

[Cite as *State v. Brusiter*, 2015-Ohio-1549.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101908

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARIN BRUSITER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-549689-A

BEFORE: Keough, J., Celebrezze, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 23, 2015

APPELLANT

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Darin Brusiter, appeals from the trial court's decision denying his petition to vacate or set aside his judgment or conviction. For the reasons that follow, we affirm.

{¶2} In 2011, Brusiter was charged with two counts of aggravated murder with murder for hire specifications. He was also charged with kidnapping, insurance fraud, and tampering with evidence. After the trial court denied Brusiter's motion to suppress the statements he made to police, he entered into a plea agreement where he agreed to plead guilty to aggravated murder with a three-year firearm specification, kidnapping, insurance fraud, and tampering with evidence. Brusiter was sentenced to 33 years to life in prison.

{¶3} Brusiter appealed his convictions, raising as his sole assignment of error that the trial court erred in denying his motion to suppress. *State v. Brusiter*, 8th Dist. Cuyahoga No. 98614, 2013-Ohio-3803, ¶ 4.

{¶4} While his direct appeal was pending with this court, Brusiter timely filed a petition to vacate or set aside the judgment or conviction, and requested an evidentiary hearing. The basis for the petition was that his trial counsel was ineffective for failing to properly research the issues underlying the motion to suppress. The state opposed the motion.

{¶5} Subsequently, in April 2013, this court rendered its decision on Brusiter's direct appeal — overruling his assignment of error, affirming his convictions, and concluding that Brusiter waived his right to appeal the trial court's denial of his motion to suppress by virtue of his guilty plea. *Id.* at ¶ 5, 10.

{¶6} Brusiter filed an application to reopen his appeal in June 2013, contending that his appellate counsel was ineffective for failing to raise an allied offense issue. This court denied his application. *State v. Brusiter*, 8th Dist. Cuyahoga No. 98614, 2013-Ohio-3803.

{¶7} In September 2013, Brusiter moved the trial court for leave to amend his petition for postconviction relief to add the additional issue that his trial court was ineffective by inducing him into entering a guilty plea.

{¶8} In March 2014, the trial court denied Brusiter's motion for leave to amend and subsequently denied his petition for postconviction relief. The court issued findings of fact and conclusions of law in September 2014. It is from this decision that Brusiter now appeals, raising one assignment of error — the trial court abused its discretion in denying him an evidentiary hearing on his petition for postconviction relief.

{¶9} An appellate court applies an abuse-of-discretion standard in reviewing a trial court's ruling on a petition for postconviction relief alleging ineffective assistance of counsel. *State v. Hendrex*, 11th Dist. Trumbull No. 2010-T-0103, 2011-Ohio-1588, ¶ 28; *see also State v. Warmus*, 8th Dist. Cuyahoga No. 99962, 2014-Ohio-928. Likewise, an appellate court reviews a trial court's decision not to conduct a hearing in postconviction

matters under an abuse of discretion standard. *Warmus* at ¶ 27. An abuse of discretion is “more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶10} Pursuant to R.C. 2953.21(C), a trial court may dismiss a petition for postconviction relief “without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus.

{¶11} “In a petition for postconviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness.” *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus. Further, “the evidence submitted must not be cumulative of or alternative to evidence presented at trial.” *State v. Cowan*, 151 Ohio App.3d 228, 2002-Ohio-7271, 783 N.E.2d 955, ¶ 13 (11th Dist.). Moreover, “the evidence dehors the record must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the defendant wished to use it.” *Id.* at ¶ 15; quoting *State v. Slagle*, 8th Dist. Cuyahoga No. 76834, 2000 Ohio App. LEXIS 3641, *3 (Aug. 10, 2000).

{¶12} In this case, Brusiter premised his petition on an ineffective assistance of counsel claim, which was not supported by any facts or evidentiary documentation. Therefore, the trial court did not abuse its discretion in denying Brusiter's petition without a hearing because he failed to satisfy his burden to provide sufficient, operative facts outside the record to demonstrate that counsel's performance was deficient.

{¶13} Furthermore, Brusiter's assertions that his trial counsel was ineffective could have been raised in his direct appeal. Brusiter could have also premised his application to reopen on appellate counsel's failure to assign as error an ineffective assistance of trial counsel claim. Therefore, his unsupported claim of ineffective assistance of trial counsel is barred by the doctrine of res judicata.

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 or conviction, or an appeal from that judgment.

State v. Cole, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982), citing *State v. Perry*, 10 Ohio St.2d 175, 226 NE.2d 104 (1967).

{¶14} It is well settled that the doctrine of res judicata applies in postconviction relief proceedings. *State v. Blalock*, 8th Dist. Cuyahoga No. 94198, 2010-Ohio-4494, ¶ 19. Thus, a defendant may not raise any issue in a motion for postconviction relief if he could have raised the issue on direct appeal. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131. Because he could have raised his claims regarding

trial counsel in his direct appeal, or in his application to reopen, his challenges are barred by res judicata.

{¶15} Although not assigned as error but raised as an issue on appeal, Brusiter complains that the trial court failed to issue findings of fact and conclusions of law on its decision denying his motion for leave to amend his petition for postconviction relief. Brusiter sought to amend his petition for postconviction relief to add an additional argument that his trial counsel was also ineffective by giving erroneous advice regarding the effect of his guilty plea. As addressed above, Brusiter could and should have raised this issue in his prior appeals; thus, res judicata effectively bars this issue now on appeal. Furthermore, a review of the trial court record reveals that Brusiter's request for the trial court to issue findings of fact and conclusions of law only pertained to the trial court's denial of his petition for postconviction relief; not the denial of his motion for leave to amend his petition.

{¶16} Accordingly, Brusiter's assignment of error is overruled.

{¶17} 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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN T. GALLAGHER, J., CONCUR