

[Cite as *State v. West*, 2009-Ohio-6464.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92800

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

TIMOTHY WEST

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-468578

BEFORE: Kilbane, P.J., Dyke, J., and Celebrezze, J.

RELEASED: December 10, 2009

JOURNALIZED:

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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).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Timothy West (“West”), appeals the trial court’s denial of his petition for postconviction relief. West argues that the trial court erred in denying his petition without an evidentiary hearing, that his trial counsel was ineffective, and the State withheld exculpatory materials under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, thus entitling him to a new trial. After reviewing the pertinent law and facts, we disagree and affirm the trial court’s denial of West’s petition for postconviction relief.

Procedural History

{¶ 2} On July 22, 2005, a Cuyahoga County Grand Jury indicted West on two counts of aggravated arson. In Count 1, West was charged with a first degree felony, in violation of R.C. 2909.02(A)(1), for setting fire to the building owned by his brother, Todd West, located at 5106 Fleet Avenue, Cleveland, Ohio. In Count 2, he was charged with a second degree felony, in violation of R.C. 2909.02(A)(2), for agreeing to hire someone to set fire to the building.

{¶ 3} On November 1, 2006, a jury trial commenced.

{¶ 4} On November 8, 2006, the jury found West not guilty on both counts in the indictment, but guilty of the lesser included offense of arson, which was a fourth degree felony in Count 1, and a third degree felony in Count 2.

{¶ 5} On December 18, 2006, West was sentenced to a six-month term of incarceration on count one, and three years of community control sanctions on count two.¹

{¶ 6} On January 3, 2007, West appealed his conviction and sentence.

{¶ 7} On September 14, 2007, during the pendency of his appeal, West filed his petition for postconviction relief, styled as a petition to vacate or set aside sentence pursuant to R.C. 2953.21.

{¶ 8} On May 27, 2008, this court affirmed West's convictions and sentence in *State v. West*, Cuyahoga App. No. 89229, 2008-Ohio-2190 ("*West I*").

{¶ 9} On June 19, 2008, West appealed his conviction to the Ohio Supreme Court. On October 1, 2008, the Ohio Supreme Court declined to accept review of West's convictions and sentence. See *State v. West*, 119 Ohio St.3d 1476, 2008-Ohio-4911, 894 N.E.2d 334.

{¶ 10} On January 28, 2009, after West's direct appeal was concluded and the Supreme Court declined to accept review, the issues surrounding West's petition for postconviction relief were fully briefed, and the trial court issued a four-page findings of fact and conclusions of law denying West's petition for postconviction relief under R.C. 2953.21.

¹The trial court granted West's motion for judicial release on March 1, 2007.

{¶ 11} On February 12, 2009, West filed the instant appeal, raising three assignments of error for our review.

{¶ 12} West's first assignment of error states:

“The trial judge erred in failing to grant the appellant an evidentiary hearing as is required by R.C. 2953.21(E).”

{¶ 13} In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard in determining whether the trial court erred in denying the petitioner's motion without a hearing. *State v. Watson* (1998), 126 Ohio App.3d 316, 324, 710 N.E.2d 340. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 14} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing on the petition. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 1999-Ohio-102, 714 N.E.2d 905. In order to obtain such a hearing, the petitioner must show that there are substantive grounds for relief that would warrant a hearing based upon the petition, supporting affidavits, and files and records in the case. See R.C. 2953.21(C); *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819; *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169; *State v. Kapper* (1983), 5 Ohio St.3d 36, 448

N.E.2d 823; *State v. Carpenter* (1996), 116 Ohio App.3d 292, 295, 688 N.E.2d 14.

{¶ 15} Substantive grounds for relief exist where there was such a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable. R.C. 2953.21(A)(1); *Jackson*, supra; *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 98, 667 N.E.2d 1041; *Calhoun* at 282-283. The burden is on the petitioner to show that the claimed errors resulted in prejudice before a hearing on a postconviction relief petition is warranted. *Calhoun* at 283. The test to be applied is whether there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case. *State v. Strutton* (1988), 62 Ohio App.3d 248, 251, 575 N.E.2d 466. While R.C. 2953.21(C) includes consideration of the transcript in its list of items that courts "shall" consider in determining whether grounds exist to grant a hearing on a petition for postconviction relief, it does not limit courts exclusively to this consideration.²

²R.C. 2953.21(C) provides in pertinent part: "Before granting a hearing, 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 and supporting affidavits, 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 records of the clerk of the court, and the court reporter's transcript."

{¶ 16} In this case, no such grounds for relief exist. West contended in his postconviction relief petition that he was innocent of the charges and that he was deprived of effective assistance of counsel at trial. He further claimed, as he does in the instant appeal, that he was deprived of certain exculpatory evidence that he does not identify, though West alludes to the fact that the State's witnesses received "favorable treatment" in exchange for their testimony against him.

{¶ 17} West argues in the affidavit attached to his postconviction petition that certain utility bills and cell phone records prove his innocence. West admits, however, that these were available to his trial counsel, but contends they were never used. This amounts to a strategic argument that dovetails with West's ineffective assistance of counsel claim in his second assignment of error. Even if true, the information contained in the affidavit does not rise to the level of demonstrating a constitutional violation, but instead raises only a tactical question. *Calhoun* at 284. Here, as in *Calhoun*, the actual truth or falsity of the affidavit is inconsequential where the constitutional deprivation alleged is insufficient and instead amounts to a tactical question under an ineffective assistance of counsel argument. *Id.* As such, West has not demonstrated that he was entitled to a hearing on his petition for postconviction relief. We agree with the trial court's findings of fact and conclusions of law, which stated:

“As for defendant’s * * * claim, that he is ‘actually innocent of the offenses charged,’ such assertion is as common as it is irrelevant to the issues before the court. Every defendant who takes his indictment to trial does so upon a claim of innocence, coupled with the legal presumption of innocence. It is not a defendant’s innocence or guilt that is established at trial, but rather whether sufficient evidence of guilt has been presented to convince a jury beyond a reasonable doubt. While our criminal justice system is not perfect, it takes more than a mere assertion of innocence to render a jury verdict void or voidable as a matter of law. Id. at ¶7.

“* * *

“Similarly, in the case *sub judice*, this Court finds that none of the examples set forth by defendant constitute anything more than toxic tactical decisions by trial counsel as evidence that conceivable might --- or might not — have had an impact on the jury’s verdict.” Id. at ¶8. (Emphasis in original.)

{¶ 18} In Ohio, contrary to West’s assertion, postconviction relief petitioners are not entitled to a hearing “[u]nless the petition and the files and records of the case” show the petitioner is entitled to relief. R.C. 2953.21(E). It is only in such cases where a right to relief is shown that the trial court “shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.” Id.

{¶ 19} Here, the trial court reviewed the record and not only determined that West was not entitled to relief, but the court, at West’s request, issued a four-page statement of findings of fact and conclusions of law supporting its decision to deny him relief. In our review of the record, including the trial

court's findings of fact and conclusions of law, we see no reason to reverse the decision of the trial court denying West's petition simply because it did not grant him a hearing.

{¶ 20} The trial court's reasons for denying West a hearing were manifest in its findings of fact and conclusions of law denying him relief, and evidenced the fact that the trial court considered the entire record. Those reasons cited by the trial court included West's mere assertion that he was innocent, and his inference, without any specific explanation, that the State's witnesses received "favorable treatment" that was never fully revealed by the State. Such assertions by themselves do not entitle a postconviction relief petitioner to a hearing under R.C. 2953.21(E).

{¶ 21} A review of the record indicates that State's witness Dennis Dvorak ("Dvorak") was not charged in this matter. It is impossible to speculate, as West does in his brief, the type of "treatment" Dvorak received from the State, as he was never charged. Phillip Lowe, West's codefendant in this case, received a three-year term of incarceration for his participation in the arson, while West received only six months of incarceration. Based on the record, therefore, West was treated more "favorably" by the court than Lowe. As the trial court determined, West's argument on this point lacks specific, operable facts that would entitle him to relief.

{¶ 22} We have no quarrel with the trial court’s reasoning, nor do we have reason to question whether it considered the entire record. We find no abuse of discretion in denying West a hearing on these issues, based upon the fact that the trial court determined clearly, explicitly, and concisely that West was not entitled to relief in the first instance upon reviewing the record. Further, since West has not shown his claimed errors resulted in prejudice to him under *Calhoun*, supra, he has not shown his right to a hearing under R.C. 2953.21(E). See, also, *State v. Fair*, Cuyahoga App. No. 84498, 2009-Ohio-2382, concluding that “the trial court properly denied the petition [for postconviction relief] because there is no evidence that [appellant] was prejudiced by counsel’s failure to present the cell phone records at trial.” *Id.* at ¶11. West’s first assignment of error is overruled. For convenience, we will address appellant’s second and third assignments of error together.

{¶ 23} West’s second and third assignments of error state:

“The appellant was denied effective assistance of counsel at trial.”

“The state failed to fully disclose the extend [sic] of the promises made to its witnesses in exchange for the testimony of those witnesses.”

{¶ 24} These arguments are restatements of assignments of error four and five from *West I*, supra, surrounding ineffective assistance of counsel and the State’s alleged failure to comply with *Brady*, supra, in turning over

possible exculpatory evidence during discovery. Specifically, West alleged in *West I* that the identities of four potential suspects were unknown to him until one of the State's investigators revealed their existence on the witness stand at trial. Having already addressed these arguments in *West I*, in which we affirmed West's convictions, we need not recapitulate them here. In the instant appeal, West argues that his trial counsel failed to obtain certain records and call certain witnesses that would have proved his innocence, and that the State failed to adequately disclose the promises made to certain witnesses in exchange for their testimony. While West makes additional arguments from the ones originally argued in assignments of error four and five in *West I*, West was not prevented from raising these additional arguments in his original appeal. These facts were available to West at the time of his original appeal, and allowing him to reargue them here is tantamount to giving West a second bite at the proverbial apple. These issues have already been thoroughly addressed by both the trial court and this court. Therefore, these assignments of error are barred by the principles of res judicata. See *State v. Sawyer*, Cuyahoga App. No. 91496, 2009-Ohio-2391, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169.

{¶ 25} West has failed to demonstrate, as required by R.C. 2953.23(A), that he was unavoidably prevented from discovery of the facts upon which he relied to present his claim and that no reasonable factfinder would have

found him guilty of the offense. His petition is barred by res judicata; the trial court properly denied his petition for postconviction relief.

{¶ 26} West's second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY