

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,	:	CASE NO. CA2025-12-018
Appellee,	:	
vs.	:	<u>OPINION AND</u>
	:	<u>JUDGMENT ENTRY</u>
SHERMAN R. SMITH,	:	8/17/2026
Appellant.	:	
	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2022-2047

Zachary A. Corbin, Brown County Prosecuting Attorney, and Robert F. Benintendi, Assistant Prosecuting Attorney, for appellee.

Sherman R. Smith, pro se.

OPINION

SIEBERT, J.

{¶ 1} Sherman Smith appeals the Brown County Court of Common Pleas' dismissal of his petition for postconviction relief stemming from his conviction for, among other crimes, murder and attempted murder of two of Smith's uncles. On appeal, Smith

argues he received ineffective assistance of counsel because his trial counsel did not thoroughly investigate Smith's allegations of sexual abuse by his uncles as well as Smith's generally contentious history with them. Smith claims if his counsel had pursued additional witnesses to speak on these issues at trial, there would have been sufficient evidence of provocation to justify a conviction for the lesser crime of manslaughter.

{¶ 2} We overrule Smith's assignments of error. The affidavits Smith attached to the petition to support his claim of ineffective assistance of counsel were cumulative to evidence already in the record to support Smith's previously rejected argument that he should have received a manslaughter instruction at trial. Therefore, Smith cannot demonstrate any substantive grounds for relief. Moreover, Smith could have made this argument on direct appeal where he was represented by new counsel.

Background

{¶ 3} The relevant facts underlying Smith's conviction are undisputed. Smith shot and killed his uncle, Jay Smith, and attempted to kill another uncle, Ervin Smith. Smith claims Jay and Ervin sexually abused him when he was 6-7 years old. He asserts "the abuse was never prosecuted and the horrible emotional and physical pain festered and devastated Sherman for his entire life." Smith was 66 when he murdered Jay and shot Ervin. A jury found him guilty of all indicted offenses, and the trial court sentenced Smith to 20 years to life. This court upheld Smith's conviction, and the Ohio Supreme Court subsequently dismissed his appeal. *State v. Smith*, 2024-Ohio-2849 (12th Dist.), *motion for delayed appeal granted*, 2024-Ohio-5529, and *cause dismissed*, 2024-Ohio-6084.

{¶ 4} Smith filed a timely petition for postconviction relief. In it, he asserted his trial counsel failed to investigate mitigating evidence of the alleged history of abuse (sexual, physical, and verbal) of Jay and Ervin against Smith and others in the family. Smith asserts this evidence demonstrates he was sufficiently provoked into committing

his crimes and that a jury could have found him guilty of manslaughter as opposed to murder. Smith attached multiple affidavits from witnesses documenting this history of alleged abuse. The trial court denied Smith's petition, stating that Smith "offered allegations which if true would have no legal significance" and that there were "no sufficient operative facts to establish substantive grounds for relief."

{¶ 5} Smith now appeals, raising the same ineffective assistance of counsel claims within three separate assignments of error that we will address together.

First, Second, and Third Assignments of Error – Postconviction Petition and Ineffective Assistance of Counsel

Standard of Review and Applicable Law

{¶ 6} "A trial court's decision to grant or deny a postconviction petitioner pursuant to R.C. 2953.21 is upheld absent an abuse of discretion." *State v. Watson*, 2017-Ohio-1403, ¶ 14 (12th Dist.). An abuse of discretion occurs when the trial court's "attitude is unreasonable, arbitrary, or unconscionable." *State v. Hancock*, 2006-Ohio-160, ¶ 130.

{¶ 7} "A postconviction proceeding is not an appeal of a criminal conviction, but rather, is a collateral civil attack on a criminal judgment." *State v. Harris*, 2020-Ohio-4101, ¶ 13 (12th Dist.). "An evidentiary hearing is not automatically guaranteed each time a defendant files a petition for postconviction relief." *State v. Harding*, 2020-Ohio-1067, ¶ 5 (12th Dist.). If the petition, its supporting affidavits and evidence, and the record, do not demonstrate "substantive grounds for relief," the trial court may deny the petition without a hearing. R.C. 2953.21(D).

{¶ 8} When a postconviction petition claims ineffective assistance of counsel, "the defendant must show that his counsel's actions were outside the wide range of professionally competent assistance, and that *prejudice* resulted by reason of counsel's actions." (Emphasis added.) *Harris*, at ¶ 16. However, the doctrine of res judicata

precludes defendants from raising claims of ineffective assistance of counsel that could have been raised on direct appeal. *State v. Blanton*, 2022-Ohio-3985, ¶ 2. The doctrine applies unless "(1) the petitioner had the same attorney at trial and on appeal or (2) he must rely on evidence outside the trial record to establish his claim for relief." *Id.* However, "[f]inding an item outside the record to attach to a petition does not turn an issue into a substantive post-conviction claim where it is essentially cumulative to evidence that was in the record on a topic that could have been raised on direct appeal." *State v. Hall*, 2024-Ohio-1235, ¶ 42 (12th Dist.), *quoting State v. Boyd*, 2023-Ohio-4725, ¶ 41 (7th Dist.).

Analysis

{¶ 9} Smith's petition does not demonstrate substantive grounds for relief. Smith raised the issue of his uncles' alleged abuse at his trial in an attempt to receive a manslaughter instruction. Indeed, at trial, Smith argued that "decades of pent-up trauma" regarding the abuse "caused him to 'snap'" when Jay (once again) denied ever abusing Smith. *Smith*, 2024-Ohio-2849, ¶ 5 (12th Dist.). However, in his direct appeal, we held the trial court did not err in refusing to instruct the jury on manslaughter because Jay's denial of the abuse "was not a legally sufficient provocation for a manslaughter instruction." We also held that even if it were, "his testimony and actions [after Jay's denial] ma[de] it clear that it was Smith's specific intention in that moment to cause the deaths of Jay and Ervin to achieve some level of peace of mind" for the abuse he allegedly received. *Id.* at ¶ 25.

{¶ 10} As a result, the affidavits Smith presented with his petition for postconviction relief do not present substantive grounds for relief. They are simply cumulative to evidence already in the record on an issue litigated on direct appeal. *Hall* at ¶ 42. Therefore, even if we were to assume Smith's trial counsel did not provide competent assistance by failing to pursue more information and witnesses on the issue of this alleged

abuse (which we do not), Smith has not demonstrated any prejudice. Regardless of whether counsel pursued and presented the information contained in those affidavits at trial, Smith would not have been entitled to a manslaughter instruction for the same reasons stated in his direct appeal.

{¶ 11} Moreover, because Smith was represented by different counsel during his trial and on appeal, Smith could have argued ineffective assistance of counsel in this regard during his direct appeal. Because he failed to do so, the doctrine of res judicata barred him from raising it in a petition for postconviction relief. *Id.*

{¶ 12} Smith's three assignments of error are overruled.

{¶ 13} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.

J U D G M E N T E N T R Y

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Brown County Court of Common Pleas for execution upon this judgment and that a certified copy of this Opinion and Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

/s/ Robin N. Piper, Presiding Judge

/s/ Mike Powell, Judge

/s/ Melena S. Siebert, Judge