

[Cite as *State v. Sawyer*, 2009-Ohio-2391.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91946

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EUGENE SAWYER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-415422

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED: MAY 21, 2009

JOURNALIZED:

FOR APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶1} Defendant-appellant, Eugene Sawyer (“appellant”), appeals the trial court’s dismissal of his petition for postconviction relief. For the reasons set forth below, we affirm.

{¶2} In Cuyahoga County Court of Common Pleas Case No. CR-415422, a jury found appellant guilty of corrupting another with drugs, a felony of the second degree, and child endangerment resulting in serious physical harm to the victim, a felony of the third degree. The charges ensued after appellant’s 14-year-old daughter alleged that he had offered her crack cocaine and that she had used the illegal substance with him on a number of occasions. On appeal, this court affirmed in part and reversed in part, remanding the case with instructions to revise the judgment of conviction for child endangering to a first degree misdemeanor and to resentence appellant. *State v. Sawyer*, Cuyahoga App. No. 81133, 2003-Ohio-1720.

{¶3} On November 15, 2002, appellant filed a postconviction petition that the trial court denied on March 4, 2003. Appellant appealed to this court but we dismissed the appeal for a lack of final appealable order due to an absence of findings of fact and conclusions of law.

{¶4} Thereafter, the trial court issued findings of fact and conclusions of law on December 17, 2003. Appellant attempted an appeal of those findings and conclusions, but we dismissed that appeal for failure to file a praecipe.

{¶5} On November 15, 2002, appellant also filed a “motion for court order finding that he was unavoidably prevented from discovery of evidence.” In that

motion, appellant maintained that he was unavoidably prevented from timely filing a motion for a new trial based upon the “newly discovered evidence” of his daughter’s recantation of the allegations of criminal activity. The trial court denied the motion and this court affirmed said denial. *State v. Sawyer*, Cuyahoga App. No. 84487, 2004-Ohio-6911.

{¶6} On January 11, 2005, appellant filed another “motion for court order finding that he was unavoidably prevented from discovery of evidence.” Appellant supported this motion with the same affidavit of his daughter as used in his prior motion as well as probation records, which demonstrated that his daughter’s urine screens from February 27, 2001 through May 30, 2001 were negative. Appellant further asserted that Cuyahoga County Children Services denied him access to his own urine tests. This court affirmed the denial of this motion in *State v. Sawyer*, Cuyahoga App. No. 85911, 2005-Ohio-6486.

{¶7} On March 3, 2008, appellant filed another petition for postconviction relief. The trial court dismissed his second petition for postconviction relief on July 21, 2008 without a hearing.

{¶8} Appellant now appeals the trial court’s dismissal and asserts the following six assignments of error for our review.

{¶9} “I. Trial court erred and abused its discretion when it failed to grant the appellant a [sic] evidentiary hearing and an in-camera inspection, when evidence dehors the record.

{¶10} “II. Trial court erred and abused its discretion by dismissing the appellants [sic] petition for post conviction relief, because he was unavoidably prevented from discovering Tim Mahon’s affidavit.

{¶11} “III. Trial court erred and abused its discretion by denying the appellants [sic] petition for post conviction relief, because the appellant was denied effective assistance of counsel.

{¶12} “IV. Trial court erred and abused its discretion by denying the appellants [sic] petition for post conviction relief, because the prosecutors [sic] misconduct deprived the appellant a fair trial by withholding exculpatory evidence.

{¶13} “V. Trial court erred and abused its discretion by denying the appellants [sic] petition for post conviction relief, because the prosecutors [sic] misconduct deprived the appellant a fair trial by knowingly using perjured testimony.

{¶14} “VI. Trial court erred and abused its discretion by denying the appellants [sic] petition for post conviction relief, because the appellant was denied effective assistance of counsel, when trial counsel failed to object to trial court, for allowing the victim to testify as an expert.”

{¶15} Because these assignments of error are similar, we will address them together.

{¶16} We employ an abuse of discretion standard when reviewing a trial court’s denial of a petition for postconviction relief based upon R.C. 2953.21. *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927. In *Hines*, supra, we explained that “[a] postconviction proceeding is not an appeal of a criminal

conviction, but, rather, a collateral civil attack on the judgment.” *Id.*, quoting *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. “In postconviction cases, a trial court acts as a gatekeeper, determining whether a defendant will even receive a hearing.” *Hines*, *supra*. While performing this function, the trial court is given deference, especially when rendering its decision regarding the sufficiency of the facts presented by the petitioner and the credibility of the provided affidavits. *Id.* An abuse of discretion connotes more than an error in law or judgment, it means that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶17} Furthermore, we reiterate that a trial court may dismiss a petition for postconviction relief without holding an evidentiary hearing when: 1) the petitioner fails to present “sufficient operative facts to establish substantive grounds for relief” and 2) the petitioner raises claims barred by the doctrine of res judicata. *State v. Thomas*, Cuyahoga App. No. 87666, 2006-Ohio-6588, citing *Calhoun*, 86 Ohio St.3d at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 530, 1994-Ohio-532, 639 N.E.2d 784. In determining whether a hearing is mandated, an appellate court must consider “whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case.” *Thomas*, *supra*.

{¶18} All the claims presented in appellant’s most recent petition involve questions that have been or could have been raised either on direct appeal or in his previous postconviction petition. Accordingly, the trial court was correct in dismissing

appellant's postconviction petition based upon the doctrine of res judicata without holding a hearing.

{¶19} “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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* (1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104. The doctrine of res judicata excludes subsequent actions or postconviction petitions involving the same legal theory of recovery as the previous action or petition as well as claims which could have been presented in the first action or postconviction petition. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169; *State v. Castro* (1979), 67 Ohio App.2d. 20, 425 N.E.2d 907; *State v. Blankenship* (Nov. 10, 1997), Butler App. Nos. CA97-03-062, CA97-03-063. Such a mandate prevents repeated attacks on a final judgment. *State v. Brown*, Cuyahoga App. No. 84322, 2004-Ohio-6421.

{¶20} After a review of the record and the arguments, we find appellant has or could have presented the same arguments presented in his second postconviction petition in his previous appeals or prior postconviction petition. Appellant made the following arguments in his postconviction petition: (1) he was unavoidably prevented from discovering Tim Mahon's affidavit because his counsel ineffectively advised against presenting Mahon's testimony at the trial; (2) his counsel was ineffective for not acquiring his daughter's drug tests; (3) the prosecutor committed misconduct by

withholding evidence; (4) the court erred in failing to rule upon Cuyahoga County Family and Children's Motion to Quash and (5) the prosecutor elicited perjured testimony from appellant's daughter. Appellant's claim that he was unavoidably delayed in discovering Tim Mahon's affidavit is without merit as appellant was aware of Mahon's testimony at the time of trial. Furthermore, any claim that his counsel was ineffective for failing to present Mahon's testimony is barred by the doctrine of res judicata because appellant could have presented this argument in his first appeal. Additionally, with regard to appellant's issues involving his daughter's testimony, in *State v. Sawyer*, Cuyahoga App. No. 84487, 2004-Ohio-6911 and *State v. Sawyer*, Cuyahoga App. No. 85911, 2005-Ohio-6486, we upheld the trial court's denial of motions concerning her testimony. Finally, the other arguments asserted by appellant regarding ineffective assistance of counsel, prosecutor misconduct or Cuyahoga County Family and Children's Motion to Quash could have been raised in the previous appeals or postconviction petition. Accordingly, we find the trial court did not err in dismissing appellant's second postconviction petition. Appellant's six assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR