

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23690
v.	:	T.C. NO. 2007CR2745
JOSEPH A. GOLDICK	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 17th day of September, 2010.

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JOSEPH A. GOLDICK, #568-055, Ross Correctional Institution, P. O. Box 7010, Chillicothe, Ohio 45601
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} Defendant-appellant Joseph A. Goldick, pro se, appeals a decision of the Montgomery County Court of Common Pleas, General Division, denying his petition for post-conviction relief made pursuant to R.C. 2953.21. Goldick filed his motion on April 28, 2009. On September 28, 2009, the trial court denied Goldick's

petition in a written decision. Goldick filed a timely notice of appeal with this Court on October 8, 2009.

I

{¶ 2} In the early morning hours of July 8, 2007, an intruder kicked down Gerald Skapik's locked apartment door at 2116 Bellefontaine Avenue in Dayton and beat him, breaking his dentures, smashing his nose and injuring his knee and ribs. Skapik, who had known Goldick for many years, identified him as the perpetrator. On September 25, 2007, Goldick was indicted by the Montgomery County Grand Jury on one count of aggravated burglary, a violation of R.C. 2911.11(A)(1), and one count of felonious assault, a violation of R.C. 2903.11(A)(1). He was sentenced to concurrent prison terms of ten years for the first count and eight years for the second count. We affirmed Goldick's conviction and sentence on direct appeal. *State v. Goldick*, Montgomery App. No. 22611, 2009-Ohio-2177 (hereinafter "*Goldick I*").

{¶ 3} In *Goldick I*, we affirmed Goldick's convictions for aggravated burglary and felonious assault. While *Goldick I* was still pending, however, Goldick filed a petition for post-conviction relief in which he argued that his speedy trial rights were violated when he was coerced into signing a time waiver in lieu of release on a conditional own recognizance (C.O.R.) bond. Goldick also argued that his trial counsel was ineffective for coercing him into signing a time waiver with the promise of being released on a C.O.R. bond. Lastly, Goldick asserted that his trial counsel was ineffective because he failed to use evidence of outstanding warrants in order to impeach the state's two corroborating witnesses.

{¶ 4} Goldick submitted three affidavits to support a claim that his trial counsel was ineffective, to wit: his own affidavit, his ex-wife's, and his mother's. These affidavits assert that Goldick agreed to sign off on a speedy trial time waiver after being promised by defense counsel that he would be granted a C.O.R. bond. The court, however did not grant Goldick a C.O.R. bond. Additionally, all three affidavits alleged that defense counsel was aware that both of the State's witnesses had outstanding warrants at the time they testified. Defense counsel did not impeach either witness with that evidence.

{¶ 5} Ultimately, the trial court denied Goldick's petition for post-conviction relief in a decision filed on September 28, 2009. It is from this judgment that Goldick now appeals.

II

{¶ 6} Because they are interrelated, Goldick's first and second assignments of error will be discussed together as follows:

{¶ 7} "THE APPELLANT'S SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN HE WAS COERCED INTO SIGNING A TIME WAIVER IN LIEU OF RELEASE ON A CONDITIONAL OWN RECOGNIZANCE BOND."

{¶ 8} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE COERCED THE APPELLANT INTO SIGNING A TIME WAIVER WITH THE PROMISE OF BEING RELEASED ON C.O.R. BOND."

{¶ 9} "[A]buse of discretion is the most prevalent standard [of review] for reviewing the dismissal of a petition for post-conviction relief without a hearing." *State v. Hicks*, Highland App. No. 09CA15, 2010-Ohio-89, at ¶10 (surveying other

Ohio courts). “Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 10} “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶ 11} Initially, we note that a post-conviction proceeding is not an appeal of a criminal conviction, but a collateral civil attack on a criminal judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. “Indeed, post-conviction state collateral review itself is not a constitutional right, even in capital cases.” *Id.*, citing *Murray v. Giarratano* (1989), 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1. Post-conviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal. *Id.* Accordingly, in a post-conviction proceeding, a convicted defendant has only the rights granted him by the legislature. *State v. Moore* (1994), 99 Ohio App.3d 748, 751.

{¶ 12} In his first assignment, Goldick asserts that his speedy trial rights were violated when he was coerced into waiving his right to speedy trial in return for release from jail on a C.O.R. bond. Specifically, Goldick argues that his defense

counsel informed him that the State agreed that if he would waive his right to speedy trial, he would be released on bond. After Goldick signed the time waiver, however, the court did not grant him a C.O.R. bond. Goldick asserts that the time waiver he was “coerced” into signing provided the State with a tactical advantage at trial in regards to certain witnesses who were called during trial.

{¶ 13} Upon review of the record, we cannot find that Goldick suffered any prejudice as a result of his decision to execute a waiver of his right to speedy trial. We note that pursuant to R.C. 2945.71(C)(2), a defendant against whom a felony is pending must be brought to trial within 270 days of his arrest. Goldick was arrested and indicted on September 25, 2007, and remained in jail after failing to post bond. R.C. 2945.71(E) states that every day that a defendant is held in jail in lieu of bail on the pending charge shall count as three days. In order to comply with the mandate set forth in R.C. 2945.71(C)(2) and (E), the State was required to bring Goldick to trial within 90 days of his arrest and detention, no later than December 24, 2007. It is undisputed that Goldick’s trial began on December 18, 2007, well within the 90 days set by statute. Regardless of Goldick’s reasons for signing the time waiver, the State chose not to utilize the waiver and brought him to trial within the statutory time limit. The State could not have possibly received a tactical advantage from a time waiver that it did not use. Thus, Goldick did not suffer any prejudice as a result of his decision to sign the waiver of his right to speedy trial.

{¶ 14} In his second assignment, Goldick contends that he received ineffective assistance of counsel when his trial counsel falsely promised a bond

reduction to him in order to induce the signing of a time waiver. Goldick contends this was an error by his trial attorney since the C.O.R. bond was never granted.

{¶ 15} “We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel’s conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel’s perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel.” (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 16} In order to decide the issue of ineffectiveness of Goldick’s counsel, we must first look at whether his counsel’s performance fell outside the range of professionally competent assistance. Goldick alleges that trial counsel falsely promised a bond reduction to him in order to induce the signing of a time waiver. Goldick also argues that trial counsel displayed an “unprofessionally deferential relationship” with the prosecutor when he said, “So where are you taking me out to

dinner?”

{¶ 17} “Generally, counsel’s performance falls below the norm if he fails to advocate the defendant’s cause, fails to keep the defendant informed of important developments, or fails to use the requisite level of skill necessary to ensure the integrity of the adversarial proceedings.” *State v. Peeples* (1994), 94 Ohio App. 3d 34. Upon review, we can find nothing on this record which establishes that counsel’s conduct violated any of these standards. Goldick’s three affidavits suggest that he was promised a C.O.R. bond in exchange for signing the time waiver. Self-serving assertions, standing alone, do not rise to the level of evidence required in post-conviction proceedings. *State v. Kapper* (1983), 5 Ohio St.3d 36. Moreover, defense attorneys and prosecutors meet in court rooms every day and may sometimes frequent the same social circles. Any suggestion that defense counsel asked the prosecutor “where he is taking him out to dinner,” although ill-advised and suggestive of a relationship which may raise a concern of an appearance of impropriety, without more, does not establish any conflict nor prejudice to Goldick.

{¶ 18} We conclude that the record does not establish that Goldick’s trial counsel’s performance was deficient. Goldick fails to establish that there is a reasonable probability that the outcome of the trial would have been different had his bond reduction been granted. Nor can we find that defense counsel’s personal remark to the prosecutor affected the outcome of the proceedings. Goldick’s speculation that his counsel was deficient is insufficient to meet the standard announced in *Strickland*.

{¶ 19} Goldick's first and second assignments of error are overruled.

III

{¶ 20} Goldick's third assignment of error is as follows:

{¶ 21} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO USE EVIDENCE TO IMPEACH THE STATE'S ONLY CORROBORATING WITNESSES."

{¶ 22} "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 * * * any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus.

{¶ 23} In regards to his third assignment, Goldick contends that he was provided ineffective assistance of counsel because his attorney failed to impeach the testimony of the State's witnesses with evidence that they both were subject to outstanding warrants for their arrest. The State's witnesses were identified as Beau and Cindy Webb. Their testimony bolstered that of Skapik who was the only witness who testified regarding Goldick's identity as his attacker. Goldick contends that disclosing the Webbs' warrants would have undercut their credibility and placed the outcome of the trial in question. He asserts this omission on the part of defense counsel falls below an objective standard of reasonable representation.

{¶ 24} A petition for post-conviction relief based on ineffective assistance of

counsel is subject to dismissal on *res judicata* grounds where the ineffective assistance of counsel claim could otherwise have been raised on direct appeal without resorting to evidence outside the record. *State v. Lentz* (1994), 70 Ohio St.3d 527, 529-30. We note that Goldick concentrates a significant portion of his argument for ineffective assistance on citations to the record. Defense counsel's tactical decisions regarding the use of witness impeachment evidence should have been raised on direct appeal. Thus, this claim is barred by *res judicata*.

{¶ 25} We further note that evidence of the outstanding warrants would have been inadmissible to impeach the State's witnesses at trial pursuant to Evid. R. 616 since the evidence did not establish bias or mental defect. Nor did Goldick seek to use the evidence to contradict the witnesses' testimony, but merely to impeach their characters. Evid. R. 616(A), (B), & (C).

{¶ 26} Significantly, even if this claim was not barred by *res judicata*, the scope of cross-examination is a matter of trial strategy and such debatable trial tactics do not establish ineffective assistance of counsel. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183. "Reviewing courts must indulge in a strong presumption that counsel's conduct was not improper, and reject post-trial scrutiny of an act or omission that was a matter of trial tactics merely because it failed to avoid a conviction." *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686. In this instance, there is no indication that Goldick's counsel's performance fell below an objective standard which prejudiced Goldick.

{¶ 27} Goldick's third assignment of error is overruled.

{¶ 28} All of Goldick's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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