[Cite as *State v. Krug*, 2009-Ohio-6232.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-038**
- vs -	:	
JON P. KRUG,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CR 000008.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Jon P. Krug, pro se, PID: 544-929, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Jon P. Krug appeals from the judgment of the Lake County Court of Common Pleas denying his postconviction petition. Our review of the record indicates the trial court did not abuse its discretion in denying Mr. Krug's petition, and we therefore affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} This criminal matter stemmed from Mr. Krug's involvement in a bar fight where he stabbed two individuals with a knife and severely injured them. After trial, the jury found him guilty of four counts of felonious assault, each with a repeat violent offender specification, and one count of carrying concealed weapons. Mr. Krug was sentenced to a total of 37 years and six months of imprisonment for his convictions. He appealed his convictions and sentence and we affirmed, in *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815.

{¶4} After his direct appeal, on January 27, 2009, Mr. Krug filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence." His postconviction petition raised two claims. First, he claimed he did not receive a fair trial because of pretrial publicity. In support of this claim, he attached an article from a local newspaper and two pages from the voir dire portion of the trial transcript. Second, he contended his trial counsel did not fully investigate and interview two potential witnesses. For this claim, he presented his own unsworn statement alleging his trial counsel should have fully questioned two potential witnesses, and he referred in his petition to an exhibit which he failed to attach.

{¶5} The trial court denied the petition, and Mr. Krug filed an appeal with this court on March 12, 2009. On May 8, 2009, he filed the appellant's brief with this court, to which he attached a "Motion for Leave to Add Additional Claims to this Post Conviction Petition." In that motion, he alleged the public defender responsible for reviewing his postconviction petition did not return certain "evidentiary documents" to him until January 25, 2009, days after he hastily mailed his petition to the clerk on January 21, 2009 to meet the February 2, 2009 filing deadline for his petition. He

claimed the public defender's delay hindered his ability to raise all available issues in his pro se petition.

{¶6} On June 3, 2009, this court denied his "Motion for Leave to Add Additional Claims," noting that we do not have the authority to consider his request for leave to amend his postconviction petition. On July 29, 2009, he filed a "Motion for Leave to Remand Petitioner['s] Pro-Se Petition Back to Trial Court," asking this court to remand the case to the trial court to allow him to amend his petition. The majority of this panel denied his request for remand, stating that it would be inappropriate for this court to remand an appeal merely to allow an appellant to raise additional issues for appeal.

{¶7} We now consider the assignments of error presented by Mr. Krug in his appeal from the trial court's denial of his postconviction petition. They state:

{¶8} "[1.] Ineffective assistance of trial counsel when he failed to ensure a fair and impartial jury trial as guaranteed under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution and section 10, Article 1 of the Ohio Constitution.

{¶9} "[2.] Ineffective assistance of trial counsel when he failed to conduct a reasonable investigation to make informed decisions about who's [sic] testimony to proffer at trial, in violation of the defendant-petitioner['s] rights to due process, a fair trial, and to present witnesses as guaranteed under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution and section 10, Article 1 of the Ohio Constitution.

{¶10} "[3.] Ineffective assistance of trial counsel when he failed to obtain evidence to proffer at trial in violation of the defendant-petitioner['s] rights to due process and a fair trial as guaranteed under the Fifth, Sixth, and Fourteenth

Amendment of the United States Constitution and section 10, Article 1 of the Ohio Constitution.

{¶11} "[4.] Ineffective assistance of trial counsel when he failed to consult an expert to determine depth and angle of contraversial [sic] injuries in violation of the defendant-petitioner['s] rights to due process, a fair trial, and present witnesses as guaranteed under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution and section 10, Article 1 of the Ohio Constitution."

{¶12} **Standard of Review**

{¶13} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶58. "An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} A petition for postconviction relief does not provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶23. "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* *** on an appeal from that judgment." (Emphasis sic.) *State v. Saxon*, 109 Ohio St.3d 176,

2006-Ohio-1245, ¶17, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

{¶15} In particular, the doctrine of res judicata precludes a defendant from raising, in a petition for postconviction relief, an ineffective assistance of counsel claim. *State v. Delmonico*, 11th Dist. No. 2004-A-0033, 2005-Ohio-2882, ¶14, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113. We recognize, however, a claim is not barred by operation of res judicata to the extent "a petitioner sets forth competent, relevant, and material evidence dehors the record." *Delmonico* at ¶14, citing *State v. Burgess*, 11th Dist. No. 2003-L-069, 2004-Ohio-4395, ¶11.

{¶16} An exception to res judicata exists when a defendant presents "new, competent, relevant and material evidence dehors the record." *State v. Jones*, 11th Dist. No. 2001-A-0072, 2002-Ohio-6914, ¶17, quoting *State v. Redd* (Aug. 31, 2001), 6th Dist. No. L-00-1148, 2001 Ohio App. LEXIS 3884, *1. "The outside evidence must meet a threshold level of cogency." Id., citing *State v. Lynch* (Dec. 21, 2001), 1st Dist. No. C-010209, 2001 Ohio App. LEXIS 5765. Then new evidence must be competent, relevant and material to the petitioner's claim, and must be more than marginally significant, and advance the claim "beyond mere hypothesis and a desire for further discovery." Id. at ¶18 (citations omitted). Furthermore, "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 ¶19 (citations omitted). "[T]o overcome the res judicata bar, it is not sufficient for the petitioner to simply present evidence outside the record, he must also demonstrate that the evidence was not available at the time of his trial, or at the time of

his direct appeal." Id. "Examples of evidence that dehors the record and not in existence or available at the time of trial that would overcome res judicata would include: evidence withheld by the state; an affidavit by a witness sworn to after the trial in which the witness states that his testimony at trial was false; and, a DNA finding in cases that were heard before the use of DNA evidence." Id. at fn. 2.

{¶17} Here, the documents Mr. Krug attached to his petition before the trial court consisted of (1) an article from the local newspaper regarding the incident; (2) two pages from the voir dire portion of the trial transcript; (3) a copy of a summons on a previous, unrelated indictment; and (4) his own unsworn statement alleging trial counsel's failure to fully investigate two witnesses.

{¶18} Mr. Krug attached the first three items to show he was prejudiced by pretrial publicity and his trial counsel did not ensure he received a fair trial. The summons indicates his arraignment for that unrelated case was scheduled on September 2, 2005; the pages of the trial transcription shows a juror stated he served as a grand juror in the summer of 2005; and the newspaper article simply reported the bar incident and Mr. Krug's involvment in it. Mr. Krug attempted to establish from these attachments that the juror was somehow involved in his 2005 indictment and therefore was biased, and that the pretrial publicity from the newspaper article prejudiced the jury.

{¶19} After review, we agree with the trial court that Mr. Krug did not present any competent, credible evidence to show that the jury was prejudiced by any pretrial publicity or that any juror had any involvement in his previous indictment. The trial court noted it conducted an extensive voir dire to ensure the selected jurors were not

prejudiced by any pretrial publicity and further that the cited transcript did not evidence hostility of the jury panel toward Mr. Krug. Our review does not indicate otherwise.

{¶20} More importantly, the claim of any perceived prejudice by pretrial publicity is barred by res judicata, because all three documents submitted were in existence at the time of trial or direct appeal. They do not constitute new, competent, relevant, and material evidence warranting consideration by the trial court at the postconviction proceedings.

{¶21} The last item of "evidence" submitted with his postconviction petition consists of Mr. Krug's own unsworn statement, in which he alleged his trial counsel's performance was deficient because counsel failed to question two potential witnesses thoroughly before trial. Mr. Krug asserts that a thorough interview of the witnesses would have better prepared counsel for his cross-examination of the state's witnesses. Without any supporting document,[1] Mr. Krug made a blanket statement that if these "favorable" witnesses were fully questioned before trial, the outcome of the trial would have been different.

{¶22} Mr. Krug's allegation that evidence from these witnesses would have been favorable and would have changed the outcome of the trial is mere conjecture and simply reflects a desire for further discovery. Such an unsubstantiated allegation does not constitute new, competent, relevant, and material evidence. He also fails to demonstrate why any evidence regarding these witnesses was not available at trial or at

1. Mr. Krug referred to an "Exhibit B" in his petition for his allegation that these two witnesses should have been more thoroughly investigated by his trial counsel. The document, however, was not attached to his petition. On appeal, he attached this document to his merit brief, which consisted of an investigator's interview of an individual present at the bar fight. Even if the interview had revealed any potential witnesses who may provide evidence favorable to the defense, the document was not provided to the trial court and is, therefore, not part of the record.

the time of his direct appeal. Therefore, his claim of trial counsel's deficient performance is barred by res judicata.

{¶23} The trial court did not abuse its discretion in denying Mr. Krug's postconviction petition. We overrule all four assignments of error raised in this appeal and affirm the judgment of the Lake County Court of Common Pleas.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.