

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2003-P-0077
EDWARD D. DAVIS,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2002 CR 0138.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Erik M. Jones, Mentzer, Vuillemin and Mygrant, Ltd., One Cascade Plaza, 20th Floor, Akron, OH 44308 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Edward D. Davis, appeals the June 2, 2003 judgment entry of the Portage County Court of Common Pleas, in which his petition for postconviction relief was denied without a hearing.

{¶2} An indictment was returned against appellant on April 18, 2002, charging him with one count of kidnapping, in violation of R.C. 2905.01(A), a felony of the first degree; five counts of rape, in violation of R.C. 2907.02(A), all felonies of the first

degree; and three counts of felonious assault, in violation of R.C. 2903.11(A)(1)(B), all felonies of the second degree. All of the charges stemmed from an incident that occurred on April 2, 2002, between appellant and his girlfriend, the victim. On April 24, 2002, appellant entered a plea of not guilty to the charges, and a trial was scheduled for June 18, 2002.

{¶3} On June 17, 2002, appellant withdrew his not guilty plea and entered a written plea of guilty to one count of felonious assault, in violation of R.C. 2903.11(A)(1)(B), a felony of the second degree. Upon motion of the state, the trial court entered a nolle prosequi with regard to the remaining charges. The court accepted the guilty plea and ordered a presentence investigation report. A sentencing hearing was held on September 3, 2002. In an entry dated September 4, 2002, appellant was sentenced to a term of six years in prison. Appellant did not seek a direct appeal from that entry.

{¶4} On March 27, 2003, appellant filed, in his own behalf, a petition for postconviction relief with the trial court pursuant to R.C. 2953.21. In his petition, he alleged that he did not enter into the guilty plea of his own free will, that he was denied the effective assistance of counsel, and that there was prosecutorial misconduct. Attached to the petition was appellant's own affidavit and three affidavits from the victim of the felonious assault. In the victim's affidavits, she recanted her prior statements and claimed she did not know who attacked her. She further stated that appellant was not involved and that the only reason she initially accused him was because she was coerced by the police and the prosecution. On April 1, 2003, the state filed a response to the petition and included a motion for summary judgment. In an entry dated June 2,

2003, the trial court denied appellant's petition for postconviction relief without a hearing. Appellant timely filed the instant appeal and now assigns the following as error:

{¶5} "[1.] The trial court erred by dismissing appellant's petition for [postconviction] relief.

{¶6} "[2.] The trial court erred by dismissing appellant's petition for [postconviction] relief without a hearing."

{¶7} Appellant's assignments of error are interrelated and will be addressed in a consolidated manner. Under the first assignment of error, appellant claims that the trial court erred in dismissing his petition for postconviction relief. For the second assignment of error, appellant alleges that the trial court erred in dismissing his petition for postconviction relief without a hearing.

{¶8} R.C. 2953.21(A)(1) provides: "[a]ny person who has been convicted of a criminal offense *** and who claims that there was such a denial or infringement of his 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."

{¶9} In the case at bar, appellant alleges that his trial counsel's performance was deficient because he had knowledge of the victim's recantation of her testimony prior to the trial court's acceptance of his guilty plea. He argues that he was prejudiced by his counsel's deficient performance because he entered a plea of guilty that was not

knowing, voluntary, and intelligent as he was not advised of the victim's recantation prior to entering the guilty plea. Appellant also claims that there was prosecutorial misconduct. Appellant states that the victim told the police and the prosecution that he was not the attacker and that they ignored her statements and intimidated her.

{¶10} Preliminarily, we note that when appellant entered his plea of guilty, as part of his plea agreement, he waived all errors that may have occurred at the proceedings, including ineffective assistance of counsel, unless the error is shown to have precluded him from entering a knowing and voluntary plea. *State v. Lewis* (Aug.19, 1994), 11th Dist. No. 92-T-4687, 1994 WL 590303, at 4, citing *State v. Barnett* (1991), 73 Ohio App.3d 244, 249.

{¶11} To prevail under a postconviction relief ineffective assistance of counsel claim after pleading guilty, a defendant not only must show that his trial counsel's performance was professionally unreasonable, but also must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. *State v. Cole* (1982), 2 Ohio St.3d 112, 114. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, and *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus.

{¶12} Absent from the record in this case is a transcript of the plea hearing which could have in part or entirely supported or undermined appellant's argument. Without a transcript of the guilty plea hearing, we must presume the trial court's findings are correct. *Columbus v. Link* (1998), 127 Ohio App.3d 122, 127. Also, appellant has not provided any evidential material dehors the record that shows that he would have been entitled to relief.

{¶13} Furthermore, appellant's written guilty plea, which is contained in the record and was signed by appellant, states that appellant's attorney and the trial judge informed appellant of the effect of his plea. The written plea agreement also indicates that by appellant entering a guilty plea to one count of felonious assault, he waived his right to a jury trial, the right to confront witnesses, and the right to require the state to prove his guilt beyond a reasonable doubt. The written agreement further mentioned that the plea was not coerced. The court specifically found that appellant was knowingly and voluntarily entering his plea.

{¶14} Appellant claims that the victim recanted her statement before his plea and that his counsel knew about it and did nothing. However, we have reviewed the entire record and find no evidence that trial counsel's performance fell below an objective standard of reasonable representation. In particular, we note that since appellant was charged with one count of kidnapping, five counts of rape, and three counts of felonious assault, he was facing a lengthy prison sentence. By entering the guilty plea, he significantly reduced his sentence to six years. Thus, nothing before this court leads us to conclude that appellant's plea was not knowing and voluntary.

{¶15} Additionally, appellant supported his petition for postconviction relief with affidavits from himself and the victim, in which the victim recanted her testimony. In determining the credibility of an affidavit in support of a motion for postconviction relief, a trial court should consider all relevant factors. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 285. Among those factors are: (1) whether the judge reviewing the postconviction relief 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.* Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony. *Id.*

{¶16} Here, we note that the same judge did not preside over appellant's guilty plea and his postconviction motion.¹ However, appellant, one affiant, had a clear interest in succeeding, and the victim, the other affiant, contradicted her earlier statements at the sentencing hearing and in the presentence investigation report, which were both contained in the record. The victim, who is appellant's girlfriend and mother of his son, presented three affidavits that nearly contained identical language. She was also interested in the success of appellant's efforts as she does not want him to go to prison because she wants to marry him and raise their child together. Moreover, the record indicates through appellant's written guilty plea that the plea was voluntary and intelligent. In addition, at the sentencing hearing, the victim testified that even though appellant was her attacker, she wanted the judge to be lenient in sentencing appellant. Specifically, the victim stated that she believed:

{¶17} "[The incident] would have never happened but for the drugs and alcohol [appellant] was under. We have love for each other and with God's help [we] will get through all of this together and be able to become a family.

1. In a Certificate of Assignment issued by the Supreme Court of Ohio on March 17, 2003, the Honorable Harold Elden DeHoff was assigned to preside over the Portage County Court of Common Pleas, General Division, from May 30, 2003 to June 6, 2003.

{¶18} “We have been together for a year and a half and he hasn’t been abusive.

{¶19} “***

{¶20} “Your Honor, I’m not defending that night and I do not believe anyone should have had to go through what I did. At the same time, I know him and I know that [he] wasn’t really himself that night. That isn’t the kind of man he really is. I honestly don’t believe he needs prison time, but I believe he needs help.”

{¶21} Based on the foregoing evidence, the trial court was clearly within its discretion in rejecting appellant’s allegation of ineffective assistance of counsel. Hence, it is our view that appellant received effective assistance of counsel as to this issue.

{¶22} Appellant next asserts that there was prosecutorial misconduct because the state had knowledge of the victim’s recantation from the victim’s letters and oral statements prior to appellant entering his guilty plea and that the prosecution failed to disclose that the victim recanted her identification of appellant as her attacker.

{¶23} In *Brady v. Maryland* (1963), 373 U.S. 83, 87, the United States Supreme Court held that “[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

{¶24} To prove the prosecution violated *Brady*, a defendant must show that: “(1) the prosecution failed to disclose evidence upon request; (2) the evidence was favorable to the defense; and (3) the evidence was material.” *State v. West* (Oct. 27, 2000), 11th Dist. No. 98-P-0132, 2000 WL 1616802, at 3, citing *Moore v. Illinois* (1972), 408 U.S. 786. The withholding of exculpatory or impeachment evidence constitutes a Brady violation only if it is “material.” *West*, supra, citing *United States v. Bagley* (1985),

473 U.S. 667. With respect to the materiality prong, the United States Supreme Court has noted that “*Bagley’s* touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the [g]overnment’s evidentiary suppression “undermines the confidence in the outcome of the trial.”” (Citations omitted.) *West*, supra, quoting *Kyles v. Whitley* (1995), 514 U.S. 419, 434.

{¶25} The Supreme Court of Ohio has recognized that due process is violated when material evidence, favorable to the accused, is suppressed. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33. However, undisclosed information that might have affected the outcome of the trial or helped the defense does not establish “materiality” in the constitutional sense. *Id.* “*Brady* requires a ‘reasonable probability’ of a different outcome with the exculpatory evidence, that is, an undermined confidence in the trial result obtained without the exculpatory evidence.” *Id.* The defense must also prove a *Brady* violation and the subsequent denial of due process. *Id.* Finally, any undisclosed information must be evaluated in the context of the entire record in order to determine if there would be a reasonable doubt about the guilt of a defendant if the additional evidence was considered. *Id.* at 34.

{¶26} In the case at hand, appellant attached three affidavits from the victim to his petition for postconviction relief. Two of the letters were dated January 25, 2003, and the other letter was dated February 2, 2003. In those letters, the victim claims that

she would have never given the false statement if she did not feel pressure from the prosecution. She felt she was manipulated and feared getting in trouble herself. Yet, at the September 3, 2002 sentencing hearing, about three months after appellant entered a plea of guilty, she admitted to the trial court that appellant was her attacker, and she blamed his behavior on drug and alcohol use. Moreover, her three affidavits contradicted the statements contained in the presentence investigation report. Therefore, appellant has failed to demonstrate that any such information regarding the victim's recantation was available prior to appellant's plea. Hence, it is our position that there was no *Brady* violation.

{¶27} Lastly, appellant alleges that the trial court erred in denying his petition for postconviction relief without a hearing.

{¶28} R.C. 2953.21(C) states that “[b]efore granting a hearing [on a petition], the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript. The court reporter’s transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.”

{¶29} A criminal defendant is not automatically entitled to a hearing on his petition for postconviction relief. *State v. Kinley* (1999), 136 Ohio App.3d 1, 7. A hearing will be granted only if there are substantive grounds for relief set forth in the

petition, or contained in the supporting affidavits, files and record of the case. *Id.* An alleged constitutional error that could have been raised and fully litigated on direct appeal is *res judicata* and cannot be litigated in the postconviction proceeding. *Id.* However, if the alleged error is supported by evidence outside the record and could not have been fully litigated on direct appeal, it is not subject to *res judicata*. *Id.* A trial court may dismiss a petition for postconviction relief without a hearing if the petition and its supporting evidential documents fail to establish any substantive grounds for relief. *State v. Perry* (1967), 10 Ohio St.2d 175, 178.

{¶30} Furthermore, not all affidavits accompanying a postconviction relief petition entitle one to an evidential hearing, even assuming the truthfulness of their content. *Calhoun*, 86 Ohio St.3d at 284. Thus, where a petitioner relies upon affidavit testimony as the basis for being entitled to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of showing a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential. *Id.*, citing *Perry*, *supra*.

{¶31} The Supreme Court addressed how a trial court should assess the credibility of affidavits filed in support of petitions for postconviction relief and held:

{¶32} “In reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact.” *Calhoun*, *supra*, at paragraph one of the syllabus. See, also *State v. Christley* (May 19, 2000), 11th Dist. No. 99-P-0022, at 4, 2000 WL 655448.

{¶33} In the case sub judice, from the record before us, it appears as though the prosecution and the defense had the same information regarding the victim's reluctance to proceed with the prosecution of appellant. Further, the trial court determined that the victim's affidavits were not credible because she wanted to marry appellant. Her affidavits contradicted the statements she made for the presentence investigation report and at the sentencing hearing. We conclude that the trial court did not err in denying appellant's petition for postconviction relief without a hearing due to the absence of sufficient operative facts to establish grounds for relief.

{¶34} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.