[Cite as *State v. Betts*, 2010-Ohio-438.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92780

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON BETTS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-451845

BEFORE: McMonagle, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: February 11, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant Jason Betts appeals the January 12, 2009 trial court judgment denying his motion for postconviction relief without a hearing and motion for discovery. We affirm.

I

{¶ 2} Betts was indicted in May 2004 on two counts each of aggravated murder and aggravated robbery, all with specifications. The charges stemmed from the October 8, 2002 fatal shooting of David Reyes. The case was twice tried to a jury. The first jury was "hung" and a mistrial was declared. The second jury found Betts not guilty of aggravated murder in count one, but guilty of count two, aggravated murder, with a felony murder specification and three-year firearm specification. The jury also found him guilty of both counts of aggravated robbery with one- and three-year firearm specifications. The jury recommended life without parole and the court followed its recommendation and sentenced Betts accordingly. This court affirmed the conviction and sentence. *State v. Betts*, Cuyahoga App. No. 88607, 2007-Ohio-5533.

II

{¶ 3} The relevant facts were previously summarized by this court as follows:

{¶ 4} "The state's evidence demonstrated that in the weeks preceding his death, the decedent drove a gold Buick Riviera with distinctive specialty '20 inch Polo' rims. At this time, he was also helping his friend Jeffrey Williams remodel Williams'[s] mother's house.

{¶ 5} "On October 8, 2002, Reyes left his vehicle on Cantor Avenue and went with Williams to meet friends at a bar. Later that night, Reyes was driven back to his car. Trisha Smith and Tina Maynard spoke to Reyes. After a few minutes, Tina observed someone walking in a nearby alley. Reyes said, 'Oh shit,' and fled. The individual chased Reyes. Reyes slipped and fell and the other man caught Reyes by the back of the shirt, took out a gun and shot Reyes, killing him. Maynard then observed a man drive away in Reyes'[s] car.

{¶ 6} "Smith described the assailant as a dark complexioned African-American male, approximately 5'6" or 5'5", with dread locks or braids. Police recovered a 9 mm shell casing from the scene. A few hours later, police recovered Reyes'[s] car while respond[ing] to a call that an automobile was being stripped on Parkview Avenue. The vehicle was missing both passenger side tires and the wheels on the driver's side appeared to be replacement wheels. The distinctive Polo rims had been removed. Police obtained fingerprints from the right front fender, three exterior windows and a CD case inside the car.

{¶ 7} "Smith believed that she saw the man again at Reyes'[s] wake. In the ensuing weeks, she looked at approximately twenty photographs for police but could not identify the assailant.

{¶ 8} "On October 16, 2002, Jeffrey Williams received a telephone call from Norman Pomales. Following this phone call, Williams contacted investigators and investigators in turn identified a green Pontiac automobile owned by [Jessica] Randleman.

{¶ 9} "By April 2003, police linked two of the fingerprints recovered from the right front fender of Reyes'[s] car to defendant. The next month, Trisha Smith was shown a six-person photo array and indicated that defendant looked like the person but she could not be sure. Following a second photo array in April 2004, Smith identified defendant. That same month, Maynard identified defendant from a different six-person phot[o] array but she stated that she could not be sure. At trial, Smith also identified defendant as the assailant.

{¶ 10} "In March 2003, Houston Foster turned over to police a 9 mm weapon he had found in the outdoor grill at his home located at 1371 East 185th Street. Police later determined that defendant had been arrest[ed] at 1371 East 185th Street in March 2003. In May 2004, police determined that a Browning 9 mm weapon found in the grill at Foster's home fired the 9 mm casing found at the crime scene and that a live round found within the

Browning 9 mm was the same make and manufacture of the casing found at the crime scene.

{¶ 11} "Police located defendant hiding in a closet at his parents' home. He denied ever seeing Reyes or Reyes'[s] car. Defendant stated that Randleman is his girlfriend.

{¶ 12} "* * *

{¶ 13} "The defense [ ] presented the testimony of Officer Edward Csoltko who arrested defendant at 1371 East 185th Street. According to Officer Csoltko, he reported to his dispatcher that the subject he was chasing was 'possibly armed,' and the report does not mention a gun but he believed that he did observe defendant to be armed during the pursuit. He conceded, however, that it was possible that a second individual involved in this incident could have been the person he observed with a weapon." *Betts* at ¶4-13.

{¶ 14} The State theorized that the shooting occurred at approximately 8:30 p.m.

III

{¶ 15} R.C. 2953.21, governing postconviction petitions, provides as follows:

{¶ 16} "(A)(1) Any person who has been convicted of a criminal offense * * * 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."

{¶ 17} Betts contended in his petition that he was denied effective assistance of counsel because, among other reasons not raised in this appeal, his counsel failed to investigate his alleged alibi. Three affidavits were included in support of his petition: (1) his, (2) Jessica Randleman's,[1] and (3) Fernando Taylor's.

{¶ 18} Betts averred in his affidavit that he was not in the city of Cleveland at the time of the shooting (approximately 8:30 p.m. according to the State). Specifically, he averred that between 8:00 and 9:00 that evening, Randleman was driving him from her Elyria home, where they had been "hanging out," to a party in Cleveland. Betts averred that shortly after arriving at the party he was asked, and agreed, to go to Daily's Food Mart to get additional snacks and beverages for the party. On the way to the store, he encountered an acquaintance working on a car. When he learned that the

[1]Randleman testified at the first trial. She failed to appear at the second trial, despite having been subpoenaed and subjected to a bench warrant, so her testimony from the first trial was read into the record.

car was stolen, he ended his conversation with the acquaintance and continued to the store. Betts averred that he went to Daily's, made a purchase, and returned to the party.

{¶ 19} Randleman averred that on the day of the shooting, she and Betts purchased a car in Mentor and immediately drove it to her home in Elyria. She further averred that she dropped Betts off at his friend's house in Cleveland at approximately 9:00 p.m.

{¶ 20} Taylor averred that in the afternoon on the day of the shooting, Betts and Randleman picked him up from physical therapy and they "hung out" for awhile, until his (Taylor's) girlfriend picked him up. According to Taylor, at approximately 8:00 p.m. he met up with Betts again at the party and shortly before 10:00 p.m., they went to "a convenience store," made a purchase, and took the purchase back to the party.

{¶ 21} According to Taylor, he and Betts then left the party again to go to "Dailey's" to attempt to purchase marijuana. As they were approaching the store, an individual who appeared to be selling drugs diverted them down a side street. On the side street, they noticed a car being "stripped" and they looked through the inside of it. Betts saw a gun between the front driver's seat and center console and said he was going to take it. Taylor averred that he did not see Betts take the gun, but when they returned to the party, Betts

showed it to him. Taylor "hung out" at the party with Betts, and Betts was still at the party when he left sometime between midnight and 1:00 a.m.

{¶ 22} The trial court found the affidavits "conflicting" and "not credible." Relative to Randleman, the court noted that, with the exception of the averment in her affidavit that she dropped Betts off at a friend's house in Cleveland at 9:00 p.m.,[2] her affidavit was consistent with her trial testimony. The court noted that Randleman failed to previously mention this fact despite several opportunities: (1) her written statement to the police; (2) her testimony at the first trial, including upon cross-examination; and (3) her opportunity to testify at the second trial.

{¶ 23} In regard to Betts's affidavit vis-a-vis Taylor's affidavit, the court found several inconsistencies: (1) Betts averred that Randleman was driving him to the party between 8:00 p.m. and 9:00 p.m., while Taylor said he met back up with Betts at 8:00 p.m.; (2) Taylor averred that he and Betts were at the party for "a couple of hours" before they left for the store, while Betts never mentioned Taylor and averred that he (presumably alone) left the party to go to the store "shortly after" he arrived at the party; and (3) Betts averred that while on his way to the store (with still no mention of Taylor), he encountered "an acquaintance" working on a car, but continued with his errand when he learned that the car was stolen, while Taylor averred that he

[2]She never testified to this at trial.

and Betts went to the store, made a purchase, brought the purchase to the party, then left the party again in search of drugs, and at that time encountered "individuals" stripping a car. According to Taylor, he and Betts looked in the car and Betts saw a gun that he indicated he was going to take; Betts later showed Taylor the gun when they returned to the party.

{¶ 24} Finding the affidavits not credible, the trial court held that Betts failed to provide competent, relevant, and material evidence outside the record and that his alibi claim therefore was barred by the doctrine of res judicata. The court further found that counsel's decisions were trial strategy and Betts was not denied effective assistance of counsel. Further, the court denied Betts's motion for discovery. Betts challenges these findings in his four assignments of error, which we consider together.

{¶ 25} Res judicata is a bar to claims in a petition for postconviction relief. *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161, 679 N.E.2d 1131. "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. An exception to the res judicata bar in a postconviction proceeding exists, however, when a

petitioner presents competent, relevant, and material evidence outside the record that was not in existence and available to the petitioner in time to support the direct appeal. *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362.

{¶ 26} "According to the postconviction relief statue, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. Before granting an evidentiary hearing on the petition, the trial court shall determine whether there are substantive grounds for relief, i.e., whether there are grounds to believe 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 fo the United States.'" (Citations omitted.) *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282-283, 714 N.E.2d 905.

{¶ 27} Thus, the trial court must determine if a hearing is warranted based upon the petition, supporting affidavits, and all of the files and records pertaining to the proceedings. *State v. Pierce* (1998), 127 Ohio App.3d 578, 586, 713 N.E.2d 498. A trial court's decision regarding whether to conduct an evidentiary hearing in postconviction matters is governed by the abuse of discretion standard. *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927, ¶8. An abuse of discretion connotes conduct or an attitude

that is unreasonable, arbitrary, or unconscionable. *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151, 666 N.E.2d 1134.

{¶ 28} Although a trial court should give affidavits filed in support of a postconviction petition "due deference," it may also "judge their credibility in determining whether to accept the affidavits as true statements of fact." *Calhoun* at 284. In assessing the credibility of affidavit testimony, consideration should be given to all relevant factors. Id. Among those factors are: (1) whether the judge reviewing the petition also presided at the trial; (2) whether multiple affidavits contain nearly identical language or otherwise appear to have been drafted by the same person; (3) whether the affidavits contain or rely on hearsay; (4) whether the affiants are relatives of the petitioner or otherwise interested in the success of the petitioner's efforts; and (5) whether the affidavits contradict evidence proffered by the defense at trial. Id. at 285.

{¶ 29} Further, a trial court may find an affidavit to be contradicted by evidence in the record given by the same witnesses or to be internally inconsistent, thereby weakening the credibility of that testimony. Id. Depending on the record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Id.

{¶ 30} Here, the same judge who presided over the trial reviewed the postconviction petition. The record demonstrates that he gave careful consideration to the arguments set forth in the petition, as demonstrated by his in-depth 11-page findings of fact and conclusions of law. Further, the affiants were interested persons (Betts,[3] Randleman (the mother of his children), and Taylor (his friend)). Also, Randleman had three prior occasions to state that Betts was with her that evening from 8:00 p.m. to 9:00 p.m., and failed to do so.

{¶ 31} On this record, the trial court did not err by finding the affidavits not credible. Consequently, Betts failed to provide competent, relevant, and material evidence outside the record. Moreover, he failed to demonstrate that counsel was ineffective. In order to show ineffective assistance of counsel, a petitioner must demonstrate that defense counsel substantially violated one or more of his essential duties to his client and that the violation prejudiced the defense. *State v. Lytle* (1976), 48 Ohio St.2d 391, 395, 358 N.E.2d 623. Counsel's conduct is examined under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, which considers 1) whether the performance of counsel constituted a substantial violation of any essential duties owed to the defendant, and 2)

[3]"[An] affidavit from the petitioner is considered self-serving and therefore it is reasonable to afford it less credibility." *State v. Haschenburger*, Mahoning App. No. 08-MA-223, 2009-Ohio-6527, ¶46.

whether the defendant was materially prejudiced as a result of counsel's claimed ineffectiveness.

{¶ 32} Betts's claim of ineffective assistance of counsel was based, in part, on counsel's alleged failure to investigate his alleged alibi. As already set forth, the affidavits from the alibi witnesses were conflicting and not credible. Betts therefore failed to demonstrate that his counsel substantially violated any essential duties owed to him and that he was materially prejudiced by counsel's performance.

{¶ 33} Finally, as to the denial of Betts's motion for discovery, the long-standing rule in Ohio is that a convicted criminal defendant has no right to additional or new discovery, whether under Crim.R. 16 or any other rule, during postconviction relief proceedings. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159, 718 N.E.2d 426 (per curiam), certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1977, 146 L.Ed.2d 806; see, also, *State v. Taylor*, Cuyahoga App. No. 80271, 2002-Ohio-2742, ¶19 ("Courts are not required to provide petitioners discovery in postconviction proceedings.") The trial court therefore did not err by denying Betts's motion for discovery.

{¶ 34} In light of the above, Betts's four assignments of error are overruled and the judgment is 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR