

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 1-04-31

v.

CLEVELAND R. JACKSON

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: October 4, 2004

ATTORNEYS:

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CUPP, J.

{¶1} Defendant-appellant, Cleveland Jackson (hereinafter “Jackson”), appeals the judgment of the Allen County Court of Common Pleas, denying his petition for post-conviction relief.

{¶2} On January 3, 2002, Jackson and his brother, Jeronique Cunningham (hereinafter “Cunningham”), went to the home of Shane Liles in Lima, Ohio to purchase drugs. Although Shane was not at home when Jackson and Cunningham arrived at his residence, other people were present, namely Coron Liles, Dwight Goodlow, Armetta Robinson, Leneshia Williams, Tomeaka Grant, James Grant and three-year-old Jayla Grant.

{¶3} When Shane arrived at his residence, he and Jackson went upstairs so that Jackson could purchase drugs. Instead, Jackson pulled a gun on Shane, tied his hands and took the cash and drugs Shane was carrying. Meanwhile downstairs, Cunningham pulled a gun on Coron Liles, Dwight Goodlow and Leneshia Williams, who were in the living room. Jackson ordered Shane downstairs and all of the victims were ordered into the kitchen with Armetta Robinson, Tomeaka Grant, James Grant and Jayla Grant. Cunningham then demanded that all of the victims give up their money and jewelry. Jackson demanded that Shane reveal where the rest of his money was. When Shane refused, Jackson shot him. Jackson and Cunningham then proceeded to fire at the

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others in the kitchen before running out of the house. When Jackson and Cunningham were gone, Shane called 911.

{¶4} As a result of the shooting, Leneshia Williams and three-year-old Jayla Grant died and Shane Liles, Armetta Robinson, Tomeaka Grant, James Grant, Coron Liles and Dwight Goodlow were wounded.

{¶5} Jackson was subsequently indicted on two counts of Aggravated Murder, in violation of R.C. 2903.01 with death penalty specifications, pursuant to R.C. 2929.04(A) and firearm specifications on each count; one count of Aggravated Robbery, in violation of R.C. 2911.01 with a firearm specification; and six counts of Attempted Aggravated Murder, in violation of R.C. 2903.01 and R.C. 2923.02 with a firearm specification on each count.

{¶6} On August 5, 2002, following a jury trial, Jackson was found guilty on all counts and specifications. The penalty phase commenced one week later. Following testimony, the jury returned a death verdict. The trial court accepted the jury's verdict and sentenced Jackson to death on the two counts of Aggravated Murder, ten years on the Aggravated Robbery count plus a mandatory three-year sentence for the firearm specification, and ten years each on the six counts of Attempted Aggravated Murder.

{¶7} Jackson filed a direct appeal with the Supreme Court of Ohio on August 9, 2002, which is currently pending. On August 13, 2003, Jackson filed a

petition for post-conviction relief with the trial court. On December 18, 2003, the trial court denied Jackson's petition without allowing an evidentiary hearing.

{¶8} It is from this decision that Jackson appeals, setting forth three assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

The trial court erred in dismissing Jackson's post-conviction petition where sufficient operative facts were presented to merit relief or, at least warrant, an evidentiary hearing.

{¶9} The trial court denied Jackson's petition, finding that there was no merit to Jackson's claims for post-conviction relief. Jackson, however, maintains that his petition demonstrated violations of his constitutional rights, contained facts sufficient to necessitate an evidentiary hearing, and was supported by evidence outside the record that could not have been litigated on direct appeal.

{¶10} R.C. 2953.21(A)(1) provides that a person convicted of a criminal offense may file a petition for post-conviction relief in the sentencing court, asking that court to vacate or set aside the judgment or sentence, if the petitioner "claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable" under either the Ohio or United States Constitutions. A petitioner in a post-conviction proceeding is not, however, automatically entitled to an evidentiary hearing. *State v. Jackson* (1980), 64 Ohio St.2d 107. Before granting a hearing, the trial judge must determine from the petition, any

supporting affidavits, and the record whether the petition sets forth substantive grounds for relief. R.C. 2953.21(C). If a trial court finds that there are not substantive grounds for relief, the court is not required to grant the petitioner an evidentiary hearing. R.C. 2953.21(E).

{¶11} An appellate court reviews a trial court's denial of a petition for post-conviction relief without a hearing under an abuse of discretion standard. *State v. Watson* (1998), 126 Ohio App.3d 316, 324. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶12} In his petition for post-conviction relief, Jackson asserted twenty-six claims for relief. His first eleven claims related to the alleged deficient performance of his trial counsel. The bulk of Jackson's argument is that his counsel failed to develop and present compelling mitigation evidence by failing to introduce particular records or experts. Specifically, Jackson asserted that his trial counsel failed to thoroughly investigate his background; introduce his lengthy history or his records with Children's Services; present his mother's history of mental illness and neglect of Jackson; introduce his juvenile record; present a

cultural expert; request expert and investigative assistance; present evidence in support of pre-trial motions; conduct an inquiry into the consideration received by a witness in exchange for her testimony; and interview an expert witness prior to trial.

{¶13} A petitioner alleging ineffective assistance in a post-conviction proceeding bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel. *State v. Jackson* (1980), 64 Ohio St.2d 107; *Strickland V. Washington* (1984), 466 U.S. 668. The defendant must also demonstrate he was prejudiced by counsel's ineffectiveness. *Strickland* at 689.

{¶14} When determining a claim of ineffective assistance, judicial scrutiny of counsel's performance and strategies must be highly deferential. *Strickland*, supra at 689. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* For instance, the decision to forego the presentation of mitigating evidence at sentencing does not itself constitute proof of ineffective assistance of counsel. *State v. Johnson* (1986), 24 Ohio St.3d 87, 91. The presentation of mitigating evidence is a matter of trial strategy. *State v. Keith* (1997), 79 Ohio St.3d 514. Likewise, the questioning of particular witnesses is within the purview of trial counsel's trial tactics. See *State v. Coulter* (1992), 75 Ohio App.3d 219. A defendant is not

deprived of effective assistance of counsel when counsel chooses, simply for strategic reasons, not to pursue every possible trial tactic. *State v. Brown* (1988), 38 Ohio St.3d 305, 319.

{¶15} The trial court determined Jackson's ineffective assistance claims had no merit. With regard to Jackson's claims regarding the introduction of mitigating evidence, the trial court found that the bulk of the evidence Jackson presented in his petition *was* introduced during the penalty phase and in the presence of the jury, by the testimony of Jackson's mother, his aunt, and a psychological expert. In fact, Jackson's relatives testified to the following: Jackson was in and out of foster care for the majority of his childhood due to the neglect by his mother; there were times, while Jackson was living with his mother, that there would be no furniture and no food in the house; Jackson was raped while in foster care; Jackson's mother had problems with drugs and alcohol; there was physical abuse in Jackson's home; when Jackson was four he witnessed his mother stab and kill his father; and his mother attempted suicide multiple times. Moreover, the psychologist testified regarding her review of Jackson's records from Children's Services, as well as various agencies and treatment facilities Jackson was admitted to while he was a juvenile.

{¶16} The trial court further found that even if trial counsel erred in failing to present other mitigating evidence, the existence of such evidence would not

constitute proof of counsel's ineffectiveness when the record demonstrates, as in this case, counsel competently presented the case in mitigation in light of the available facts. See *State v. Post* (1987), 32 Ohio St.3d 380, 388. Moreover, the trial court determined that Jackson had not demonstrated that, but for counsel's ineffectiveness, the result of his sentencing would have been different. With regard to the questioning of witnesses, the trial court found that Jackson had failed to set forth operative facts that would demonstrate a violation of trial counsel's essential duties or prejudice as a result of counsel's performance.

{¶17} After a review of Jackson's claims of the ineffective assistance of counsel, we do not find that Jackson demonstrated his trial counsel's performance fell below an objective standard of reasonableness. Moreover, Jackson has failed to show how trial counsel's failure to introduce what amounts to cumulative evidence of mitigation resulted in prejudice. Therefore, we do not find that the trial court abused its discretion in denying Jackson's claims for relief based on ineffective assistance of trial counsel.

{¶18} In his remaining claims for post-conviction relief, Jackson asserts the following: jury selection was flawed; potential jurors were improperly excused; voir dire was unduly limited; irrelevant victim impact evidence was considered; Jackson's sentence of death is disproportionate; the trial court considered improper and inflammatory evidence at trial; gruesome photographs

were improperly admitted; irrelevant and inflammatory evidence was introduced at the penalty phase; the surviving victims were present in the courtroom at the penalty phase; the prosecutor improperly appealed to the passions and prejudices of the jury; the prosecutor argued that Jackson's mitigation was an excuse to avoid punishment; the prosecutor improperly relied on opposing theories of guilt at the trials of Jackson and the co-defendant, Jeronique Cunningham; the prosecutor failed to provide Jackson with material exculpatory evidence; Jackson's sentence of death is in violation of the Ohio Constitution and international law; and that Ohio's post-conviction procedures do not allow Jackson to fully and fairly address his constitutional claims. The trial court found that the evidence Jackson relied on to support these claims could be found in the record. Therefore, the trial court concluded these claims were barred by *res judicata*. We agree.

{¶19} The Ohio Supreme Court has explicitly held that a trial court may dismiss a petition for post-conviction relief without a hearing where the doctrine of *res judicata* applies. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Under the doctrine of *res judicata*, constitutional issues cannot be considered in post-conviction proceedings brought pursuant to R.C. 2953.21 where they have already or could have been fully litigated by the defendant, either before his judgment of conviction or on direct appeal from that judgment. *Id.* at paragraph seven of the syllabus. Issues properly raised in a petition for post-

conviction relief are those which could not have been raised on direct appeal because the evidence supporting such issues is outside the record. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 50. If an issue has, or should have been, raised on direct appeal, the trial court may dismiss the petition on the basis of res judicata. *State v. Spisak* (Apr. 13, 1995), Cuyahoga App. No. 67229.

{¶20} Upon review of Jackson's remaining claims, we find that Jackson relies on evidence which is found in the record and these claims could have been raised on direct appeal. Therefore, we do not find the trial court abused its discretion in determining these claims were barred by res judicata. However, even considering Jackson's claims on the merits, we find that Jackson failed to present evidence sufficient to advance his claims "beyond mere hypothesis." See *State v. Coleman* (March 17, 1993), 1st Dist. App. C-900811.

{¶21} Accordingly, for the reasons stated herein, we do not find that the trial court erred in denying Jackson's petition for post-conviction relief without an evidentiary hearing. Jackson's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

The trial court erred when it denied Jackson's post-conviction petition without first affording him the opportunity to conduct discovery.

ASSIGNMENT OF ERROR NO. III

The trial court erred when it denied Jackson access to reasonable and necessary expert and investigative assistance.

{¶22} Jackson first contends that the trial court's denial of his request for leave to conduct discovery constituted error. Jackson also asserts that due to his indigency, the trial court should have allowed him to appropriate funds for expert and investigative assistance. Jackson asserts that the denial of these requests deprived him of due process. Jackson argues that to adequately develop the factual bases for his claims, he required expert and investigative assistance of a mitigation specialist, forensic psychologist, gunshot trajectory expert, crime scene reconstruction expert, jury selection expert, cultural expert and an attorney expert to testify to the prevailing professional norms. Without the tools to develop facts to support his claims, Jackson argues, he is denied any meaningful opportunity to address the violations of his constitutional rights.

{¶23} Postconviction review itself is not a constitutional right. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, citing *Murray v. Giarratano* (1989), 492 U.S. 1. The proceeding is a collateral civil attack on a judgment and is governed only by the post-conviction relief statute, R.C. 2953.21. Therefore, a petitioner receives no more rights than those granted by the statute. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281. Since R.C. 2953.21 does not contain a provision entitling a post-conviction petitioner to discovery during the post-conviction process or the right to public funding for expert assistance, the denial of these requests is not a violation of due process. We discern no abuse of discretion by the trial court in

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denying Jackson the opportunity to pursue discovery and seek investigative assistance. See *State v. Chaiffetz*, 3d Dist. App. 9-99-23, 1999-Ohio-872.

{¶24} Jackson's second assignment of error is overruled.

{¶25} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J. and BRYANT, J., concur.

/jlr