

[Cite as *State v. Kent*, 2010-Ohio-6368.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94562

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN KENT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-485882

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

RELEASED AND JOURNALIZED: December 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, John Kent (“Kent”), appeals the trial court’s denial of his postconviction petition. Finding no merit to the appeal, we affirm.

{¶ 2} In 2006, Kent was convicted of one count of aggravated murder and two counts of aggravated robbery; all counts were accompanied by three-year firearm specifications. The trial court sentenced Kent to 30-years-to-life, and this court affirmed his conviction on appeal. *State v. Kent*, Cuyahoga App. No. 90795, 2009-Ohio-3889 (“*Kent I*”). We reopened his appeal for the limited purpose of determining whether appellate counsel was ineffective for failing to challenge the aggravated robbery charge. *State v. Kent*, Cuyahoga App. No.

90795, 2010-Ohio-1851. We determined that Kent had been afforded effective assistance of appellate counsel as Kent failed to establish any error with regard to his conviction for aggravated robbery under R.C. 2911.01(A)(3). *State v. Kent*, Cuyahoga App. No. 90795, 2010-Ohio-4343.

{¶ 3} In 2008, Kent moved for postconviction relief, which the trial court denied. Kent filed his notice of appeal, and raises the following four assignments of error for our review:

“I. The doctrine of res judicata does not bar the appellant’s claims and the lower court’s finding of res judicata is not supported by the record and violates the 14th Amendment of the Federal Constitution.

“II. An evidentiary hearing should have been conducted since the appellant supported his petition with an affidavit with evidence dehors the record that supported the relief he sought and the failure to conduct such a hearing violated R.C. 2953.21 and the Fourteenth Amendment of the Federal Constitution.

“III. A court must allow appellant to conduct discovery in post conviction [sic]and the failure to adopt the federal standard for when discovery takes place violated the Fourteenth Amendment of the Federal Constitution and Ohio law.

“IV. The trial court erred in denying the claim that trial counsel was ineffective for failure to properly investigate the alibi claim before presenting it in violation of the Sixth and Fourteenth Amendments of the Federal Constitution.”

Postconviction Petition

{¶ 4} “A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Hines*, Cuyahoga App. No. 89848, 2008-Ohio-1927, ¶8, quoting *State v. Steffen*, 70 Ohio St.3d 399,

1994-Ohio-111, 639 N.E.2d 67. R.C. 2953.21(A)(1)(a) allows Kent to file a petition asking the trial court to vacate or set aside the judgment of conviction or sentence. Kent, as petitioner, must state all grounds for relief on which he relies, and he waives all other grounds not so stated. R.C. 2953.21(A)(4). In determining whether substantive grounds for relief exist, the trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support of the petition. R.C. 2953.21(C). If the trial court finds no grounds for granting relief, it must make findings of fact and conclusions of law supporting its denial of relief. R.C. 2953.21(G).

{¶ 5} A trial court may rule on a postconviction petition without first holding a hearing. Proper grounds for dismissing a petition for postconviction relief without holding an evidentiary hearing include: “1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and 2) the operation of res judicata to bar the constitutional claims raised in the petition.” *State v. Thomas*, Cuyahoga App. No. 87666, 2006-Ohio-6588, citing *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 1994-Ohio-532, 639 N.E.2d 784.

{¶ 6} “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* (1967), 10 Ohio St.2d 175, 226

N.E.2d 104, at paragraph nine of the syllabus. In other words, a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal.

{¶ 7} Evidence submitted in support of a postconviction petition “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 that is only marginally significant and does not advance the petitioner’s claim beyond mere hypothesis and a desire for further discovery.” *State v. Lawson* (1995), 103 Ohio App.3d 307, 659 N.E.2d 362. The evidence submitted with the petition must be competent, relevant, and material and not merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 652 N.E.2d 205.

{¶ 8} We review the trial court’s ruling on a postconviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶45.

Kent’s Postconviction Petition

{¶ 9} In his first, second, and fourth assignments of error, Kent argues that his claims of ineffective assistance of counsel regarding the presentation of the alibi defense at trial are not barred by the doctrine of res judicata.¹

¹Although Kent raised additional grounds for postconviction relief in his petition, including ineffective assistance of appellate counsel, cumulative error, constitutionality of postconviction proceedings, and insufficient indictment, Kent does not raise these grounds for relief on appeal; therefore, we will not consider them. Even if we did sua sponte review his claims, we would find they, too, are barred by res judicata or otherwise have no merit.

{¶ 10} In order to establish a claim of ineffective assistance of counsel, Kent must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

{¶ 11} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. *Id.* at 689. The *Strickland* court noted that it is very tempting for a defendant to question his lawyer's performance after conviction and that it would be too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. *Id.* Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

{¶ 12} Kent argues that his trial counsel was ineffective for failing to "investigate and understand the alibi evidence and how it would be affected by the phone records that counsel never investigated or understood." Kent claims that if counsel had investigated the phone records used at trial, Kent could have been in a better position to accept a plea offer or abandon his alibi defense. While generally the introduction in an R.C. 2953.21 petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a

hearing, at least to avoid dismissal on the basis of res judicata, *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, Kent failed to present any evidence outside the record other than his own affidavit. The only other evidence Kent offered to support his claims are the same telephone records that were used at trial. Since by his own admission, those phone records were known to him during trial, they cannot serve as evidence dehors the record. Moreover, Kent fails to show how the phone records would have affected the outcome of the trial.

{¶ 13} Although not mentioned in his appellate brief, Kent also argued in his postconviction petition that his trial counsel was ineffective for failing to object to the jury instructions. This claim, too, should have been raised on direct appeal and the failure to do so bars his claim from further review.

{¶ 14} In sum, Kent's argument that his trial counsel was ineffective could have been made on direct appeal; therefore, we agree with the trial court that Kent's claims are barred by the doctrine of res judicata.

{¶ 15} Thus, the trial court did not err in finding that res judicata bars his petition and did not err in choosing not to hold a hearing on his petition. The first, second, and fourth assignments of error are overruled.

Discovery

{¶ 16} In the third assignment of error, Kent argues that the trial court erred when it did not afford him an opportunity to conduct discovery as to his postconviction petition.

{¶ 17} 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. *State v. Bryan*, Cuyahoga App. No. 93038, 2010-Ohio-2088; *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 718 N.E.2d 426, 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 Kent's motion for discovery.

{¶ 18} The third assignment of error is overruled.

{¶ 19} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR