

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-79
TIMOTHY SNYDER	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas Case Nos. 06-CR-494; 06-CR-553; 07-CR-363

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: April 13, 2010

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT  
Licking County Prosecutor  
20 S. Second Street, 4<sup>th</sup> Fl.  
Newark, Ohio 43055

DANIEL H. HUSTON 0042034  
Assistant Prosecuting Attorney  
(Counsel of Record)

For Defendant-Appellant:

TIMOTHY SNYDER  
Inmate Number 569-272  
Marion Correctional Institution  
P.O.Box 56  
Marion, Ohio 43302

*Delaney, J.*

{¶1} Defendant-Appellant appeals from the Licking County Court of Common Pleas Judgment Entry denying his post-conviction petition without a hearing.

{¶2} Appellant was indicted in three cases for theft offenses. Case 06-CR-494 involved three counts of theft against Mildred Stahl and James Bauer. Two of the counts concerned theft by deception from an elderly person, Ms. Stahl and Mr. Bauer. The third count concerned misuse of Mr. Bauer's credit card. Case number 07-CR-363 involved one count of theft by deception from an elderly person, James Bauer.

{¶3} Appellant was a contractor with mostly elderly clients. He met seventy-five year old Mildred Stahl in May, 2004. Appellant handled an insurance repair claim for the repair of the roof of Mr. and Mrs. Stahl's mobile home. After the death of Mrs. Stahl's husband, Appellant began assisting her with errands and small jobs around her home. They opened a joint savings account into which she deposited life insurance proceeds from the death of her husband. Appellant cut Mrs. Stahl's grass and drove her to appointments.

{¶4} During a one-year period between March, 2004, and November, 2005, Appellant received nearly \$56,000.00 from Mildred Stahl. The State presented evidence that Appellant received money for work he did not perform. Appellant contended that the majority of the money was given to him by Ms. Stahl as loans and gifts.

{¶5} Appellant met seventy-three year old James Bauer in 2004 when Appellant sealed the roof of Mr. Bauer's mobile home. Mr. Bauer hired Appellant to do other work on his home, including work on the exterior and interior. The interior work was to include new cabinets in the kitchen and wallpaper. During a two-year period

between May, 2004, and August, 2006, Appellant received nearly \$36,000.00 from Mr. Bauer. Appellant additionally utilized cash advances, purchases and a check to obtain an additional \$3,000.00 from Mr. Bauer's credit card. Appellant asserted that he received money as loans and cash advances for work he was going to do for Mr. Bauer. Appellant did not replace the storm door, or skirting around Mr. Bauer's trailer. Kitchen cabinets that Appellant had promised were produced only after Appellant was indicted. The cabinets finally provided to Mr. Bauer were not the correct size. After indictment, while on bond and with the specific term that he have no contact with Mr. Bauer, Appellant obtained \$3,400.00 from Mr. Bauer in the form of cash advances. Appellant did put two coats of rubber sealant on the roof of Mr. Bauer's mobile home.

{¶6} Case number 06-CR-553 involved one count of grand theft by deception from an elderly person, Stephen McClellan.

{¶7} Appellant first met Stephen McClellan in the year 2000 when Appellant was going around Mr. McClellan's mobile home park asking for work. During a nine month period between January, 2006, and September, 2006, Appellant received nearly \$26,000.00 from Mr. McClellan. Appellant did not replace Mr. McClellan's roof or perform any other repair work as promised. Mr. McClellan hired another contractor at a price of \$4,800.00 to replace the roof on his mobile home.

{¶8} The cases were tried together. Appellant was found guilty on each count by the jury. Appellant was sentenced to five years on each count of theft by deception from an elderly person. These sentences were ordered to be served consecutively. For misuse of a credit card, the trial court ordered Appellant to serve a term of three years.

However, this sentence was merged with Count Two and ordered to run concurrently to the sentences for two counts of theft by deception from an elderly person.

{¶9} For one count of grand theft by deception from an elderly person, a felony of the fourth degree, Appellant was ordered to serve a term of twelve months. This sentence was ordered to run consecutive to the other sentences.

{¶10} Finally, for one count of grand theft by deception from an elderly person a felony of the fourth degree, Appellant was ordered to serve a term of twelve months. This sentence was ordered to run consecutive to the other sentences. Appellant's aggregate prison sentence totaled twelve years.

{¶11} Appellant filed a direct appeal to this Court, raising two assignments of error in his appeal. In his first assignment of error, he argued that his convictions were against the manifest weight of the evidence. In his second assignment of error, he argued that the trial court erred in imposing consecutive sentences. This Court affirmed his convictions and sentences. See *State v. Snyder*, 5<sup>th</sup> Dist. No. 2008-CA-25, 2080-Ohio-6709.

{¶12} Appellant then filed a timely application for re-opening on March 18, 2009, requesting to reopen his appeal pursuant to App. R. 26(B) claiming ineffective assistance of appellate counsel. Appellant also filed a motion to "cause surrender of transcripts and trial record." Additionally, he filed a motion to stay this Court's decision pending his receipt of the transcript and record. Further, on April 7, 2009, Appellant filed a "Notice of appeal appellant Timothy L. Snyder on Handwriting Expert." Finally, on April 27, 2009, Appellant filed a pro se document styled, "Appeal Rule 26. B. Reopening Amended."

{¶13} In his motion to reopen, Appellant argued that he received ineffective assistance of appellate counsel on direct appeal. Appellant stated that his appellate counsel on direct appeal was ineffective for failing to raise the assignment of error of ineffective assistance of trial counsel.

{¶14} Several of Appellant's arguments in his motion to reopen focused on a claim of prosecutorial misconduct occurring during the cross-examination of Appellant at trial. Specifically, Appellant argued that the prosecuting attorney held up a copy of a notarized contract between Appellant and one of his victims and referred to the document as "bogus." He further argued the prosecutor's use of the word "lie" during cross-examination and argument constituted prejudicial error. Finally, he argued that trial counsel should have presented testimony from a handwriting expert to rebut the testimony of Jeff Stahl concerning the amount of money paid back by Appellant.

{¶15} We found, in our decision denying his motion to reopen, "Appellant has failed in his burden to demonstrate that appellate counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. For that reason, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal\* \* \*" *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753." *State v. Snyder*, 5<sup>th</sup> Dist. No. 2008-CA-25 , 2009-Ohio-2473, ¶34.

{¶16} In his "amended" application to reopen, Appellant argued that the state failed to prove the requisite amount to support a second degree felony classification with respect to Count Two and Count Three of the indictment, i.e. theft by deception and

misuse of a credit card. We found this argument to also be without merit and denied both his original application and his amended application for reopening.

{¶17} Appellant also filed a post-conviction petition on October 27, 2008. On March 16, 2009, he filed an additional petition for post-conviction relief. On March 30, 2009, he filed a third petition for post-conviction relief. Finally, on April 14, 2009, he filed his Amended Petition for Post Conviction Relief. It is this final petition on which the trial court based its May 11, 2009, Judgment Entry denying Appellant's petition for post-conviction relief.

{¶18} In his petitions, Appellant argued that trial counsel was ineffective for various reasons and that the trial court erred in suppressing "key evidence". Appellant failed to cite to any specific places in the trial court record where these errors occurred. Appellant attached self-serving affidavits, which the court found to lack credibility.

{¶19} In denying Appellant's petition, the trial court addressed each of Appellant's claims separately, issued findings of fact and conclusions of law on those claims, and determined that all claims failed to set forth sufficient operative facts to establish substantive grounds for relief. Moreover, the trial court found that Appellant failed to overcome the presumption that counsel acted competently or that there was a reasonable probability that but for counsel's errors, the outcome of the trial would have been different.

{¶20} Appellant challenges the trial court's entry, and raises nine Assignments of Error:

{¶21} "1. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO MAKE AND FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS

TO GROUNDS ONE THROUGH FIVE OF THE APPELLANT'S PETITION FILED ON MARCH 11, 2009.

{¶22} "II. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT THE APPELLANT AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHEN COUNSEL FAILED TO TEST AND CHALLENGE THE STATE'S REPRESENTATION OF MONIES ALLEGEDLY STOLEN FROM JAMES BAUER.

{¶23} "III. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT AN EVIDENTIARY HEARING FOR APPELLANTS [SIC] CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO TEST AND CHALLENGE THE STATE'S REPRESENTATION OF MONIES ALLEGEDLY STOLEN FROM MILDRED STAHL.

{¶24} "IV. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT THE APPELLANT AN EVIDENTIARY HEARING FOR HIS CLAIM OF INEFFECTIVE ASSISTANCE FO COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE DISPROPORTIONATE SENTENCE GIVEN TO APPELLANT.

{¶25} "V. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT THE APPELLANT'S EVIDENTIARY HEARING BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE AND POINT OUT INCONSISTENCIES IN THE PROSECUTION'S CASE WHICH PREJUDICED THE APPELLANT.

{¶26} "VI. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT THE APPELLANT AN EVIDENTIARY BASED UPON

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT OT PROFILE EVIDENCE, WHEN THE PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE AND CONFUSING ISSUES MISLEADING THE JURY, THUS VIOLATING THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶27} "VII. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION FOR FAILING TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE TRIAL COURT'S QUASHING OF KEY EVIDENCE.

{¶28} "VIII. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CALL ANY OF APPELLANT'S AVAILABLE WITNESSES TO TESTIFY.

{¶29} "IX. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION WHEN IT FAILED TO GRANT AN EVIDENTIARY HEARIG [SIC] ON APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT."

I.

{¶30} Appellant first argues that the trial court erred in failing to separately address his second petition for post-conviction relief, filed on March 16, 2009. We disagree.

{¶31} Appellant's amended post-conviction petition, filed on April 14, 2009, contained a revised argument that included the arguments Appellant made in his

previous petitions. Accordingly, the trial court did not err in failing to address each claim in each separate post-conviction petition separately.

{¶32} Moreover, as discussed below, the trial court would have been within its rights to deny Appellant's petitions outright as being barred by res judicata and based on the fact that Appellant failed to provide sufficient evidentiary support to warrant a hearing.

{¶33} Appellant's first assignment of error is overruled.

## II - IX

{¶34} In Appellant's second through ninth assignments of error, Appellant argues that the trial court erred in failing to grant Appellant an evidentiary hearing for his post-conviction petition based on various claims of trial counsel ineffectiveness and prosecutorial misconduct. We disagree.

{¶35} When a defendant files a post-conviction petition pursuant to R.C. 2953.21, the trial court must grant an evidentiary hearing unless it determines that the files and records of the case show that the petitioner is not entitled to relief. R.C. 2953.21(E). A trial court may also dismiss a petition for post-conviction relief without holding a hearing when the doctrine of res judicata bars the claims raised in the petition. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 1996-Ohio-337, 671 N.E.2d 233. "Res judicata is applicable in all postconviction relief proceedings." *Id.* at 95. Under the doctrine of res judicata, a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *Id.*

{¶36} We apply an abuse of discretion standard when reviewing a trial court's decision to deny a post-conviction petition without a hearing. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶37} A. RES JUDICATA**

{¶38} Appellant filed a direct appeal, and filed a reopening of that appeal, arguing that appellate counsel was ineffective for failing to raise the issue of trial counsel ineffectiveness. In his motion for reopening, Appellant claimed that appellate counsel was ineffective for failing to argue the issue of prosecutorial misconduct based on various acts of the prosecutor, as set forth in our statement of the facts above.

{¶39} He also argued that trial counsel was ineffective for failing to call certain witnesses to testify on his behalf at trial.

{¶40} Because Appellant had the opportunity to litigate these claims in his application for reopening, these claims are barred by res judicata. See *State v. Butts*, 10<sup>th</sup> Dist. No. 05AP-732, 2006-Ohio-2538.

**{¶41} B. INEFFECTIVE ASSISTANCE**

{¶42} In his post-conviction petition, Appellant argues various reasons that trial counsel was ineffective. The basis for his claims revolve around trial counsel's alleged failure to fully cross-examine State witnesses at trial, for failing to object to the admission of evidence, and for failing to call witnesses to testify on his behalf.

{¶43} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently.

*Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶44} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶45} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

{¶46} The trial court, in denying Appellant’s petition, found that Appellant failed to meet his initial burden of providing sufficient evidentiary documentation containing sufficient operative facts to demonstrate the lack of competent counsel or that he was prejudiced by the alleged ineffectiveness of counsel. The court found that Appellant made only broad assertions that failed to demonstrate prejudice and that were inadequate to require an evidentiary hearing.

{¶47} Specifically, the court found that Appellant failed to overcome the presumption that trial counsel’s decision not to call witnesses was a sound trial strategy.

Appellant asserted that several witnesses would have provided favorable testimony for the defense. However, Appellant failed to provide affidavits or supporting evidence from the majority of those witnesses. He did present affidavits from Kenneth Snyder and Ruth Winters concerning investigator Angel Bowers. Those affidavits only stated that Bowers harassed Mr. Snyder and Ms. Winters about the money used to pay Appellant's bond. The court further found that Appellant failed to provide any evidence to support his contention that Mrs. Stahl was not competent to testify at trial.

{¶48} The trial court found that the affidavits submitted by Appellant failed to contradict evidence presented at trial and that Appellant failed to substantiate his claims of prosecutorial misconduct.

{¶49} Appellant has not provided any evidence to this court to show that the trial court abused its discretion in so finding.

{¶50} Moreover, as we previously stated in denying Appellant's application for reopening, "a decision regarding which defense to pursue at trial is a matter of trial strategy 'within the exclusive province of defense counsel to make after consultation with his client.' *State v. Murphy*, 91 Ohio St.3d 516, 524, 2001-Ohio-0112. This court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff.'" ' *State v. Woullard*, 158 Ohio App.3d 31, 813 N.E.2d 964, 2004-Ohio-3395, ¶ 39, quoting *State v. Yarber* (1995), 102 Ohio App.3d 185, 188, 656 N.E.2d 1322. Further, the Ohio Supreme Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528

N.E.2d 523. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189, citing *People v. Miller* (1972), 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089; *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008 at ¶ 21.” Snyder, supra, at ¶31.

{¶51} Given that the trial court heard the initial jury trial in this matter and the evidence presented at that trial, and was in the best position to evaluate the performance of trial counsel during the trial, we do not find that the trial court abused its discretion in refusing to grant an evidentiary hearing on the basis of the claims set forth in Appellant’s post-conviction petition.

{¶52} Appellant’s assignments of error are overruled.

{¶53} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TIMOTHY SNYDER	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-79
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN