[Cite as *State v. Royster*, 2015-Ohio-625.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26378
	:	
v.	:	Trial Court Case No. 2012-CR-1272
	:	
JOSEPH A. ROYSTER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 20th day of February, 2015.

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MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JOSEPH A. ROYSTER, Inmate No. 688-021, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601
Defendant-Appellant-Pro Se

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WELBAUM, J.

{¶ 1} Defendant-appellant, Joseph A. Royster, appeals pro se from a decision of the Montgomery County Court of Common Pleas denying his petition for post-conviction relief. Royster's petition alleged three claims of ineffective assistance of counsel, as well as a violation of the evidence disclosure rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). For the reasons outlined below, the judgment of the trial court will be affirmed.

{¶ 2} On September 18, 2013, the Montgomery County Grand Jury indicted Royster on three counts of rape of a child under ten years of age in violation of R.C. 2907.02(A)(1)(b), and one count of endangering children in violation of R.C. 2919.22(B)(3). The indictment alleged that the offenses occurred sometime between August 1, 2010 and April 30, 2011. The victim was the eight-year-old daughter of Royster's live-in girlfriend.

{¶ 3} Royster pled not guilty to the charges and the matter proceeded to a jury trial. At trial, the State presented testimony from the mental health professional who counseled the victim, the pediatrician who physically examined the victim, the officer and detective who interviewed the victim, the victim's grandmother, and the victim herself. No witnesses were called on the defendant's behalf.

{¶ 4} Following trial, on August 5, 2013, the jury found Royster guilty of two counts of rape in violation of R.C. 2907.02(A)(1)(b) and one count of endangering children in violation of R.C. 2919.22(B)(3). On August 19, 2013, the trial court sentenced Royster to an aggregate term of 15 years to life in prison. The same day, Royster appealed from his conviction, and that appeal is still pending before this court in *State v. Royster*, 2d Dist.

Montgomery No. 25870.

{¶ 5} Approximately seven months after filing his direct appeal, on March 3, 2014, Royster filed a petition for post-conviction relief. In the petition, Royster alleged ineffective assistance of trial counsel on grounds that his attorney: (1) failed to call two key witnesses at trial—the victim's uncle, H.W., and the victim's seven-year-old brother, J.W.; (2) advised him to reject a favorable plea bargain; and (3) failed to investigate an alibi that he was staying at a homeless shelter in Virginia during the time frame of the alleged offenses. On June 12, 2014, the trial court granted Royster leave to supplement his petition, and Royster further alleged that the State failed to provide him with exculpatory evidence as required by *Brady*, which he claimed violated his rights under the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause.

{¶ 6} In support of his petitions, Royster filed a self-serving affidavit with the following attachments: (1) a letter from the deputy director of a Virginia homeless shelter called "Carpenter's Shelter"; (2) a notarized document from Carpenter's Shelter stating that Royster resided at the shelter between July 16, 2010 and October 12, 2010; (3) a prior complaint filed against Royster in Dayton Municipal Court Case No. 12CRA5939; and (4) Royster's extradition documentation.

{¶ 7} On August 25, 2014, the trial court issued a written decision denying Royster's petition for post-conviction relief without a hearing. Royster now appeals from that decision and he raised the following two assignments of error in his appellate brief:

> I.) THE TRIAL COURT VIOLATED DEFENDANT'S 6TH AMENDMENT RIGHTS TO THE CONFRONTATION CLAUSE AND 14TH AMENDMENT

RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WHEN IT SUPPRESSED EXCULPATORY AND IMPEACHING EVIDENCE FAVORABLE TO THE ACCUSED.

II.) DEFENDANT'S 6TH AMENDMENT RIGHTS TO EFFECTIVE COUNSEL AND RIGHTS TO A FAIR TRIAL WERE VIOLATED DUE TO INEFFECTIVE COUNSEL.

{¶ 8} Royster also raised three additional assignments of error in a supplemental appellate brief. Those assignments of error are as follows:

I.) THE TRIAL COURT'S DECISION TO PROCEDURALLY BAR PETITIONER[']S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER THE DOCTRINE OF RES JUDICATA CREATES A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

II.) TRIAL COURTS [sic] ANALYSIS IS CONTRARY TO LAW SET DOWN BY THE OHIO SUPREME COURT, AND VIOLATES PETITIONER[']S 6TH AMENDMENT RIGHT TO A FAIR TRIAL AND 14TH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

III.) THE TRIAL COURT ERRS IN RULING THAT PETITIONER[']S AFFIDAVITS ARE IMMATERIAL TO HIS CASE.

{¶ 9} We interpret all of Royster's assignments of error as collectively arguing that the trial court erred in denying his petition for post-conviction relief. "We review trial court decisions on petitions for post-conviction relief under an abuse of discretion standard." (Citations omitted.) *State v. Perkins*, 2d Dist. Montgomery No. 25808, 2014-Ohio-1863, ¶ 27. The term "abuse of discretion" has been defined as a decision that is

"unreasonable, arbitrary, or unconscionable." (Citation omitted.) *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 10} Petitions for post-conviction relief are governed by R.C. 2953.21 through R.C. 2953.23. Under these statutes, any defendant who has been convicted of a criminal offense and who claims to have experienced a denial or infringement of his or her constitutional rights may petition the trial court to vacate or set aside the judgment and sentence. R.C. 2953.21(A). A post-conviction proceeding is not an appeal of a criminal conviction; it is a collateral civil attack on the judgment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 48, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994); R.C. 2953.21(J). "For this reason, a defendant's petition for post-conviction relief is not a constitutional right; the only rights afforded to a defendant in post-conviction proceedings are those specifically granted by the legislature." *State v. Palmer*, 2d Dist. Montgomery No. 26279, 2014-Ohio-5266, ¶ 10, citing *Steffen* at 410 and *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999).

{¶ 11} The post-conviction relief statutes do "not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required." *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). A trial court may dismiss a petition for post-conviction relief without a 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.' " *Gondor* at ¶ 51, quoting *Calhoun* at paragraph two of the syllabus.

{¶ 12} A petitioner "must present substantive facts and not mere self-serving

affidavits in order to obtain a post-conviction relief hearing." *State v. Goldwire*, 2d Dist. Montgomery No. 20838, 2005-Ohio-5784, ¶ 19. "[A] trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun* at paragraph one of the syllabus. "The trial court may, under appropriate circumstances in post-conviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." *Id*. at 284.

{¶ 13} Furthermore, "[i]f an alleged constitutional error could have been raised and fully litigated on direct appeal, the issue is res judicata and may not be litigated in a post[-]conviction proceeding." (Emphasis deleted.) *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶ 9, citing *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). "If, however, the alleged constitutional error is supported by evidence outside the record as well as evidence appearing in the record, and thus could not have been fully litigated on direct appeal, the issue is not subject to the doctrine of res judicata." (Emphasis deleted.) *Id*., citing *State v. Smith*, 125 Ohio App.3d 342, 348, 708 N.E.2d 739 (12th Dist.1997). (Other citation omitted.)

{¶ 14} We conclude that all of the claims Royster raised in his petition for post-conviction relief rely, at least in part, on factual allegations and evidence that is outside the record. Accordingly, his claims were properly raised in a petition for post-conviction relief.

I. *Brady* Violation

{¶ 15} In his petition, Royster alleged a violation of the rule announced in *Brady*,

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Specifically, Royster claimed that during the discovery phase of his case, the State failed to provide him with a copy of a prior complaint filed against him in the Dayton Municipal Court alleging that he raped the victim on or near July 27, 2010. Royster claims the prior complaint was dismissed due to a discrepancy with the offense date since he had resided at the Carpenter Shelter in Virginia between July 16, 2010 and October 12, 2010. Royster contends that the false date alleged in the prior complaint amounts to exculpatory evidence that the State should have provided him pursuant to *Brady*. He further claims that without the prior complaint, he was prevented from effectively cross-examining and impeaching the victim's testimony, which violated his rights under the Sixth Amendment's Confrontation Clause.

{¶ 16} In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87. *See also, State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph four of the syllabus; *State v. Aldridge*, 120 Ohio App.3d 122, 145, 697 N.E.2d 228 (2d Dist.1997). Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶ 17} The rule in *Brady* only applies to evidence unknown to the defendant at the time of the trial. *See United States v. Clark*, 928 F.2d 733, 738 (6th Cir.1991) (no *Brady* violation exists where a defendant knows of essential facts permitting him to take advantage of exculpatory information or where evidence is available from another

source); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, fn. 2; *State v. Buhrman*, 2d Dist. Greene No. 96 CA 145, 1997 WL 566154, *7 (Sept. 12, 1997) ("*Brady's* Due Process disclosure requirement only applies to evidence discovered after trial that had been known to the prosecution, but unknown to the defense").

{¶ 18} As the defendant in the Dayton Municipal Court case, Royster was necessarily aware of the prior complaint filed against him. Royster indirectly confirms this fact in his self-serving affidavit, which states, in pertinent part:

> [R]egarding my whereabouts on or around July 27, 2010, the date of the alleged incident, I met with my attorney Sean Hooks again and advised him that I wanted him to get the allegations dropped, because I was not in town during that time, but instead staying at a Homeless Shelter in Virginia. * * * I informed my attorney that when they found out that I was not around during the date of July 27, 2010, they changed the dates on the indictment to encompass a nine month window in order to bring the charges and get a conviction. I explained to him that the date of the alleged rape occurring on or around July 27, 2010 was sworn to by Detective Taylor * * *[.]

Affidavit (Mar. 3, 2014), p. 2.

{¶ 19} The foregoing statement from Royster's affidavit indicates that he was aware a complaint had been filed against him alleging that he committed a rape offense on July 27, 2010. Because he knew about the complaint and its allegations, the rule in *Brady* simply does not apply. Furthermore, the prior complaint does not qualify as *Brady* material because there is no reasonable probability that it would have changed the outcome of his case since the indictment alleged that he committed the offenses

sometime between August 1, 2010 and April 30, 2011, and there was testimony presented at trial supporting the alleged time frame.

{¶ 20} Royster's Confrontation Clause argument is also unpersuasive. "The Confrontation Clause of the Sixth Amendment to the United States Constitution gives the accused the right to be confronted with the witnesses against him." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 83. "To establish a Confrontation Clause violation, the defendant must show that he was 'prohibited from engaging in otherwise appropriate cross-examination' and '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defendant's] counsel been permitted to pursue his proposed line of cross-examination.' " *State v. Warmus*, 197 Ohio App.3d 383, 2011-Ohio-5827, 967 N.E.2d 1223, ¶ 64 (8th Dist.), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). A defendant cannot claim that he was denied the right to confront his accuser when he has had the opportunity to cross-examine his accuser at trial. *See State v. Wickline*, 50 Ohio St.3d 114,118, 552 N.E.2d 913 (1990).

{¶ 21} Here, Royster had the opportunity to cross-examine the victim at trial and there was nothing keeping him from addressing the prior complaint and asking questions regarding the alleged offense date. Accordingly, we fail to see how Royster can claim that he was denied the right to confront his accusers.

{¶ 22} For the foregoing reasons, Royster's *Brady* and Confrontation Clause claims have no merit and are overruled.

II. Ineffective Assistance of Counsel

{¶ 23} Royster's petition for post-conviction relief also alleged that he received ineffective assistance of counsel because his trial counsel: (1) failed to call two key witnesses at trial; (2) advised him to reject a favorable plea offer; and (3) failed to investigate and pursue an alibi that he was staying at a homeless shelter in Virginia called "Carpenter's Shelter" between July 16, 2010 and October 12, 2010.

{¶ 24} In order for Royster to establish his ineffective assistance claims, he must demonstrate that his counsel's performance was deficient and fell below an objective standard of reasonable representation, and that the defendant was prejudiced by counsel's performance; that is, there is a reasonable probability that but for counsel's unprofessional errors, the result of the defendant's trial or proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Failure to Call Witnesses

{¶ 25} Royster contends that his trial counsel was ineffective in failing to call the victim's uncle, H.W., and the victim's seven-year-old brother, J.W., as trial witnesses. In support of this claim, Royster stated in his affidavit that H.W. was willing to testify that the victim and her grandmother had fabricated the rape claims against him. Specifically, Royster's affidavit states that H.W. sent him a note while they were serving time together in jail stating that "he had seen evidence of [the victim] being brainwashed as to what to say by [the victim's grandmother]." Affidavit (Mar. 3, 2014), p. 1-2. Royster also averred that he advised his trial counsel about what H.W. had told him, and that counsel indicated he would contact H.W., but never did.

{¶ 26} "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." (Citation omitted.) *State v. Hill*, 2d Dist. Greene No. 2004 CA 79, 2005-Ohio-3176, ¶ 13. A defendant must overcome the presumption that counsel is competent and must show that counsel's decisions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 688.

{¶ 27} " 'Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-7762, 890 N.E.2d 263, ¶ 222, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). Moreover, " 'attorneys need not pursue every conceivable avenue; they are entitled to be selective.' " *State v. Murphy*, 91 Ohio St.3d 516, 542, 747 N.E.2d 765 (2001), quoting *U.S. v. Davenport*, 986 F.2d 1047, 1049 (7th Cir.1983). "Even unsuccessful tactical or strategic decisions will not constitute ineffective assistance of counsel." *State v. Williams*, 2d Dist. Montgomery No. 24548, 2012-Ohio-4197, ¶ 28, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶ 28} In this case, Royster has not overcome the strong presumption that his trial counsel's failure to call H.W. and J.W. was anything other than sound trial strategy. The trial court reasonably concluded that the decision not to call H.W. as a witness could have been for purposes of not highlighting Royster's previous incarceration. The court also reasonably concluded that the decision not to call J.W. as a witness could have been due to the fact that the victim never claimed J.W. was present during the abuse, and also

because J.W. eventually told authorities that Royster had physically abused him as well. Royster has also not demonstrated that the result of trial would have been different had H.W. and J.W. been called to testify.

{¶ 29} The self-serving statements in Royster's affidavit regarding what H.W. would have allegedly testified to at trial lack credibility and are insufficient by themselves to demonstrate ineffective assistance. *See State v. Banks*, 2d Dist. Montgomery No. 25188, 2013-Ohio-2116, ¶ 17-19; S*tate v. Combs*, 2d Dist. Montgomery No. 25262, 2013-Ohio-620, ¶ 15 (self-serving declarations standing alone do not rise to the level of evidence required to establish a claim of ineffective assistance of counsel in a post-conviction proceeding). Royster has also not submitted any evidence as to what J.W.'s testimony would have been. Without such evidence, it is pure speculation to conclude that the result of Royster's trial would have been different had J.W. testified. *See State v. Hoover-Moore,* 10th Dist. Franklin No. 07AP-788, 2008-Ohio-2020, ¶ 20, citing *State v. Thorne*, 5th Dist. Stark No. 2003CA00388, 2004-Ohio-7055, ¶ 70. (Other citation omitted.)

{¶ 30} For the foregoing reasons, Royster has not demonstrated that his counsel's failure to call H.W. and J.W. as witnesses constitutes ineffective assistance of counsel.

Advice on Rejecting Favorable Plea Offer

{¶ 31} Royster also contends that his trial counsel was ineffective in advising him to reject the State's ten-year plea offer because he was convicted by the jury and subjected to a harsher sentence of 15 years to life. In support of this claim, Royster stated in his affidavit that his counsel had told him ten years was too much time and

advised him to submit a counteroffer that he thought was fair. Royster also averred that he and his counsel both came up with a counteroffer of six years. According to Royster, his counsel told him that if the State did not accept the six-year offer, that they should take his case to trial because counsel believed the State's case was weak.

{¶ 32} In *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the United States Supreme Court held that defendants are entitled to the effective assistance of counsel during plea negotiations and that counsel may be ineffective when counsel's advice led to the rejection of a plea bargain that would have resulted in a lesser sentence. However, in order to prevail on a claim of ineffective assistance of counsel on those grounds, "a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted [the plea's] terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed." *Id.* at paragraph one of the syllabus.

{¶ 33} Thus, "[t]o show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law." *Missouri v. Frye*, ___ U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), paragraph three of the syllabus.

{¶ 34} In this case, even if we were to assume that the plea advice given by Royster's trial counsel was deficient, Royster has failed to demonstrate resulting

prejudice in the manner prescribed by *Lafler* and *Frye*. Specifically, Royster did not claim in his petition or supporting affidavit that he would have accepted the State's ten-year plea offer had it not been for counsel's advice. Rather, Royster indicated that both he and his counsel thought a six-year prison term was a fair compromise. He also provided no credible evidence that prior to trial, he was amenable to a plea bargain that would have involved him serving ten years in prison.

{¶ 35} For the foregoing reasons, Royster has failed to establish ineffective assistance of counsel based on his counsel's plea advice.

Failure to Investigate Alibi

{¶ 36} Next, Royster claims his counsel was ineffective in failing to investigate his alibi that he was residing at the Carpenter Shelter in Virginia during the time frame that the rape offenses allegedly occurred. In support of the alibi argument, Royster submitted documentation from the shelter indicating that he was residing there between July 16, 2010 and October 12, 2010. Royster states in his affidavit that he had a discussion with his counsel regarding the dates of the alleged offenses and his alibi. He also averred that he provided his counsel with other supporting documentation, but that counsel did not want to use it.

{¶ 37} Even if we were to assume counsel's performance was deficient with respect to investigating Royster's alibi, Royster has failed to establish that any further investigation would have changed the outcome of his case. As previously noted, he was indicted for committing the rape offenses sometime between August 1, 2010 and April 30, 2011. While he established an alibi between July 16, 2010 and October 12, 2010, there

is still a six month window of time in which the offenses could have occurred as alleged. There was also testimony presented at trial indicating that the offenses were committed within the alleged time frame. As the trial court indicated, Royster is not alleging that he was at the homeless shelter during the entire period between August 1, 2010 and April 30, 2011. Therefore, we agree with the trial court's finding that the homeless shelter evidence is immaterial to the outcome.

{¶ 38} For the foregoing reasons, Royster's claim that his trial counsel was ineffective in failing to investigate his alibi has no merit.

III. Conclusion

{¶ 39} Because none of the claims raised in Royster's petition for post-conviction relief have any merit, the trial court did not abuse its discretion in denying the petition. Accordingly, Royster's five assignments of error are overruled and the judgment of the trial court is affirmed.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

Mathias H. Heck, Jr.
Andrew T. French
Joseph A. Royster
Hon. Timothy N. O'Connell