

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-249
v.	:	(C.P.C. No. 08CR02-1098)
	:	
John Q. Graggs,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 23, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

John Q. Graggs, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, John Q. Graggs ("appellant"), pro se, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for postconviction relief. For the following reasons, we affirm the trial court's judgment.

{¶2} This case originated on February 15, 2008, when appellant was indicted on one count of aggravated robbery, one count of kidnapping, one count of murder, and two

counts of aggravated murder, with all counts carrying firearm specifications. The charges stemmed from the robbery and shooting death of Fred Brock ("Brock") on January 8, 2008.

{¶3} The following relevant facts were adduced at the jury trial. Marcus Jones ("Jones") leased an apartment at 3566 East Main Street from which he and his friend, Jessie Lanier ("Lanier"), ran a drug trafficking operation, selling bricks of cocaine for approximately \$28,000 each. Around January 5, 2008, Jones hired Brock, a friend of Lanier's, to help guard the cocaine and money kept in the apartment.

{¶4} On the evening of January 8, 2008, Jones and his cousin left Brock and Lanier in the apartment while they attended a local high school basketball game. Lanier later joined the two men at the game. After the game, which ended at approximately 8:30 p.m., Jones and his cousin drove to Jones' father's house. Around 9:00 p.m., Jones received a call from Lanier telling him to return to his apartment. When Jones and his cousin arrived at the apartment at approximately 9:15 p.m., Lanier was not there. However, Lanier and a girl arrived about two minutes later. The three men entered the apartment and found Brock lying face-down on the floor inside the apartment; he had been handcuffed and fatally shot in the back. The apartment had been ransacked; \$35,000 in cash and Lanier's revolver were missing.

{¶5} For the next 15 minutes or so, Jones and Lanier cleared the apartment of items related to their drug trafficking operation, including \$17,000 in cash hidden under the mattress in the bedroom. Jones and Lanier placed the items in Lanier's car, which he then drove away. Thereafter, Jones and his cousin went to a nearby recreation center and called Jones' father. Around 9:45 p.m., Jones' father met the two men at the

recreation center and urged them to call the police. Jones and his cousin returned to the apartment and called 911 at approximately 9:52 p.m.

{¶6} Police responded to the 911 call at approximately 9:54 p.m. Evidence collected at the scene included the torn-off fingertip of a green latex glove found underneath Brock's body; the glove fingertip contained appellant's DNA. A revolver and a green latex glove similar to the glove fingertip found at the scene were recovered from appellant's residence. The revolver was later determined not to be the one that had fired any of the bullets recovered from the crime scene.

{¶7} As of January 8, 2008, appellant was employed full-time earning \$16.36 per hour. He lived in a separate household from his wife and had difficulty paying his bills, including his car payment. However, on January 9, 2008, the day after Brock's murder, appellant spent over \$5,200 in cash at a local jewelry store. On January 14, 2008, he made a \$2,900 payment on his car loan.

{¶8} Appellant was arrested on February 6, 2008. He told police that he knew Brock, but had not seen him in ten years. He also stated that he had never been to Jones' apartment and did not even know where it was located.

{¶9} At trial, the parties stipulated that on January 8, 2008, appellant made three calls between 7:42 and 7:43 p.m. from his cell phone in the vicinity of a cell tower one-half mile from Jones' apartment and made two calls on his cell phone between 8:54 and 8:57 p.m. in the vicinity of a cell tower near his home.

{¶10} At the close of its case, appellee, state of Ohio, dismissed the murder count. Appellant presented no witnesses or evidence. Following deliberations, the jury

found appellant guilty of all the remaining counts, but not guilty of the firearm specifications.

{¶11} On February 5, 2009, appellant filed a motion for new trial, pursuant to Crim.R. 33, arguing, inter alia, jury misconduct. Specifically, appellant alleged that during the deliberation phase of the trial, appellant's wife overheard certain members of the jury discussing the case outside the presence of the other jurors.

{¶12} On February 23, 2009, the trial court denied appellant's motion for new trial. Regarding the alleged jury misconduct, the court noted that appellant failed to support his accusation with an affidavit from his wife, and, in any event, the jury was presumed to have followed the trial court's instruction to deliberate only behind closed doors with all 12 jurors being present.

{¶13} Following a February 26, 2009 sentencing hearing, the trial court imposed an aggregate sentence of life imprisonment without parole. The trial court filed its final judgment entry on March 4, 2009.

{¶14} Appellant appealed his conviction and sentence on April 3, 2009. Appellant argued that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, that the trial court improperly instructed the jury on accomplice liability, and that trial counsel was ineffective in failing to object to the testimony of the BCI employee who tested the DNA on the latex glove fingertip found near Brock's body and in failing to object to the trial court's jury instruction on accomplice liability. This court overruled all of appellant's assignments of error and affirmed. See *State v. Graggs*, 10th Dist. No. 09AP-339, 2009-Ohio-5975.

{¶15} Meanwhile, on November 10, 2009, appellant filed in the trial court a petition for postconviction relief. In its February 16, 2010 entry, the trial court dismissed the petition without a hearing, finding that appellant's claims were both barred by res judicata and were substantively without merit.

{¶16} On appeal, appellant asserts one assignment of error, as follows:

THE TRIAL COURT ERRED WHEN IT DENIED
APPELLANT'S PETITION FOR POST CONVICTION RELIEF
WITHOUT FRIST [sic] HOLDING A HEARING.

{¶17} The right to seek postconviction relief arises from R.C. 2953.21(A)(1)(a), which provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's 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.

{¶18} The postconviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. It is a means to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233. A petitioner does not have a constitutional right of postconviction review. *Steffen*. Rather, postconviction relief is a narrow remedy that affords a petitioner no rights beyond those granted by statute.

State v. Calhoun, 86 Ohio St.3d 279, 281, 1999-Ohio-102. A postconviction petition does not provide a petitioner a second opportunity to litigate his or her conviction. *Murphy*.

{¶19} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun* at 282. The trial court "shall determine whether there are substantive grounds for relief" before granting a hearing on a postconviction petition. R.C. 2953.21(C). Pursuant to R.C. 2953.21(C), a trial court properly denies a postconviction petition without a hearing if the petition, supporting documents, and court record "do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun* at 291.

{¶20} A trial court may also dismiss a petition seeking postconviction relief without holding a hearing if it determines that the doctrine of res judicata applies. *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 1996-Ohio-337. Res judicata bars a defendant who was represented by counsel from raising an issue in a petition seeking postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.* at syllabus. In order to avoid dismissal on res judicata grounds, the evidence supporting the petition must be competent, relevant, and material evidence outside the trial court record. *State v. Raver*, 10th Dist. No. 05AP-374, 2006-Ohio-645, ¶11.

{¶21} A trial court's decision to deny a postconviction without a hearing is reviewed under the abuse of discretion standard. *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶14, citing *Calhoun* at 284. An abuse of discretion connotes more than an error of law or judgment; it implies a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶22} In his petition for postconviction relief, appellant argued that his conviction and sentence should be vacated because his trial counsel was ineffective (1) in stipulating to cell phone records without first consulting with him, and in failing to include in the stipulation, or otherwise submit, exculpatory cell phone records and testimony pertaining thereto; (2) in failing to prepare and attach to appellant's motion for new trial an affidavit from his wife supporting the allegation of juror misconduct; and (3) in failing to call Tierra Davis ("Davis") to testify.

{¶23} Appellant's claims are all barred by res judicata. As to his first claim, the trial court record shows that appellant's cell phone records, and the stipulation pertaining to those records, were at issue at trial. In seeking admission of its exhibit containing the stipulation regarding appellant's cell phone records, the prosecutor asserted that he and defense counsel had agreed to the stipulation in lieu of introducing complicated cell-phone-tower testimony. In addition, when the jury asked a question about the stipulation during its deliberations, defense counsel consulted with appellant about the proposed answer. Further, appellant asserts in his petition that prior to trial, he and defense counsel "went over petitioner's cell phone records for the date of January 8, 2008" and discussed issuing a subpoena to a "cell phone tech." (Appellant's petition for postconviction relief, 3.) Therefore, any claim of error premised upon either the stipulation or whether defense counsel should have included in the stipulation, or otherwise submitted, additional cell phone evidence either was, or should have been, known to appellant and could have been raised at trial or on direct appeal.

{¶24} Regarding his second claim, the trial court record establishes that appellant was well aware of the alleged juror misconduct at the time of trial, as he raised it as one

of his grounds in support of his motion for new trial. Thus, any claim of error pertaining to trial counsel's alleged failure to obtain an affidavit from his wife regarding the allegation of juror misconduct either was, or should have been, known to appellant and could have been raised on direct appeal.

{¶25} Finally, as to his third claim, the trial court record demonstrates that Davis was named as a potential witness, that a subpoena was issued, and that she did not testify at trial. Thus, any claim of error based upon whether Davis should have testified either was, or should have been, known to appellant and could have been raised at trial or on direct appeal. Accordingly, as the issues appellant raises in his petition could have been raised at trial or in his direct appeal of right, we find that res judicata bars further consideration of these issues.

{¶26} Regardless of the doctrine of res judicata, appellant's claims do not constitute ineffective assistance of counsel. "A defendant does not state a claim for ineffective assistance of counsel unless his attorney acted unreasonably given the facts of the case, and the unreasonable conduct was prejudicial to the defense." *State v. Mills* (1992), 62 Ohio St.3d 357, 370, citing *Strickland v. Washington* (1984), 466 U.S. 668, 690-92, 104 S.Ct. 2052, 2066-67. A reviewing court examines trial counsel's performance with great deference, and must refrain from second-guessing counsel's strategic decisions. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

{¶27} Regarding his first claim, appellant submitted with his petition several unauthenticated documents purportedly establishing his cell phone usage on the night of Brock's murder. Appellant contends that submission of this additional evidence, by

stipulation or live testimony, would have established that he could not have been at the scene of Brock's murder. However, other evidence submitted at trial belies appellant's assertion. As noted above, a piece of torn latex glove containing appellant's DNA was found beneath Brock's body despite appellant telling police that he had never been to Jones' apartment. Thus, even assuming that trial counsel should have submitted the additional cell phone evidence, the failure to do so was not prejudicial to appellant.

{¶28} As to his second claim, appellant submitted with his petition an affidavit from his wife, Kim Graggs ("Graggs"), purportedly establishing that defense counsel failed to timely secure from her an affidavit in support of his claim of juror misconduct. We first note that the affidavit is not properly notarized. Moreover, even if the affidavit were properly notarized, it is still deficient to establish a claim of juror misconduct. Graggs states that she overheard a conversation between four jurors during lunch break on January 22, 2009, the day the verdicts were rendered. However, she fails to affirmatively state that these jurors were seated in appellant's case, fails to specify where she heard the alleged conversation, and fails to disclose the substance of the conversation. The failure to provide specific information in the affidavit is fatal to appellant's claim of juror misconduct. Appellant cannot establish that defense counsel was ineffective in failing to attach Graggs' affidavit to his new trial motion when that affidavit is devoid of specific facts that would support his claim of juror misconduct.

{¶29} With regard to his final claim, appellant submitted with his petition an affidavit from Davis stating what her testimony would have been had she been called to testify. Initially, we note that the affidavit is not properly notarized. Moreover, even if the affidavit were properly notarized, it is still deficient to establish that defense counsel was

ineffective in failing to call Davis to testify. In her affidavit, Davis states that in late 2007, appellant purchased a 2000 Harley Davidson motorcycle from her for the sum of \$6,500. She further avers that appellant made a \$2,000 payment on November 16, 2007, a \$2,000 payment on December 2, 2007, and a \$2,500 payment on December 29, 2007. Davis further states that on January 3, 2008, she refunded the \$6,500 to appellant because she could not find the title to the motorcycle. Appellant asserts that Davis' testimony could have explained how he was able to purchase expensive jewelry and make a large payment on his automobile loan shortly after Brock's murder.

{¶30} " 'Counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Matthews*, 10th Dist. No. 03AP-140, 2003-Ohio-6307, ¶31, quoting *State v. Treesh* (2001), 90 Ohio St.3d 460, 489. Appellant bears "the burden to show that the witness's testimony would have significantly assisted the defense and would have affected the outcome of the case." *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶54, citing *State v. Dennis*, 10th Dist. No. 04AP-595, 2005-Ohio-1530, ¶22.

{¶31} Appellant has failed to meet his burden. Even assuming Davis' testimony would have provided a plausible explanation as to how appellant was able to purchase the jewelry and pay his automobile loan, such testimony would not have affected the outcome of the trial. As noted above, a piece of torn latex glove containing appellant's DNA was found beneath Brock's body despite appellant telling police that he had never been to Jones' apartment. Thus, even assuming that trial counsel should have called Davis to testify, the failure to do so was not prejudicial to appellant.

{¶32} In sum, as appellant's claims are barred by the doctrine of res judicata, the trial court was not required to hold an evidentiary hearing before ruling on the petition and did not err in not doing so. *Szefcyk* at syllabus. Additionally, appellant's counsel did not provide ineffective assistance of counsel upon any of the grounds asserted in appellant's petition. We, therefore, conclude that the trial court did not abuse its discretion in denying appellant's petition for postconviction relief without a hearing. Appellant's assignment of error is overruled.

{¶33} Having overruled appellant's single assignment of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.
