

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-12-014

Appellee

Trial Court No. 2007CR0359

v.

Calvin Neyland, Jr.

DECISION AND JUDGMENT

Appellant

Decided: July 12, 2013

* * * * *

Paul A. Dobson, Prosecuting Attorney, Gwen Howe-Gebers, Heather M. Baker and Thomas E. Madden., Assistant Prosecuting Attorneys, for appellee.

Timothy Young, State Public Defender, Tyson Fleming and Kelle Hinderer, Assistant State Public Defenders, for appellant.

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YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Calvin Neyland, Jr., appeals the judgment of the Wood County Court of Common Pleas, granting appellee's, the state of Ohio, motion for summary judgment. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On June 30, 2006, Neyland was hired by Liberty Transportation as a commercial truck driver. His supervisor was Doug Smith. He initially performed well as a truck driver. However, after several months, customers began to complain that Neyland was not maintaining his truck or keeping up with his paperwork. Consequently, Liberty decided to terminate Neyland's employment.

{¶ 3} At a meeting on August 8, 2007, Smith and Liberty's safety director, Thomas Lazar, informed Neyland that his employment was being terminated. Following the meeting, Smith called 911 and told the dispatcher that Neyland was attempting to steal a truck. While on the phone, Smith reported hearing gunshots. After leaving to investigate, Smith could be heard yelling for help, at which point Neyland shot him as well. Police arrived on the scene shortly thereafter, and discovered Lazar's body lying in the front yard outside Liberty's building. Police found Smith's lifeless body inside his office.

{¶ 4} Neyland was subsequently located at a motel in Michigan, where he was arrested and taken into custody. He was then indicted on two counts of aggravated murder in violation of R.C. 2903.01(A) with mass murder specifications under R.C. 2929.04(A)(5), along with the attendant gun specifications.

{¶ 5} Following his indictment, defense counsel raised the issue of Neyland's competency to stand trial. A competency evaluation was ordered, and Neyland was referred to the Court Diagnostic and Treatment Center, where he was evaluated by Dr.

Thomas Sherman. Sherman concluded that Neyland was incompetent to understand the proceedings against him or assist in his defense. The state then requested a second competency evaluation, and the court ordered Neyland to undergo a 30-day inpatient evaluation at Twin Valley Behavioral Healthcare. While at Twin Valley, Neyland was examined by Dr. Kristen Haskins, who diagnosed him with a personality disorder, but determined he was not mentally ill or incompetent to stand trial.

{¶ 6} As a result of the conflicting professional opinions, a third competency evaluation was ordered, and Neyland was sent to the Wood County Justice Center to be examined by Dr. Barbara Bergman. Bergman interviewed Neyland for an hour, after which she concluded that he was competent to stand trial.

{¶ 7} On March 21, 2008, the trial court conducted an evidentiary hearing on Neyland's competency. Following the testimony of each of the examining doctors, the trial court concluded that Neyland had failed to overcome the presumption of competence, stating that "[Neyland's] mental condition is not a mental illness that prevents him from understanding the nature of the proceedings against him nor prevents him from assisting in his defense or with his attorneys, at least in a meaningful manner."

{¶ 8} A jury trial ensued, and Neyland was subsequently found guilty of both counts of aggravated murder, along with the mass murder and gun specifications. During mitigation, the jury heard testimony from the examining doctors and an unsworn statement from Neyland. None of Neyland's family members or friends were called to

testify on his behalf. At the conclusion of the mitigation phase, the jury returned a sentence of death. On November 14, 2008, the trial court imposed the death sentence.

{¶ 9} As provided by law, Neyland directly appealed the trial court's judgment to the Ohio Supreme Court, raising many of the same issues he now raises in the instant appeal. His appeal before the Ohio Supreme Court remains pending.

{¶ 10} In addition to his direct appeal, Neyland filed a petition for postconviction relief on April 16, 2010, raising 18 grounds for relief. Essentially, Neyland's grounds for relief can be reduced to the following: (1) Neyland was tried while incompetent in violation of the Sixth, Eighth, and Fourteenth Amendments; (2) Neyland was denied effective assistance of counsel during his competency hearing; (3) Neyland was denied effective assistance of counsel as a result of trial counsel's failure to revisit the issue of competency at the time of trial; (4) the trial court's decision on the issue of Neyland's competency to stand trial was not based on reliable, credible evidence; (5) Neyland was denied effective assistance of counsel during the mitigation hearing; (6) excessive security measures used at trial violated Neyland's due process rights; (7) Neyland was denied effective assistance of counsel as a result of trial counsel's failure to request a change in venue; (8) Neyland is not competent to be executed; and (9) the cumulative effect of the errors violate Neyland's due process rights.

{¶ 11} Following discovery, the state filed a motion for summary judgment as to all claims asserted in Neyland's petition. On March 1, 2012, the trial court granted the state's motion for summary judgment, thereby dismissing Neyland's postconviction

petition. In granting summary judgment, the court found that Neyland's claims were either supported by evidence contained within the record, and thus barred by the doctrine of res judicata, or they were otherwise insufficient to give rise to a finding that his constitutional rights were violated. It is from this judgment that Neyland timely appeals.

B. Assignments of Error

{¶ 12} On appeal, Neyland assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY APPLYING THE DOCTRINE OF RES JUDICATA TO BAR NEYLAND'S GROUNDS FOR RELIEF.

SECOND ASSIGNMENT OF ERROR : THE TRIAL COURT ERRED IN DISMISSING NEYLAND'S POST-CONVICTION [PETITION] WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT A MINIMUM, AN EVIDENTIARY HEARING.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DISMISSING NEYLAND'S MOTION FOR A COMPETENCY HEARING WHEN HE PRESENTED SUFFICIENT EVIDENCE HE WAS INCOMPETENT AND [HE] HAD A RIGHT TO BE COMPETENT FOR HIS POST-CONVICTION PROCEEDINGS.

II. Standard of Review

{¶ 13} Postconviction proceedings are governed by the civil rules and the specific statutory requirements articulated in R.C. 2953.21 et seq. Civ.R. 56(C) provides that summary judgment may be granted only if (1) no genuine issue of material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to summary judgment as a matter of law. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 14} We have previously held that a trial court's decision to deny a petition for postconviction relief involves mixed questions of law and fact. We review the trial court's decision on factual issues using a manifest weight standard of review, and we review the trial court's decision on legal issues de novo. *State v. Hoffner*, 6th Dist. No. L-01-1281, 2002-Ohio-5201, ¶ 6.

III. Analysis

A. The trial court properly applied the doctrine of res judicata.

{¶ 15} In his first assignment of error, Neyland argues that the trial court's use of the doctrine of res judicata to dispose of some of his grounds for relief was erroneous. In granting summary judgment, the trial court concluded that the following claims for relief were barred by res judicata: (1) Neyland was tried while incompetent; (2) the trial court's decision regarding competency was not based on reliable, credible evidence; and (3) excessive security measures were used on Neyland at his trial.

{¶ 16} A postconviction proceeding is a collateral civil attack on a judgment of conviction. *State v. Steffan*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994).

Accordingly, if it applies, res judicata operates to bar any claim that was or could have been raised at trial or on direct appeal. *Id.* However, an exception exists where a defendant presents “new, competent, relevant and material evidence dehors the record.” *State v. Redd*, 6th Dist. No. L-00-1148, 2001 WL 1001182, *1 (Aug. 31, 2001), citing *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). For this exception to apply, the evidence must have been unavailable to the petitioner at the time of his trial. *Id.*

{¶ 17} Neyland argues that the above-referenced claims were erroneously barred by the application of res judicata because they are based on evidence dehors the record. In support of his claims, Neyland cites several pieces of evidence including his medical records from Twin Valley, records from the Wood County jail, his handwritten notes, his telephone calls, a photograph of him sitting at counsel’s table in the courtroom wearing a leg brace under his pants, and an affidavit of Dr. Rob Stinson that stated that Neyland was not competent to stand trial.

{¶ 18} It is true that the evidence Neyland relies upon was not part of the trial record. Nonetheless, we agree with the trial court that these claims were barred by res judicata for two reasons. First, all of the evidence relied upon by Neyland, with the exception of Stinson’s affidavit, was in existence and available to him at the time of trial. Second, as to Stinson’s affidavit, the trial court recognized that it was not part of the trial record and was not available at the time of trial given the fact that it was created more

than a year after the competency hearing. However, as noted by the trial court, “expert testimony that is dehors the record does not overcome the bar of res judicata if the defendant could have presented at trial the testimony of an expert who disagreed with the state’s expert, and if the techniques used for analyzing the data were available at the time of the trial.” *State v. Jones*, 11th Dist. No. 2001-A-0072, 2002-Ohio-6914, ¶ 19.

{¶ 19} Notwithstanding the fact that Stinson’s affidavit was unavailable at the time of trial, Neyland’s claims remain barred by res judicata in light of the three psychiatric evaluations that were already part of the record at the time of the competency hearing. Not only was Neyland capable of presenting expert testimony that would contradict the opinions of the state’s competency experts, he actually did produce such evidence from Dr. Sherman, who testified that Neyland was incompetent to stand trial. Further, Neyland has produced no evidence that would suggest that Stinson’s opinion was based on the use of analytic techniques that were unavailable at the time of trial.

{¶ 20} Since the additional evidence proffered by Neyland was either available to him at the time of trial or merely cumulative in nature, the trial court did not err in barring Neyland’s claims under the doctrine of res judicata. Accordingly, Neyland’s first assignment of error is not well-taken.

B. The trial court properly dismissed Neyland’s postconviction petition.

{¶ 21} In his second assignment of error, Neyland argues that the trial court’s dismissal of his postconviction petition was erroneous because he presented sufficient operative facts to warrant the relief requested, or at least a hearing.

{¶ 22} R.C. 2953.21(A)(1)(a) provides for postconviction relief. That section states, in pertinent part:

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.

{¶ 23} Notably, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. R.C. 2953.21; *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999). According to R.C. 2953.21(C), a petitioner is entitled to a hearing when, upon review of the petition and the record, the trial court finds that there are “substantive grounds for relief.” In making such a determination, the trial court must consider the petition and supporting affidavits as well as all of the files and records pertaining to the proceedings against the petitioner. R.C. 2953.21(C).

{¶ 24} Here, Neyland argues that the trial court erroneously denied his petition despite the fact that he alleged the deprivation of his constitutional rights for each ground

for relief and submitted evidence demonstrating that deprivation. In his appellate brief, Neyland makes five specific arguments in support of his position. We will address those arguments in turn.

1. Ineffective Assistance of Counsel

{¶ 25} First, Neyland argues that he was denied effective assistance of counsel throughout his trial. He contends that trial counsel was ineffective insofar as they failed to properly investigate the issue of his competency, impeach the state's experts, use their expert to examine evidence that established his incompetency, request that Neyland be re-evaluated for competency, present evidence in mitigation of his sentence, or request a change in venue.

{¶ 26} The Ohio Supreme Court has explained the constitutional right to effective assistance of counsel as follows:

Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus, citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 27} The court must defer to the strong presumption that counsel's performance falls within the wide range of reasonable professional performance. *Bradley* at 142.

Even if counsel's performance falls outside the objective standard of reasonable representation, the court shall not reverse unless counsel's ineffectiveness resulted in prejudice. *Id.* In order to show prejudice warranting reversal, the defendant must show that there is a reasonable probability that, but for counsel's ineffectiveness, the outcome of the proceeding would have been different. *Id.*, quoting *Strickland* at 694.

{¶ 28} In the present case, the trial court determined that each of Neyland's ineffective assistance claims was without merit because he failed to establish that trial counsel's representation was deficient and, further, failed to show that he was prejudiced by such representation. We agree.

{¶ 29} With regard to Neyland's arguments that counsel was ineffective for failing to establish his incompetency, the record is clear that counsel thoroughly evaluated the medical reports issued by each of the experts. Further, counsel delivered those reports, in addition to other evidence that counsel deemed relevant to the competency determination, to their own expert in order to ferret out any inconsistencies in the opinions held by the state's experts.

{¶ 30} Neyland argues that counsel should have further investigated the Twin Valley records and the jail records. He asserts that Stinson's review of those records uncovered numerous inconsistencies that demanded further investigation. However, as we already noted, Stinson's review of the records did not take place until long after the initial competency determination. Given the information available to them at the time of the hearing, we find that counsel's efforts to establish Neyland's incompetency did not

fall below an objective standard of reasonableness. Any other conclusion would require us to apply the benefit of hindsight to the analysis, which we are not permitted to do. *See State v. Carver*, 2d Dist. No. 21328, 2008-Ohio-4631, ¶ 112, citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.E.2d 674 (“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.”).

{¶ 31} Even assuming counsel’s performance was deficient, we can only speculate as to the effect that further investigation and cross-examination of the state’s experts would have had on the trial court’s decision following the competency hearing. As noted by the court in its decision:

[This court] recognized the existence of inconsistent opinions as to whether Neyland was competent to stand trial. It accorded more weight to the opinions of Dr. Smith and Dr. Haskins because they had more opportunity to observe and record Neyland’s behavior. It is doubtful that the Twin Valley and jail records would have altered the Court’s view of the evidence.

Thus, Neyland has failed to establish that counsel’s investigation into his competency to stand trial fell below an objective standard of reasonableness or prejudiced him in any way. *See Baze v. Parker*, 371 F.3d 310, 322 (6th Cir.2004) (concluding that speculation on the issue of whether the outcome of the trial or penalty phase would have been

different is insufficient to establish prejudice in a claim for ineffective assistance of counsel). Further, Neyland's allegation that counsel was ineffective for failing to request his reevaluation for competency at trial lacks factual support in the record. In actuality, Neyland's counsel attempted to readdress the issue of Neyland's competency, but the trial court denied his motion.

{¶ 32} As to counsel's presentation of mitigation evidence during the sentencing phase of the trial, Neyland argues that counsel failed to properly investigate and present evidence to rebut the state's experts on the issue of his competency. Specifically, Neyland cites to several additional expert opinions that allegedly establish that he suffers from a mental illness. In addition, he argues that counsel should have conducted further investigation into his family history, which purportedly includes several examples of family members who suffer from a mental illness. Finally, Neyland contends that his counsel was ineffective for failing to present evidence that he was abused and neglected as a child. In response, the state contends that the additional evidence Neyland points to is merely cumulative to the evidence actually presented to the jury.

{¶ 33} Regarding claims of ineffective assistance of counsel contained in a postconviction petition, the Sixth Circuit has previously stated:

A petitioner does not establish prejudice if he shows only that his counsel failed to present "cumulative" mitigation evidence, that is, evidence already presented to the jury. *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir.2006). "[T]o establish prejudice, the new evidence that a habeas

petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing.” *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir.2005). *Beuke v. Houk*, 537 F.3d 618, 645 (6th Cir.2008).

{¶ 34} While Neyland argues that the state failed to present relevant mitigating evidence concerning his mental illness, the evidence he uses to support his argument merely reinforces the evidence trial counsel presented at the sentencing hearing through Dr. Sherman. All of the evidence cited by Neyland is probative only insofar as it impacts the jury’s determination of whether he suffered from a mental illness. That is precisely the subject matter of Sherman’s testimony, which concluded with his opinion that, to a reasonable degree of scientific certainty, Neyland was “laboring under severe mental disease, mental illness.” Given that the additional mitigating evidence that counsel did not present at trial was cumulative to that which he did present, Neyland has failed to establish prejudice. *See State v. Jackson*, 3d Dist. No. 1-04-31, 2004-Ohio-5350 (holding that Jackson failed to show how his counsel’s failure to introduce additional pieces of mitigation evidence prejudiced him where the evidence was merely cumulative to what had already been introduced). Thus, we conclude that he was not denied effective assistance of counsel with regard to the presentation of evidence of his mental condition at sentencing.

{¶ 35} Finally, Neyland argues that his counsel was ineffective in failing to request a change in venue. In essence, he argues that counsel should have made such a

request due to the extent of the case's pretrial publicity. In response, the state argues that counsel's decision was based on an informed decision following four days of thorough voir dire and does not constitute ineffective assistance of counsel.

{¶ 36} R.C. 2901.12(K), which governs venue in a criminal case, provides, in pertinent part:

Notwithstanding any other requirement for the place of trial, venue may be changed upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held or when it appears that the trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice.

{¶ 37} This court has previously held that "a careful and searching voir dire provides the best test of whether pretrial publicity has prevented the defendant from obtaining a fair and impartial jury from the locality." *State v. Gravelle*, 6th Dist. No. H-07-010, 2009-Ohio-1533, ¶ 34. Further, except in rare cases where prejudice may be presumed, a defendant claiming that pretrial publicity has denied him a fair trial must show that one or more of the jurors was actually biased. *Id.*

{¶ 38} In the case sub judice, the trial court extensively questioned the jurors during voir dire in order to ensure that they were not improperly influenced by the pretrial publicity. Rather than revealing any actual bias on the part of the jurors, the

record reflects that the empaneled jurors were either unaware of the pretrial publicity or specifically informed the court that they were capable of disregarding it in arriving at their decisions. Absent a showing of juror bias, Neyland would have been unsuccessful in his request for a change of venue. Indeed, the Ohio Supreme Court has previously held that trial counsel's failure to request a change of venue was not tantamount to ineffective assistance of counsel where the voir dire was adequate. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 49. Thus, we cannot conclude that Neyland's counsel was ineffective when he failed to request a change in venue.

{¶ 39} In light of the foregoing, Neyland's contention that he was denied effective assistance of counsel is without merit.

2. Trial Court's Determination of Competency

{¶ 40} In addition to his ineffective-assistance-of-counsel argument, Neyland challenges the trial court's determination that he was competent, arguing that the determination was not based on reliable, credible evidence. Specifically, Neyland asserts that the trial court's reliance on the testimony of Drs. Smith, Haskins, and Bergman was misplaced because that testimony contained internal contradictions and was further contradicted by the Twin Valley records and the jail records. The state responds by arguing that the trial court properly applied the doctrine of res judicata to bar Neyland's claim.

{¶ 41} As we stated in our discussion of Neyland's first assignment of error, res judicata bars any claim in a postconviction petition that was or could have been raised at

trial or on direct appeal. *Steffan*, 70 Ohio St.3d at 410, 639 N.E.2d 67. However, an exception exists where a defendant presents “new, competent, relevant and material evidence dehors the record.” *Redd*, 6th Dist. No. L-00-1148, 2001 WL 1001182 at *1, citing *Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128. In order for this exception to apply, the evidence must have been unavailable to the petitioner at the time of his trial. *Id.*

{¶ 42} We agree with the trial court’s conclusion that Neyland’s argument is one that is typically reserved for direct appeal. Therefore, absent a showing that the claim is supported by new evidence dehors the record, it is barred by res judicata. Neyland has failed to provide such evidence. Rather, he relies on the same evidence that he cited in support of his first assignment of error, namely the Twin Valley records and the jail records. Since that evidence was available to him at the time of the hearing, the trial court did not err in barring Neyland’s claims under the doctrine of res judicata.

3. Physical Restraints at Trial

{¶ 43} Neyland’s third argument concerns whether excessive security measures were employed during trial. Because he was forced to wear a leg brace under his pants, Neyland argues that his due process rights to a fair and impartial trial were violated. Neyland initially raised this issue in the trial court by requesting to appear at all proceedings without restraints, but the trial court denied his motion for security reasons. Further, Neyland raised the issue of excessive security measures in his direct appeal to the Ohio Supreme Court. Because this issue was fully litigated in the trial court and

raised in Neyland's direct appeal, it is barred by res judicata. *Steffan* at 410.

Accordingly, Neyland's third argument is without merit.

4. Cumulative Error

{¶ 44} Next, Neyland argues that the doctrine of cumulative error requires the reversal of his conviction. The state argues that Neyland's argument lacks merit insofar as the doctrine of cumulative error does not apply where an appellant fails to show even a single instance of error. We agree with the state.

{¶ 45} As relevant here, the Ohio Supreme Court has previously stated that, "in order even to consider whether 'cumulative' error is present, [the court] would first have to find that multiple errors were committed in [the] case." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). Since we find that no such errors were committed, Neyland's fourth argument is without merit.

5. Neyland's Competency to be Executed

{¶ 46} Finally, Neyland argues that he is incompetent and, thus, cannot be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The trial court addressed this argument and held that the issue of Neyland's competency to be executed was not ripe because no execution date had been set.

{¶ 47} Ohio's prohibition against executing an incompetent inmate is contained in R.C. 2949.28. Essentially, R.C. 2949.28 codified the ruling in *Ford*, in which the United States Supreme Court held that it is unconstitutional under the Eighth Amendment to execute one who does not have the mental capacity to understand the nature of the death

penalty and why it was imposed upon him. “A *Ford* claim under R.C. 2949.28 is not ripe until an execution date has been set for a defendant since competency to be executed cannot be determined until execution is imminent.” *State v. Brooks*, 8th Dist. Nos. 97455, 97509, 2011-Ohio-5877, ¶ 4, citing *Panetti v. Quarterman*, 551 U.S. 930, 946, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

{¶ 48} In support of his argument that he is incompetent to be executed, Neyland states that “[his] direct appeal briefing has been complete for over two years. There is no reason to believe the Ohio Supreme Court will not shortly schedule oral argument, decide Neyland’s case, and quickly set another execution date.” While this may be true, the fact remains that the execution date has not been set. Thus, the issue of Neyland’s competency to be executed is not ripe. *Id.* Accordingly, his fifth argument is without merit.

{¶ 49} Having found each of Neyland’s arguments in support of his second assignment of error to be without merit, we find his second assignment of error not well-taken.

C. The trial court properly denied Neyland’s motion for a postconviction competency evaluation.

{¶ 50} In his third assignment of error, Neyland argues that the trial court erred in dismissing his motion for a postconviction competency evaluation.

{¶ 51} We review the denial of a motion for a competency evaluation filed after the commencement of trial for an abuse of discretion. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d. 1144, ¶ 159, citing *State v. Rahman*, 23 Ohio St.3d

146, 156, 492 N.E.2d 401 (1986). An abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 52} In support of his motion, Neyland cites *State v. Berry*, 72 Ohio St.3d 354, 650 N.E.2d 433 (1995), in which the Ohio Supreme Court held that a competency determination must be made before a capital defendant may be permitted to waive his rights to postconviction review. However, Neyland's citation of *Berry* is misplaced given that this case involves an entirely different issue – namely, whether he is competent to *proceed* with the postconviction review process, not whether he is competent to *waive* his right to postconviction review. Indeed, “Ohio Courts of Appeals have held that *Berry* does not require a determination as to whether a capital defendant who chooses to seek postconviction review is competent to *proceed*.” (Emphasis added.) *State v. Cassano*, 5th Dist. No. 12CA55, 2013-Ohio-1783, ¶ 39. On the contrary, several Ohio courts have previously concluded that a petitioner is not entitled, either statutorily or constitutionally, to a competency hearing in connection with postconviction proceedings. *Id.* at ¶ 42; *State v. Eley*, 7th Dist. No. 99-CA-109, 2001 WL 1497095 (2001); *State v. Moreland*, 2d Dist. No. 20331, 2004-Ohio-5778. Thus, the trial court did not abuse its discretion in denying Neyland's motion for a competency evaluation.

{¶ 53} Accordingly, Neyland's third assignment of error is not well-taken.

IV. Conclusion

{¶ 54} In light of the foregoing, the judgment of the Wood County Court of Common Pleas is affirmed. Costs are assessed to Neyland pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
