

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Case No. 15CA3509
GEORGE JEFF BLACK,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>

APPEARANCES:

George A. Katchmer, Bloomingburg, Ohio, for defendant-appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for plaintiff-appellee.

Hoover, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court decision and judgment entry dismissing appellant, George Jeff Black’s, petition for postconviction relief without an evidentiary hearing. Black contends that the trial court erred in dismissing the petition, and that the trial court should have held an evidentiary hearing on his claim that he was deprived of the effective assistance of trial counsel. We conclude that Black did not present sufficient credible evidence to warrant an evidentiary hearing, or to justify granting his petition for postconviction relief. Moreover, the trial court did not err in dismissing Black’s petition because the arguments raised in support of it are barred by the doctrine of res judicata. Accordingly, we overrule Black’s sole assignment of error and affirm the trial court’s dismissal of the petition for postconviction relief.

{¶ 2} Following a trial in March 2012, a jury found Black guilty of involuntary manslaughter, felonious assault, and failure to stop after a non-public road accident. The verdicts resulted from a January 2011 incident at the Valley Bar in Bainbridge, Ohio, where Black was accused of striking Bob Nibert, another patron of the bar, with his pick-up truck in the bar's parking lot. The incident resulted in the severance of Nibert's leg, and after spending nearly three months in the hospital undergoing numerous surgical procedures, Nibert's eventual death.

{¶ 3} At Black's sentencing hearing in May 2012, the trial court found that the offenses of involuntary manslaughter and felonious assault were crimes of similar import, and thus should be merged for sentencing purposes. The trial court then sentenced Black to nine years in prison for involuntary manslaughter, and three years in prison for failure to stop after a non-public road accident. The sentences of imprisonment were ordered to run consecutive to each other, for a cumulative sentence of twelve years.

{¶ 4} A different attorney, rather than Black's trial attorney, filed an appeal of his conviction and sentence. The appeal raised seven assignments of error, including an assignment of error that Black received ineffective assistance of counsel at his trial. This Court, in a decision and judgment entry issued on May 22, 2013, found merit in one assignment of error, and remanded the case to the trial court so that Black could be resentenced. *See State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, appeal not allowed, 136 Ohio St.3d 1558, 2013-Ohio-4861, 996 N.E.2d 985. On April 14, 2014, the trial court resentenced Black to nine years in prison for involuntary manslaughter, and three years in prison for failure to stop after a non-public road accident, to be served consecutively.

{¶ 5} On December 14, 2012, while his direct appeal was pending, Black filed his petition for postconviction relief that is at issue in the instant appeal. Black's petition sought an

evidentiary hearing and alleged that he received ineffective assistance of trial counsel because: (1) he had not taken his medication (Xanax) prior to giving a statement to law enforcement, and defense counsel failed to file a motion to suppress; (2) defense counsel failed to impeach medical records of the victim offered by the State; (3) defense counsel failed to impeach the victim as a drug user; (4) defense counsel failed to communicate effectively with him and members of his family; and (5) defense counsel failed to properly investigate the case and procure and prepare witnesses. The only evidentiary material submitted with the petition was an affidavit signed by Black. The trial court eventually dismissed the petition without hearing on September 9, 2015. The trial court concluded that the petition failed to set forth substantive grounds entitling Black to postconviction relief under R.C. 2953.21.

{¶ 6} Black timely appealed to this Court, assigning the following error for our review:

THE COURT ERRED IN FAILING TO CONDUCT A HEARING [SIC] THE
INEFFECTIVENESS OF COUNSEL IN APPELLANT’S PETITION FOR
POSTCONVICTION RELIEF.

{¶ 7} “[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58. “A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable.” *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 19, citing *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013–Ohio-4733, 999 N.E.2d 614, ¶ 19.

{¶ 8} A petition for postconviction relief brought pursuant to R.C. 2953.21 provides convicted individuals with a means to collaterally attack their convictions. *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, ¶ 10. “It is a civil proceeding designed to determine

whether ‘there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.’ R.C.

2953.21(A). Thus, a petitioner must demonstrate errors of a constitutional magnitude and resulting prejudice before being entitled to relief under the statute.” *Id.* R.C. 2953.21 specifically provides:

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

* * *

(C) * * * Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized record of the clerk of the court, and the court reporter’s transcript. The court reporter’s transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions

of law with respect to such dismissal.

* * *

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.

* * *

{¶ 9} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999); *State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012-Ohio-1936, ¶ 13. Rather, before granting a hearing on a petition, the trial court must first determine that substantive grounds for relief exist. R.C. 2953.21(C). “Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a violation of the petitioner’s constitutional rights.” *In re B.C.S.* at ¶ 11. Furthermore, in order to merit a hearing, the petitioner must show that the claimed “errors resulted in prejudice.” *Id.*, quoting *Calhoun* at 283.

{¶ 10} Additionally, res judicata applies to proceedings involving postconviction relief. *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). “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 except an appeal from that judgment, 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. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. “Therefore, ‘any issue that could have been raised on direct appeal and was not is res

judicata and not subject to review in subsequent proceedings.’ ” *State v. Segines*, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-5259, ¶ 8, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 16.

{¶ 11} Moreover, the fact that Black’s petition is supported by evidence outside the trial record does not automatically bar application of res judicata. In *Slagle* at ¶ 16, we noted that:

The presentation of competent, relevant, and material evidence dehors the record may defeat the application of res judicata. See *State v. Smith* (1985), 17 Ohio St.3d 98, 101, 17 OBR 219, 221, 477 N.E.2d 1128, 1131–1132, fn. 1. However, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal. *State v. Perry*, supra, 10 Ohio St.2d at 182, 39 O.O.2d at 193, 226 N.E.2d at 109. “[E]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner’s claim beyond mere hypothesis and a desire for further discovery.” *Coleman*, supra, Hamilton App. No. C–900811, at 7. To overcome the res judicata bar, evidence offered dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. [*Ohio v. Franklin*, 1st Dist. No. C–930760, 1995 WL 26281 (Jan. 25, 1995), *7.] *State v. Lawson*, 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist.1995).

{¶ 12} Here, Black contends that the trial court erred by dismissing his petition for postconviction relief without conducting an evidentiary hearing because he was subject to numerous alleged instances of ineffective assistance of counsel.

{¶ 13} As noted above, a petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. “The court may dismiss a petition for post-conviction relief without a hearing when the petitioner fails to submit evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.” *State v. Bradford*, 4th Dist. Ross No. 08CA3053, 2009-Ohio-1864, ¶ 10, citing *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980).

{¶ 14} In its decision and judgment entry dismissing the petition, the trial court noted that other than his own affidavit asserting his counsel’s ineffectiveness, Black failed to attach any other evidentiary materials relating to the allegations in the petition. The trial court specifically noted the absence of “independent evidence”, and the lack of affidavits from experts who could have corroborated his claims. Ultimately, the trial court concluded that Black “failed to present credible and material evidence to demonstrate a substantial violation of defense counsel’s duties at trial and any prejudice which arose therefrom.” This Court has previously held that where a postconviction petitioner’s only evidence in support of his ineffective assistance assertions comes from the petitioner’s own self-serving affidavit, “ ‘this evidence by itself is insufficient to mandate a hearing or to justify granting [a] petition for postconviction relief.’ ” *State v. Kelly*, 4th Dist. Scioto No. 14CA3637, 2014-Ohio-5840, ¶ 19, quoting *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 27. Thus, we believe the trial court’s reasoning to be sound and not arbitrary, unreasonable, or unconscionable; and we cannot conclude that the trial court abused its discretion by dismissing Black’s petition for postconviction relief without an evidentiary hearing.

{¶ 15} Furthermore, because Black's claims of ineffective assistance of trial counsel could have, and should have, been raised in the direct appeal of his conviction, we conclude that they are now barred by the doctrine of res judicata.

{¶ 16} Although the trial court did not rely on res judicata as a reason to dismiss Black's petition, we believe that the doctrine is applicable. Black was present during the trial court proceedings and was well aware of the actions, and inactions of his counsel. In fact, Black claims that prior to trial he instructed his trial counsel to contact witnesses on his behalf, but counsel failed to do so. He also claims that he provided his trial counsel with information about the victim, but that counsel failed to use the information at trial. Certainly Black was cognizant of these claims and other claims and could have included them in his direct appeal. Furthermore, Black obtained new counsel for his direct appeal, presumably so that he could pursue such a claim.

{¶ 17} Moreover, we note that Black's direct appeal did raise the issue of ineffective assistance without including the arguments that he now makes. Black could have included those arguments in the direct appeal but did not. Therefore, the doctrine of res judicata applies to bar Black's ineffective assistance of counsel claims. Accordingly, the trial court did not err by dismissing Black's petition.

{¶ 18} Based on the foregoing, we overrule Black's sole assignment of error. The decision and judgment entry of the trial court dismissing Black's petition for postconviction relief is affirmed.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶ 19} I concur in judgment and the rationale that supports affirming dismissal on the basis the petition and its self-serving affidavit lacked credibility. However, I do not believe that *res judicata* applies to bar those claims of ineffective assistance that could not have been the subject of a direct appeal because they are based upon evidence outside the record, i.e. items (4) and (5) on Page 3 of the majority opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure](#).

Harsha, J.: Concurs in Judgment with Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.