

[Cite as *State v. Fanaro*, 2009-Ohio-6450.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CARL FANARO

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 2009 CA 00066

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 06-CR-00036

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 4, 2009

APPEARANCES:

For Defendant-Appellant

DENNIS PUSATERI
492 City Park Avenue
Columbus, Ohio 43215

For Plaintiff-Appellee

KEN OSWALT
Licking County Prosecuting Attorney

BY: BRAD L. TAMMARO
Assistant Attorney General
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P.O. Box 968
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Hoffman, J.

{¶1} Defendant-appellant Carl Fanaro appeals the April 13, 2009 Judgment Entry of the Licking County Court of Common Pleas entering summary judgment in favor of Plaintiff-appellee the State of Ohio on Appellant's petition for post-conviction relief.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 27, 2006, the Licking County Grand Jury indicted appellant on a total of 134 counts. The indictment included violations of R.C. 1707.44 for the sale of unregistered securities, the sale of securities without a license and false representation in the sale of securities. The indictment also included violations of R.C. 2913.51 for receiving stolen property and one count of engaging in pattern of corrupt activity in violation of R.C. 2923.32(A)(1).

{¶3} On October 16, 2006, the matter proceeded to trial. Prior to the presentation of evidence, the State moved to dismiss eight counts in the indictment. On October 27, 2006, the jury found appellant guilty of 99 counts in the indictment. The convictions included the following: 27 counts of sales of unregistered securities, in violation of R.C. 1707.44(C)(1); 27 counts of sales of securities without a license in violation of R.C. 1707.44(A)(1); 27 counts of fraudulent practices in the sale of securities, in violation of R.C. 1707.44(G); 17 counts of false representation in the sale of securities, in violation of R.C. 1707.44(B)(4); one count of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1). The jury was unable to reach a unanimous verdict on the remaining counts for receiving stolen property. Appellant was

found guilty of having committed 32 fifth degree felonies, 66 third degree felonies and one first degree felony. Sentencing was deferred pending a pre-sentence investigation.

{¶14} On November 6, 2006, the State moved to voluntarily dismiss the remaining 27 counts for receiving stolen property. On November 8, 2006, the State's motion to dismiss was granted.

{¶15} On December 18, 2006, the trial court sentenced appellant to serve six months on each of the 32 fifth degree felonies and further ordered these sentences to run consecutively to each other for a total of 16 years. The trial court also ordered appellant to serve one year on three of the third degree felonies to run consecutively to each other for a total of three years. The trial court further ordered appellant to serve a five year sentence for the first degree felony conviction for engaging in a pattern of corrupt activity. Finally, the trial court ordered the fifth degree (16 year) and third degree felony (3 year) sentences to run consecutively to each other and all other sentences to run concurrently for a total aggregate sentence of 19 years. Appellant was further ordered to pay restitution and the costs of the action. The fines were waived.

{¶16} Appellant appealed his conviction and sentence in *State v. Fanaro*, 5th App. No.2006CA00168, 2008-Ohio-841. Appellant argued the trial court engaged in judicial fact finding in sentencing and that the security violations were allied offenses of similar import and should have been merged. Finally, appellant argued the trial court erroneously allowed the introduction of other acts evidence. This Court affirmed the decision of the trial court.

{¶17} On September 17, 2007, the public defender's office filed a petition to vacate and set aside judgment and sentence pursuant to R.C. 2953.21. On September

19, 2007, the trial court scheduled the petition for “non-oral hearing” for October 17, 2007 at 8:00 A.M pursuant to Loc.R. 5. The State then filed a memoranda contra to the petition on September 28, 2007.

{¶18} On October 10, 2007, prior to the non-oral hearing, the trial court via Judgment Entry denied appellant's petition.

{¶19} On October 12, 2007, Mr. Pusateri, Appellant's present counsel, entered a notice of appearance and filed a motion for continuance of the non-oral hearing. On October 15, 2007, Appellant's counsel filed a motion for status conference. The State responded with a memoranda contra appellant's motion for continuance of non-oral hearing.

{¶10} On November 9, 2007, Appellant filed a notice of appeal arguing the post-conviction petition was dismissed in advance of the non-oral hearing date assigned in the case. This Court reversed the decision of the trial court, and remanded the matter for further proceedings finding the trial court prematurely ruled on the petition for post-conviction relief.

{¶11} On December 22, 2008, Appellant filed an amended petition for post-conviction relief in the trial court. Appellee filed a memorandum contra on January 23, 2009. Appellant filed a motion for summary judgment, or in the alternative, motion to conduct discovery on March 12, 2009. Appellee filed a memorandum contra summary judgment on March 23, 2009. The trial court granted summary judgment in favor of Appellee and denied the petition without conducting an evidentiary hearing.

{¶12} Appellant now appeals, assigning as error:

{¶13} “I. THE TRIAL COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT TO APPELLANT ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND DISMISSING THE CLAIMS.

{¶14} “II. THE TRIAL COURT ERRED BY FAILING TO ORDER AN EVIDENTIARY HEARING ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND DISMISSING THE CLAIMS.”

I, II

{¶15} Both of Appellant’s assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶16} Ohio Revised Code Section 2953.21(A) states, in part, as follows:

{¶17} “(1) 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.”

{¶18} A post conviction proceeding is a collateral civil attack on a criminal conviction. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905; *State v. Phillips*, 9th Dist. No. 20692, 2002-Ohio-823. In order to obtain post conviction relief, a petitioner must show 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 [.]” R.C. 2953.21; *State v. Watson* (1998), 126 Ohio App.3d 316, 323, 710 N.E.2d 340.

{¶19} Under R.C. 2953.21, a petitioner seeking post conviction relief is not automatically entitled to an evidentiary hearing. *Calhoun*, 86 Ohio St.3d at 282, 714 N.E.2d 905. Significantly, the Ohio Supreme Court has held the proper basis for dismissing a petition for post conviction relief without holding an evidentiary hearing include: 1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and 2) the operation of *res judicata* to bar the constitutional claims raised in the petition. *Calhoun*, 86 Ohio St.3d at paragraph two of the syllabus; *State v. Lentz* (1994), 70 Ohio St.3d 527, 530, 639 N.E.2d 784.

{¶20} In order for a petitioner to be entitled to an evidentiary hearing in a post conviction relief proceeding on a claim he was denied effective assistance of counsel, the two-part test in *Strickland v. Washington* (1984), 466 U.S. 668 is to be applied. *Hill v. Lockhart* (1985), 474 U.S. 52, 58; *State v. Lylte* (1976), 48 Ohio St.2d 391; *State v. Bradley* (1989), 42 Ohio St.3d 136; *State v. Cole, supra*, 2 Ohio St.3d at 114. The petitioner must therefore prove: 1). counsel's performance fell below an objective standard of reasonable representation; and 2). there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Id.*

{¶21} In determining whether a hearing is required, the Ohio Supreme Court in *State v. Jackson* (1980), 64 Ohio St.2d 107, stated the pivotal concern is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case.

{¶22} As the Supreme Court further explained in *Jackson, supra*, “[b]road assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction relief petitions.” *Id.* at 111. Rather, a petitioner must submit evidentiary

documents containing sufficient operative facts to support his claim before an evidentiary hearing will be granted. Accordingly, “a trial court properly denies a defendant's petition for post conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *Calhoun*, 86 Ohio St .3d at paragraph two of the syllabus; see R.C. 2953.21(C).

{¶23} Furthermore, before a hearing is granted in proceedings for post conviction relief upon a claim of ineffective assistance of trial counsel, the petitioner bears the initial burden to submit evidentiary material containing sufficient operative facts that demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's ineffectiveness. *Calhoun*, 86 Ohio St.3d at 289, 714 N.E.2d 905; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus; see, also *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Phillips*, *supra*.

{¶24} “In determining how to assess the credibility of supporting affidavits in post conviction relief proceedings, the Supreme Court adopted the reasoning of the First Appellate District in *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319, which had looked to federal habeas corpus decisions for guidance. *Id.* at 753-754, 651 N.E.2d at 1322-1323. The Supreme Court ultimately determined that the trial court should consider all relevant factors in assessing the credibility of affidavit testimony in ‘so-called paper hearings,’ including the following: ‘(1) whether the judge viewing the post conviction relief petition also presided at the trial, (2) whether multiple affidavits

contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.' *Calhoun*, 86 Ohio St.3d at 285, 714 N.E.2d at 911-912, citing *Moore*, 99 Ohio App.3d at 754-756, 651 N.E.2d at 1323-1324." *State v. Kinley* (1999), 136 Ohio App.3d 1, 13-14, 735 N.E.2d 921, 930-31.

{¶25} A trial court that discounts the credibility of sworn affidavits must include an explanation of its basis for doing so in its findings of fact and conclusions of law in order that meaningful appellate review may occur. *Id.*, at 285, 714 N.E.2d at 911-912.

{¶26} In the case sub judice, Appellant maintains counsel was ineffective in rejecting plea offers without consulting petitioner, rejecting plea agreements without adequately investigating the viability of a defense to the charges, and in failing in his duty to counsel Appellant regarding the advisability of accepting or rejecting a plea offer. Specifically, Appellant asserts had counsel properly instructed him he did not have a viable defense, he would have accepted the State's first plea offer. Further, he alleges counsel summarily rejected two plea offers without consulting him.

{¶27} On December 22, 2008, Appellant filed his petition for post-conviction relief, attaching ten exhibits, including two letters from his trial counsel, a detailed billing statement of trial counsel, and affidavits supporting his petition.

{¶28} The State initially offered Appellant a four-year prison sentence, which Appellant maintains his counsel rejected without properly advising him. Second, the State demanded Appellant make restitution in exchange for a guilty plea to two counts for each victim. Appellant asserts his trial counsel summarily rejected the offer without consultation or proper advice. Appellant's only evidence as to the allegations is his own self-serving affidavit.

{¶29} In response, the State submits an affidavit of trial counsel averring he discussed the first plea offer with Appellant and advised him of the potential penalties. Counsel alleges Appellant summarily rejected the offer because he felt he did not belong in jail. The plea offer also involved restitution, which was unacceptable to Appellant due to his being financially incapable of restitution. Appellant and his wife had filed for bankruptcy in 2004, listing the victims at issue as creditors.

{¶30} On January 16, 2006, trial counsel sent a letter to the prosecutor indicating the initial plea offer of four years incarceration was not acceptable, but his client could be persuaded to enter an Alford plea to some sort of misdemeanor. The letter was copied to Appellant; indicating Appellant had knowledge of the offer and could have discussed the matter with counsel had it been inaccurate. Appellant did not do so.

{¶31} On October 3, 2006, trial counsel drafted a letter to Appellant indicating the trial was set to commence over a period of four days. In the second letter counsel explains the subsequent offer by the State involving a plea of guilty to two counts on each one of the alleged victims and restitution. Trial counsel informed Appellant he told the prosecutor it was an inferior deal to the first offer, and he was confident Appellant

would not accept the offer. Accordingly, the letter contemplates Appellant's ability to inform counsel he would be willing to accept the offer. Again Appellant did not do so.

{¶32} Further, Appellant's claim counsel was unprepared for trial was not substantiated by the record. Rather, the record demonstrates a set fee agreement between Appellant and counsel rendering hourly documentation beyond the set fee irrelevant. A review of the record demonstrates counsel properly cross-examined witnesses, and presented witnesses on behalf of Appellant.

{¶33} Based upon the record and the evidence submitted in support and in opposition to the motion, we conclude the trial court did not err in granting summary judgment in favor of the State without an evidentiary hearing as Appellant has not set forth sufficient operative facts to establish substantive grounds for relief, let alone a reasonable probability Appellant would have accepted the plea in light of his proclaimed opposition to jail and any restitution order.

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

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer

HON. SHEILA G. FARMER

s/ W. Scott Gwin

HON. W. SCOTT GWIN

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CARL FANARO	:	
	:	
Defendant-Appellant	:	Case No. 2009 CA 00066

For the reason stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN