

[Cite as *State v. Fisher*, 2010-Ohio-74.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93047

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARTURO FISHER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499991

BEFORE: Boyle, J., Cooney, P.J., and Sweeney, J.

RELEASED: January 14, 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), 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. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Arturo Fisher, appeals the trial court's order denying his petition for postconviction relief, raising the following two assignments of error:

{¶ 2} “[I.] Defendant was denied due process of law when the court granted an untimely motion for summary judgment which alleged all sorts of facts which were not apparent upon the fact of the record.

{¶ 3} “[II.] Defendant was denied due process of law when the court dismissed his petition for post-conviction relief without an evidentiary hearing.”

{¶ 4} The record reveals, however, that aside from having no merit, Fisher raised the same arguments in his direct appeal, and therefore his claims are barred under the doctrine of res judicata. And because Fisher failed to present any substantive grounds for relief, the trial court was not required to hold an evidentiary hearing. For the reasons discussed more fully below, we affirm.

Procedural History and Facts

{¶ 5} In January 2008, Fisher was convicted of rape with a sexually violent predator specification and sentenced to ten years to life imprisonment. Fisher appealed, raising numerous assignments of error, including an ineffective assistance of counsel claim based on his trial counsel's failure to file a motion to dismiss on speedy trial grounds and failure to investigate and subpoena witnesses. This court affirmed Fisher's conviction and sexual predator designation. *State v. Fisher*, 8th Dist. No. 90997, 2009-Ohio-476, appeal not

allowed, 122 Ohio St.3d 1521, 2009-Ohio-4776.

{¶ 6} While the appeal was pending, Fisher filed a petition for postconviction relief, relying on the same arguments that he had also made in his direct appeal: (1) his speedy trial rights had been violated; and (2) his trial counsel failed “to investigate or present defense witnesses.” Nearly 60 days after Fisher filed his petition for postconviction relief, the state moved for summary judgment, arguing that Fisher’s speedy trial rights had not been violated and that his father’s affidavit did not conflict with evidence presented at trial or demonstrate any prejudice. The state attached proposed findings of fact and conclusions of law to its motion. Fisher opposed the motion, arguing that it was untimely and that it relied on facts that were not apparent from the record. The trial court subsequently denied Fisher’s petition without an evidentiary hearing and adopted the state’s proposed findings of fact and conclusions of law. From this decision, Fisher filed the instant appeal.

Motion for Summary Judgment

{¶ 7} In his first assignment of error, Fisher argues that the trial court denied him due process of law by granting the state’s untimely motion for summary judgment and by considering facts “that are not apparent upon the face of the record.” Our review of the record reveals, however, that the trial court never granted the state’s motion for summary judgment. Notably, Fisher’s notice of appeal does not attach a judgment entry granting summary judgment. Moreover, to the extent that Fisher implies that his petition for postconviction

should have been granted because the state failed to timely oppose it, Ohio law provides otherwise. See *State v. Sklenar* (1991), 71 Ohio App.3d 444. Indeed, “a defendant may not obtain a default judgment in a postconviction proceeding.” *Id.* at 447.

{¶ 8} But even if we construed Fisher’s argument as an attack on the trial court’s findings of fact and conclusions of law, we find no merit to his argument. There is no indication that the trial court improperly relied on facts or information outside the record. Indeed, Fisher utterly fails to identify what “hearsay information and matters outside of the record” the trial court unlawfully considered. As this court has previously recognized, “[i]t is the duty of the defendant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record.” *State v. Semanchuk*, 8th Dist. No. 79523, 2002-Ohio-674, citing App.R. 16(A)(7) and *State v. Watson* (1998), 126 Ohio App.3d 316, 321.

{¶ 9} Accordingly, we find no merit to Fisher’s first assignment of error and overrule it.

Res Judicata and Evidentiary Hearing

{¶ 10} In his second assignment of error, Fisher argues that he was denied due process when the trial court dismissed his petition without first holding an evidentiary hearing.

{¶ 11} Under Ohio law, “a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled

to an evidentiary hearing.” *State v. Byrd* (2001), 145 Ohio App.3d 318, 329. To the contrary, a trial court should not hold a hearing unless the “petitioner adduces sufficient evidence to warrant a hearing.” *State v. Cole* (1982), 2 Ohio St.3d 112, 113, citing R.C. 2953.21(C) (“before granting a hearing [on a petition for postconviction relief] the court shall determine whether there are substantive grounds for relief”).

{¶ 12} It is well established that any claim for postconviction relief that was or could have been raised on direct appeal is barred from consideration by the doctrine of res judicata. *State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857, ¶17, citing *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Res judicata, however, does not bar claims for postconviction relief when the petitioner presents evidence outside the record that was not in existence and was not available to the petitioner in time to support a direct appeal. *Cole*, 2 Ohio St.3d at 114.

{¶ 13} Here, the entire basis for Fisher’s petition for postconviction relief, i.e., ineffective assistance of counsel for failing to file a motion to dismiss on speedy trial grounds and failing to investigate or present defense witnesses, has already been determined in his direct appeal to have *no* merit. See *Fisher*, 2009-Ohio-476. Indeed, “once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation.” *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, ¶10, quoting *State v. Cheren*, 73 Ohio St.3d 137, 138, 1995-Ohio-28; *Perry*, *supra*. Accordingly, the doctrine of res judicata

prevents his collateral attack to this court's final judgment.

{¶ 14} Because Fisher's claims are barred by the doctrine of res judicata, we find that he was not entitled to an evidentiary hearing on his petition.

{¶ 15} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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 J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
JAMES J. SWEENEY, J., CONCUR