

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. Julie A. Edwards, P.J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
BYRON N. BLAKE	:	Case No. 09-CA-67
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Case No. 06CR-I-12-0563

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 24, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaware County Prosecutor
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ALISON PETERS 0075354
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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125 North Sandusky Street
Delaware, Ohio 43015

Delaney, J.

{¶1} Defendant-Appellant, Byron Blake, appeals from the judgment of the Delaware County Court of Common Pleas, denying his petition for post-conviction relief.

{¶2} Appellant was indicted on December 21, 2006, on one count of insurance fraud, a felony of the fifth degree, in violation of R.C. 2913.47(B)(1), one count of falsification, a felony of the fifth degree, in violation of R.C. 2921.13(A)(9), and one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(3).

{¶3} At Appellant's arraignment on February 26, 2007, he was appointed a public defender to represent him. His case was set for trial on July 17, 2007, but was continued until September 11, 2007. During that time, private attorney Byron Potts filed a notice of substitution of counsel for Appellant and began representing Appellant.

{¶4} On September 5, 2007, Attorney Potts filed a motion for a continuance, which was granted. A new trial date was set for January 15, 2008. On January 10, 2008, Attorney Potts filed an additional motion to continue Appellant's trial. The motion was granted and Appellant's trial was set for May 6, 2008.

{¶5} On May 2, 2008, the State filed a motion for a continuance based on the unavailability of a State's witness. The trial was again rescheduled, this time for July 15, 2008. On July 15, 2008, Appellant waived his right to a jury trial, and the court set the matter for a bench trial on September 8, 2008.

{¶6} On September 9, 2008, Appellant was found guilty of all counts following a one day bench trial. Appellant was sentenced on October 31, 2008, and did not file a direct appeal of his convictions. On December 3, 2008, he filed a pro se petition for post-conviction relief, and supplemented his petition on February 19, 2009. The trial

court appointed counsel to represent Appellant on his post-conviction petition on February 19, 2009, and counsel filed a supplemental motion in support of his post-conviction petition on February 27, 2009, and requested a hearing on said petition. A hearing was held on March 6, 2009, wherein Appellant testified on his own behalf. The trial court denied Appellant's post-conviction petition on June 26, 2009.

{¶7} Appellant now appeals the denial of his petition and raises one Assignment of Error:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT/APPELLANT'S PETITION FOR POST CONVICTION RELIEF."

I.

{¶9} In Appellant's sole assignment of error, he argues that the trial court erred in denying his petition for post-conviction relief. We disagree.

{¶10} The post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905, 908. It is a means by which the petitioner may allow the court to reach constitutional issues that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233. The petition for post-conviction relief is thus not intended to provide a defendant with a second opportunity to litigate his conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819.

{¶11} In order for the trial court to grant a hearing the petitioner must provide evidence that demonstrates a cognizable claim of constitutional error, R.C. 2953.21(C), and such evidence must demonstrate that the denial or infringement of the petitioner's constitutional rights render the petitioner's conviction or sentence void. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 175, paragraph four of the syllabus.

{¶12} When reviewing a trial court's ruling on a petition for post-conviction relief, we apply an abuse of discretion standard. Abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶13} In his post-conviction petition, Appellant asserts that trial counsel was ineffective. The basis for his claims revolve around trial counsel's alleged failure to call witnesses to testify on his behalf and his claim that he was not provided full discovery because he was not given a tape of an interview, but was instead given a transcript of the interview prior to trial.

{¶14} 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.

{¶15} “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.

{¶16} 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.

{¶17} The trial court, in denying Appellant’s motion, stated that trial counsel for Appellant acknowledged in open court, in the presence of Appellant, that Appellant had received all discovery pursuant to Crim. R. 16. Moreover, discussions pertinent to witness availability were all conducted in the presence of Appellant. At no time during these discussions did Appellant object or complain about counsel’s representation.

{¶18} The trial court, in ruling against Appellant, found that after hearing the testimony at Appellant’s post-conviction hearing, and considering the evidence, Appellant failed to meet the standards set forth in *Strickland* and did not show that counsel’s representation fell below an objective standard of reasonableness. We agree.

{¶19} Moreover, the trial court, in rejecting Appellant’s claim that his Due Process rights were violated because certain tapes were not released to him during discovery, found that Crim. R. 16 does not dictate that the prosecution must release audiotaped witness statements to a defendant until after a witness testifies at trial. At

trial, no request for these tapes was made and no objection was made to the manner in which the transcripts were disclosed.

{¶20} Appellant did not assert in his post-conviction petition that the transcripts were inaccurate and that the actual tapes would have changed the outcome of the trial; rather, he merely complains that he wanted to compare the tapes to the transcripts, and offers no legitimate support as to how the tapes would have changed the outcome of his case.

{¶21} Appellant's complaints that the numerous continuances prejudiced him are without merit as well. Appellant agreed to the continuances on the record, and thus has no basis to challenge them now. Moreover, he was not deprived of due process because a witness that he wanted to call to the stand was unavailable. The witness had been subpoenaed on numerous occasions and failed to respond to the subpoenas. According to the record, she was a known felon who was in and out of prison. Appellant knew that his counsel had tried to locate the witness and was unable to do so. Appellant failed to request a continuance to locate her and did not proffer any evidence into the record as to how her testimony would be relevant. As such, he has failed to prove a due process violation.

{¶22} Accordingly, we find Appellant's arguments to be without merit and find that the trial court did not abuse its discretion in denying Appellant's post-conviction petition.

{¶23} Appellant's assignment of error is overruled. The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

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

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BYRON N. BLAKE	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-67
	:	

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

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER