44} Dudley's sixth assignment of error is overruled.

IV

{¶ 45} Dudley's seventh assignment of error is as follows:

{¶ 46} "DEFENDANT WAS DENIED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION AS PROVIDED BY THE SIXTH AND FOURTEENTH AMENDMENT[S] OF THE U.S. CONSTITUTION BY CUMULATIVE ERRORS OF HIS COUNSEL [WHICH] PREJUDICED HIS RIGHT TO FAIR TRIAL."

{¶ 47} In his seventh assignment, Dudley argues that he was prejudiced by his counsel's cumulative errors committed during trial. Dudley originally advanced this argument in his motion for post-conviction relief. Specifically, Dudley asserts that his trial counsel was deficient in the following ways: 1) failure to call witness who would have testified regarding Dudley's employment and whereabouts on the day of the crime; 2) failure to object to late discovery of DNA test results prior to trial; 3) failure to request a suppression hearing regarding statements made by Dudley while incarcerated; failure to request introduction of Dudley's blood type into evidence; 4) failure to present a time line of the events on the day the crime was committed; and 5) failure to request a mental health evaluation of Dudley who allegedly suffered from anxiety caused by the ten-year delay between the time that the crime was allegedly committed and when he was subsequently indicted.

{¶ 48} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those

cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 49} An appellant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. The test for a claim of ineffective assistance of counsel is not whether counsel pursued every possible defense; the test is whether the defense chosen was objectively reasonable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052. A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

{¶ 50} In the instant case, the crux of Dudley's argument regarding his claim

for ineffective assistance revolves around the tactical decisions made by his counsel during the trial. Initially, we note that to the extent that Dudley's allegations of ineffective assistance of counsel could have been raised in his direct appeal, they are barred by the doctrine of res judicata. Nonetheless, tactical decisions and trial strategy cannot form the basis of a claim for ineffective assistance. Dudley has also failed to establish that he was prejudiced by any of counsel's decisions made before and during the trial. Dudley's mere speculation that his counsel was deficient is insufficient to meet the standard announced in *Strickland*. "Reviewing courts must indulge in a strong presumption that counsel's conduct was not improper, and reject post-trial scrutiny of an act or omission that was a matter of trial tactics merely because it failed to avoid a conviction." *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686.

{¶ 51} Dudley's seventh assignment of error is overruled.

V

{¶ 52} Dudley's eighth and final assignment of error is as follows:

{¶ 53} "TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR FACTS AND CONCLUSIONS OF LAW, AS REQUIRED BY STATUTE R.C. 2953.21."

{¶ 54} In his final assignment, Dudley contends that the trial court's decision denying his motion for post-conviction relief did not provide the necessary findings of facts and conclusions of specified in R.C. 2953.21(G). Upon review of the trial court's decision denying Dudley's motion for post-conviction relief filed on August 7, 2009, we find no merit to his argument. The eight-page decision filed by the court

clearly contains factual findings, as well as legal conclusions supported by relevant case law.

{¶ 55} Dudley's eighth assignment of error is overruled.

VI

{¶ 56} All of Dudley's assignments of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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