

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

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2003-T-0162</b>
ALICE JOYCE FABIAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 02 CR 201.

Judgment: Affirmed.

*Dennis Watkins*, Trumbull County Prosecutor and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

*John B. Juhasz*, 7330 Market Street, Youngstown, OH 44512 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On November 6, 2002, petitioner, Alice Joy Fabian (“Fabian”), entered a plea of guilty to an amended charge of aggravated trafficking of drugs, a felony of the third degree.<sup>1</sup> Fabian was fully advised of her constitutional rights at the plea hearing. Fabian was additionally advised of the sentencing range associated with her plea which

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1. Appellant was initially charged with Aggravated Trafficking in drugs, a felony of the second degree, in violation of R.C. 2925.03(A)(1) and/or (2) & (C)(1)(d).

included a mandatory prison sentence. During the court's Crim.R. 11 colloquy, Fabian stated she understood the plea agreement and she did not have any questions regarding her plea. Fabian further stated that she had freely and voluntarily signed the agreement without threats or promises of any kind and averred that she was satisfied with the performance of her attorney.

{¶2} On January 13, 2003, after the completion of a pre-sentence investigation, Fabian again appeared before the court for sentencing. The court sentenced Fabian to a three year term of incarceration. Fabian immediately made an oral motion withdraw her guilty plea. The court advised Fabian that such motions may be liberally granted; however, the court noted Fabian would need more justification than her dissatisfaction with her sentence. Neither Fabian nor her attorney offered a justification and Fabian's oral motion was denied. Fabian appealed the lower court's decision on January 16, 2003 without listing the "probable issue(s) for review." Instead, Fabian checked the appeal form indicating "Crim.R. 11 challenges" and "Challenges to sentencing to revocation of probation or failure to grant probation." This court dismissed Fabian's appeal on April 28, 2003 for failure to prosecute.

{¶3} On August 25, 2003, Fabian filed her Petition to Vacate Conviction and Sentence pursuant to R.C. 2953.21. Attached to Fabian's petition was an affidavit authored by Attorney Dunlap, her defense counsel at the trial level. In his affidavit, Attorney Dunlap communicated his belief that Fabian's plea was not entered voluntarily. On October 8, 2003, the trial court denied Fabian's petition without a hearing. Fabian now appeals the trial court's denial of her petition for postconviction relief without a hearing.

{¶4} In her sole assignment of error, Fabian alleges:

{¶5} “The trial court erred in denying appellant an evidentiary hearing on her petition for post-conviction relief, T.d. 43, thus depriving appellant of liberties secured by the U.S. Const. amend. XIV, and Ohio Const. art. I, sections 1, 2, 10, and 16, including meaningful access to the courts of this state.”

{¶6} Initially, Fabian argues that she raised sufficient operative facts alleging a constitutional violation and was thus entitled to a hearing on her petition. We disagree.

{¶7} “[A] criminal defendant seeking to challenge [her] conviction through a petition for postconviction relief is not automatically entitled to a hearing.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282. R.C. 2953.21(C) states: “Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief.”

{¶8} In *Calhoun*, supra, the Court held that a trial court should give due deference to a petitioner’s affidavits sworn under oath, but may, in its sound discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact. *Id.* at 284. Further:

{¶9} “\*\*\* not all affidavits accompanying a postconviction relief petition demonstrate entitlement to an evidentiary hearing, even assuming the truthfulness of their contents. Thus, where a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential.” *Id.* at 282.

{¶10} Here, the petition on which this appeal is premised alleged that Fabian was offered an opportunity to plead to the charge for which she was indicted. Fabian indicated to her counsel, Attorney Dunlap, she did not want to enter into the agreement. Fabian and Dunlap were excused from the courtroom to discuss whether the plea agreement was in Fabian's best interests. After discussing the matter, Attorney Dunlap moved to continue the case so Fabian might seek a second opinion from a separate attorney; Attorney Dunlap expressed reservations as to whether Fabian could knowingly, voluntarily, and intelligently enter the plea. The trial court denied the continuance stating: "[w]e are either going to do a plea or go to trial."

{¶11} In her petition, Fabian alleges that Dunlap "had reservations about [p]etitioner's entry into the plea agreement, given [p]etitioner's mental state at the time \*\*\*." Through an affidavit attached to Fabian's petition, Attorney Dunlap testified stated that Fabian did not want to enter into the plea agreement. According to Dunlap's "professional opinion," Fabian's plea was not voluntary "[g]iven the pressure which [Fabian] felt" in conjunction with "the trial court's refusal to grant a continuance even for two weeks without withdrawing the plea bargain."

{¶12} In Fabian's view Attorney Dunlap rendered ineffective assistance of counsel as he failed to alert the trial court that petitioner did not enter into the underlying plea knowingly, voluntarily, and intelligently. Applying the foregoing facts and argument to the standard set forth supra, we hold the trial court did not err in dismissing the instant petition without a hearing as petitioner alleges no substantive grounds for relief.

{¶13} After the continuance was denied, Fabian and her counsel had a thirty-five minute conference as to the ramifications of accepting the state's plea offer or going to

trial. After these discussions, Attorney Dunlap stated, on the record, that Fabian desired to accept the plea. The court began its standard Crim.R. 11 plea colloquy, during which the following exchange occurred:

{¶14} “The Court: Okay, now, you understand that nobody has to plead to any charge. You have the right to go forward with a trial and have the State of Ohio prove its case by proof beyond a reasonable doubt. Do you understand that?”

{¶15} “The Defendant: Yes.”

{¶16} Fabian stated she had reviewed the plea agreement with Attorney Dunlap, understood it, and had no questions about it. Moreover, Fabian confirmed that she signed the agreement freely and voluntarily, without compulsory threats or promises. Fabian stated she was satisfied with Mr. Dunlap’s representation. The court then queried:

{¶17} “The Court: Mr. Dunlap, are you satisfied that your client understands what is contained in this document and the consequences of waiving her Constitutional Rights?”

{¶18} “Atty. Dunlap: Yes sir.”

{¶19} Neither Fabian nor her counsel expressed any hesitation or reservations concerning her plea. Further, we find no irregularities in the plea colloquy during which the court accepted Fabian’s plea of guilty. In short, the record of the plea hearing reflects that Fabian knowingly, voluntarily, and intelligently entered a plea of guilty to the underlying charges.

{¶20} That said, the representations within Fabian’s petition and Attorney Dunlap’s affidavit contradict the representations set forth at the plea hearing. As a

result, the trial judge was required to adjudicate the credibility of the petition and affidavit in relation to the extant record of the plea hearings before denying the petition without a hearing. *Calhoun*, supra, at 284.

{¶21} It bears noting that the plea colloquy between the trial court and defendant is substantively meaningful. *State v. Kapper* (1983), 5 Ohio St.3d 36, 38. Although compliance with Crim.R. 11 does not completely secure a guilty plea from collateral attack, a record demonstrating compliance with Crim.R. 11 has greater persuasive force than the record of a “signed statement.” *Id.* Thus:

{¶22} “a petition for post-conviction relief is subject to dismissal without a hearing when the record, including the dialogue conducted between the court and the defendant pursuant to Crim.R. 11, indicates that the petitioner is not entitled to relief and that the petitioner failed to submit evidentiary documents containing sufficient operative facts to demonstrate that the guilty plea was coerced or induced by false promises.” *Id.*

{¶23} Both the petition and affidavit frame the contentions upon which Fabian’s claim is premised in conclusory terms. Attorney Dunlap states that Fabian’s plea was involuntary because she was under “pressure.” Fabian’s argument in support of her claim for relief indicates her “mental state” was somehow questionable. Neither of these abstract assertions provide any substantive insight into how Fabian’s decision to plead guilty was involuntary. In our view, the petition and affidavit fail to set forth operative facts to demonstrate the guilty plea was involuntary. Fabian did not meet her initial burden and therefore the lower court did not err in denying her an evidentiary hearing.

{¶24} Further, a claim for ineffective assistance of counsel requires a petitioner to show that her trial counsel was deficient in some aspect of his representation and this deficiency prejudiced her defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. In effect, a petitioner must demonstrate that counsel's errors were so serious that she was deprived of a fair trial, i.e., a trial whose result is reliable. *Calhoun*, supra, at 289. A petitioner has the burden of proof as a properly licensed attorney is presumed competent. *Id.*

{¶25} Fabian has not submitted evidentiary documents containing sufficient operative facts to demonstrate a deficiency in Attorney Dunlap's performance or prejudice resulting therefrom. Fabian has simply made sweeping conclusory statements which, as a matter of law, do not meet the requirements for an evidentiary hearing. *State v. Pankey* (1981), 68 Ohio St.2d 58, 59. As Fabian has failed to set forth sufficient operative facts demonstrating a constitutional violation, the trial court did not err in denying her petition without a hearing.

{¶26} Fabian next takes issue with the trial court's determination that her contentions are barred by the doctrine of res judicata. Fabian contends that that her claims are not barred by res judicata because the specific violations were not and could not have been raised on direct appeal.

{¶27} In its judgment entry, the lower court concluded that Fabian: (1) could have raised her claims during her direct appeal and (2) presented no substantive evidence to avoid dismissal by operation of the doctrine of res judicata. Fabian contends that the evidence upon which she premises her claims was unavailable at the

time of her direct appeal and thus could not have been raised during her direct appeal. We disagree.

{¶28} The doctrine of res judicata precludes a defendant from raising, in a petition for postconviction relief, an ineffective assistance of counsel claim as well as any other claims that could have been raised on direct appeal. *State v. Jenkins* (1987), 42 Ohio App.3d 97, 100. However, the presentation of competent, relevant, and material evidence de hors the record defeats the application of res judicata in a claim for post conviction relief. See, *State v. Schlee* (Dec. 31, 1998), 11th Dist. No. 97-L-121, 1998 Ohio App. LEXIS 6363, at 5. To meet this standard, the evidence de hors the record must demonstrate the petitioner's claims could not have been raised on direct appeal based upon the information in the original record. See, e.g., *State v. Eley* (Nov. 6, 2001), 7th Dist. No. 99 CA 109, 2001 Ohio App. LEXIS 5225, at 6.

{¶29} In the current matter, Fabian entered a plea of guilty which was accepted by the court after a proper Crim.R. 11 inquiry. Immediately after the court imposed sentence, Fabian orally moved to withdraw her plea. The following exchange took place:

{¶30} "The Defendant: I withdraw my plea.

{¶31} "The Court: That can be done relatively liberally. If you can give a valid reason for withdrawal of the plea, I can do that.

{¶32} "Atty. Dunlap: Well - -

{¶33} "The Court: And, generally, the rule isn't because she doesn't like the sentence. It's got to be a little bit more than that.

{¶34} “Atty. Dunlap: Well, if the Court would remember that at the point in time that she did enter the plea, she was - - there was some discrepancy at that point in time when she entered that plea she was given an order from the Court at that time, either plea or go to trial. And that was her position - -

{¶35} “The Court: Well, that’s the way the system works. You either plea or you go to trial. I don’t think - - that’s not unique to this case. It’s in every single case.”

{¶36} Fabian’s claim could have been raised at trial or direct appeal. Fabian and/or her counsel could have notified the trial court at the time of the plea that she was not pleading voluntarily. Moreover, after notifying the court of her desire to withdraw the plea, Fabian or her counsel could have set forth a justification for withdrawing her plea in an attempt to meet the “manifest injustice” standard set forth in Crim.R. 32.1. Neither Fabian nor her counsel did so. Even more, Fabian had the option to appeal the trial court’s ruling. However, her notice of appeal did not address the actual denial of her oral Crim.R. 32.1 motion and, in any event, the appeal was dismissed for failure to prosecute.

{¶37} In our view, Fabian fails to provide sufficient evidence de hors the record demonstrating her claims could not have been raised on direct appeal based upon information within the original record: First, in her petition for postconviction relief, Fabian claims her trial counsel had reservations regarding her plea of guilty. Fabian alleges that, given her “mental state” at the time, she was incapable of voluntarily entering the plea. Attorney Dunlap’s reservations were duly noted by the court; in response, the court permitted Attorney Dunlap to discuss the plea agreement further with Fabian; the court advised Attorney Dunlap that if Fabian did not want to plea, the

parties would commence with trial. After a thirty five minute discussion with her counsel, Fabian agreed to plead guilty to the charge. At no time was Fabian's mental state in question nor was there any evidence of compulsory tactics on the part of the court, state, or defense counsel.

{¶38} Moreover, in his affidavit, Attorney Dunlap testified that the "pressure" of pleading guilty rendered Fabian's plea involuntary. Attorney Dunlap does not elaborate on the nature of the pressure which was allegedly brought to bear on Fabian. It seems the pressure to which Attorney Dunlap refers was that of the decision to plead or go to trial. As the lower court noted, all defendants with the option of entering a plea of guilty experience that sort of "pressure." The court was aware of Attorney Dunlap's reservations and aware that petitioner was not entirely pleased with the result of the plea into which she entered. However, these facts do not render Fabian's plea involuntary. Furthermore, because the court was aware of these facts, it is unclear whether the evidence set forth in Attorney Dunlap's affidavit is evidence de hors the record.

{¶39} However, even if we were to conclude that the evidence alleged in Attorney Dunlap's affidavit was outside the record, the evidence does not materially advance Fabian's claim that there has been a denial or infringement of her constitutional rights. See, *Schlee*, at 5. Attorney Dunlap's general allegations about the pressure experienced by Fabian are vague. The record indicates that Fabian knowingly, voluntarily, and intelligently entered her plea of guilty. Attorney Dunlap's post hoc conclusion that the pressure of making that choice rendered the plea involuntary is unsupported and in direct conflict with the existing record of the

proceedings. In our view, the Dunlap affidavit fails to provide evidence which materially advances Fabian's claim. Thus, Fabian's theory of relief is barred by res judicata.

{¶40} To summarize: we hold the trial court properly denied Fabian's petition for post conviction relief without a hearing as she failed to allege sufficient operative facts rising to the level of a constitutional violation. We further hold that a hearing, under the circumstances, would have been moot as Fabian's claim for postconviction relief is barred by the doctrine of res judicata. For the foregoing reasons, Fabian's sole assignment of error is overruled and the judgment of the Trumbull County Court of Common Pleas is therefore affirmed.

DONALD R. FORD, P.J.,

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