**IN THE COURT OF COMMON PLEAS**
**ADAMS COUNTY, OHIO**

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| **STATE OF OHIO** | ) | **CASE NOS. 20160037** |
| | ) | and **20160109** |
| Plaintiff | ) | |
| | ) | **JUDGE EUGENE A. LUCCI** |
| vs. | ) | (By Assignment) |
| | ) | |
| **DENNY BLANTON, JR.** | ) | **ORDER DENYING PETITIONS** |
| | ) | **FOR POSTCONVICTION RELIEF** |
| Defendant | ) | |

**{¶1}** The court has considered: (1) the defendant's petition to vacate or set aside judgment of conviction and sentence, filed December 1, 2017; (2) the affidavit of Denny W. Blanton, Jr., filed December 1, 2017; (3) the defendant's petition to vacate or set aside judgment of conviction and sentence, filed January 24, 2018; (4) the affidavit of Denny W. Blanton, Jr., filed January 24, 2018; (5) the state's briefs in opposition, filed December 5, 2018; (6) the defendant's reply briefs in support, filed January 18, 2019; (7) the affidavit of Lisa Marie Blanton, filed January 18, 2019; (8) the affidavit of Denny Blanton, Sr., filed January 18, 2019; (9) the affidavit of Teresa L. Edwards, filed January 18, 2019; (10) the affidavit of Attorney Michael Kelly, filed January 18, 2019; and (11) the state's surreply briefs, filed February 19, 2019.

## LAW

### *Petitions for postconviction relief*

**{¶2}** R.C. 2953.21(A)(1) provides that anyone claiming there was such a denial of his or her rights as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution may file a petition in the court that imposed the sentence. Postconviction relief is not a constitutional right, but a narrow remedy that gives the defendant no more rights than are granted by statute. *State v. Gaffin*, 4th Dist. Adams No. 17CA1057, 2019-Ohio-291, 2019WL384573, ¶20.

**{¶3}** Petitions for postconviction relief are a "means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record." *Id*.

**{¶4}** To be entitled to a hearing on a petition for postconviction relief, the defendant must produce sufficient credible evidence that substantive grounds for relief exist by demonstrating that he or she suffered of violation of his or her rights and said violation resulted in prejudice. *Id.* at ¶22. The evidence "must meet some threshold level of cogency that advances the petitioner's claim beyond mere hypothesis." *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶22. Further, the evidence must consist of materials that adhere to the rules of evidence. *Id.*

**{¶5}** In determining whether substantive grounds for relief exist, requiring a hearing, the court must consider the petition, any supporting affidavits and documentary evidence, and all files and records from the case. *In re BCS*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, 2008WL4823572, ¶12. Although the court should give due deference to sworn statements, the court need not accept the affidavits as true, but may assess the credibility of the affiant. *Id.* In making such an assessment, the court should consider all relevant factors, including: (1) whether the judge presiding over the petition also presided at 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 petition; and (5) whether the affidavits contradict evidence proffered by the defendant at trial. *Id.* at ¶13.

***Res judicata***

**{¶6}** The court may deny a petition for postconviction relief without a hearing if the petition raises a claim of constitutional deprivation, but the issue was raised or could have been raised at the trial or subsequent appeal. *State v. Combs,* 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist.1994). Such claims are barred by *res judicata*. *State v. Gaffin*, 4th Dist. Adams No. 17CA1057, 2019-Ohio-291, 2019WL384573, ¶24.

**{¶7}** To overcome *res judicata*, the evidence must be competent, relevant, and material and outside the trial court record, and cannot have existed or been available for use at the time of trial. *In re BCS*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, 2008WL4823572, ¶14. Furthermore, the evidence offered outside the record must demonstrate that the defendant could not have appealed the constitutional claim based

upon the information available from the record. *State v. Dennison*, 4th Dist. Lawrence No. 18CA6, 2018-Ohio-4502, 2018WL5840666, ¶16.

**{¶8}** Moreover, "[a] petition for post-conviction relief which alleges that the petitioner received ineffective assistance of counsel at trial is subject to dismissal on *res judicata* grounds where the petitioner had new counsel on direct appeal and where the ineffective assistance of counsel claim could otherwise have been raised on direct appeal without resort to evidence outside the record." *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶21.

***Ineffective assistance of counsel***

**{¶9}** To establish a claim of ineffective assistance of counsel, a defendant must demonstrate deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶16. As to deficient performance, the defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and that the challenged action may be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.CT. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶16. As to prejudice, the defendant must show that there is a reasonable probability sufficient to undermine confidence in the outcome and that, but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶17.

**{¶10}** Generally, decisions as to whether to call a witness, including the failure to call an expert, are considered trial strategy and do not constitute ineffective assistance of counsel. *In re BCS*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, 2008WL4823572, ¶18.

***Cumulative error doctrine***

**{¶11}** "The doctrine of cumulative error holds that a judgment may be reversed when the cumulative effect of errors deprives a defendant of his constitutional rights, even though the individual errors may not rise to the level of prejudicial error." *State v. Bennett,* 4th Dist. Scioto No.05CA2997, 2006-Ohio-2757, 2006WL1495251, ¶50. Therefore, it is not

applicable where the court does not find multiple instances of harmless error. *State v. Ruble*, 96 N.E.3d 792, 811, 2017-Ohio-7259 (4th Dist.), ¶76. Where "none of [the defendant's] individual claims of ineffective assistance has merit, he cannot establish a right to relief simply by joining those claims together." *State v. Dean*, 146 Ohio St.3d 106, 166, 54 N.E.2d 80, 2015-Ohio-4347, ¶296.

**CASE NO. 20160037**

**{¶12}** In Case No. 20160037, the defendant was convicted by a jury of two counts of rape (Counts I and IV) and two counts of kidnapping (Counts II and III), each with a sexual predator specification. Counts II and III merged for purposes of sentencing, and the defendant was sentenced to a total of thirty years to life in prison and was classified as a Tier III Sexual Offender/Child Victim Offender. The defendant argues that his conviction and sentence are void or voidable under the Ohio and/or United States Constitutions.

**{¶13}** The defendant argues that he informed trial counsel that he had initially lied to law enforcement by indicating that he had not had sexual relations with the victim because he did not want his girlfriend to learn about it and that he wanted his attorney to inform the prosecutor that he did have sexual relations with the victim, but that the conduct was consensual. He argues that his attorney failed to raise the defense of consent until he testified at trial that the sexual relations were consensual, and that this created the false impression that he changed his story after hearing the state's evidence at trial. He further argues counsel "could have blunted this attack [cross-examination regarding his repeated denials of sexual relations with the victim] by informing the prosecutor about their client's retraction of his initial denials, requesting another interview, and telling the jury that the defense was consent."

**{¶14}** The defendant's arguments do not overcome the strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.CT. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶16. Further, the defendant's argument that he was prejudiced by this is speculative at best and does not show a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100,

2006WL3861078, ¶17. The state would still have been able to impeach the defendant with his prior statements. Moreover, the defendant was aware at trial of the content of his attorney's opening statement and could have raised this argument on appeal. The defendant argues that he could not litigate this on appeal because his statements that he told his attorney prior to trial that he had lied were not part of the record. However, his trial testimony regarding consent and his reasons for lying to the police were in the record, so that the defendant could have raised this argument on appeal.

**{¶15}** The defendant further argues that the victim's father and the trial judge's wife worked together, and that the victim's father had supervisory authority over the judge's wife, so that the judge should have recused himself, and that his attorney should have filed an affidavit of disqualification with the Supreme Court of Ohio. The defendant's allegations are based on information that was available to him prior to trial. In fact, defense counsel filed a motion to recuse the trial judge on this basis. In his affidavit, the defendant indicates that his trial counsel informed him that there was a procedure to seek disqualification of a judge through the Ohio Supreme Court, that he requested that they seek disqualification of the judge, and that they refused to do so for personal reasons. Thus, the defendant was aware of all the information upon which he bases this claim prior to trial and could have raised this issue on appeal. The defendant argues that he could not have raised this issue on appeal because his affidavit alleging that counsel refused to file an affidavit of disqualification for personal reasons was not in the record. However, the motion to recuse the judge and its denial were in the record. Thus, there was sufficient information in the record to permit the defendant to argue that his counsel was ineffective for failing to file an affidavit of disqualification.

**{¶16}** Additionally, the defendant argues that counsel hired an expert in microscopy and microchemistry, but failed to call this expert at trial. The defendant states that the expert examined the victim's running shorts and opined that the soil stains on her shorts were caused by contact with a muddy object, and that this opinion contradicted the state's theory that the stains were from the defendant pushing the victim down. The court questions whether these are two contradictory assertions. However, generally, decisions as to whether to call a witness, including the failure to call an expert, are considered trial

strategy and do not constitute ineffective assistance of counsel. *In re BCS*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, 2008WL4823572, ¶18.

**{¶17}** The defendant also claims that his attorney withdrew the defendant's girlfriend as a witness after having announced his intent to call her because the state, at a sidebar, and without a legal basis for doing so, threatened to question her regarding another case pending against the defendant for pandering sexually oriented material involving a minor based on a claim that the defendant had a nude photograph of her on his cell phone. This information was available to the defendant at trial and could have been raised on appeal. Indeed, the defendant did raise his complaint regarding counsel's failure to call his girlfriend as a witness on his direct appeal, and the court of appeals rejected that argument. *State v. Blanton*, 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, 2018WL1611408, ¶72-73.

**{¶18}** Furthermore, the defendant complains that his attorney failed to consult with a medical expert regarding the testimony of Dr. Makaroff that the victim's genital bruising and bleeding were consistent with sexual assault. Again, the defendant knew this at the time of trial and made this argument on appeal. *Id.* at ¶66-69.

**{¶19}** The defendant additionally asserts that counsel failed to effectively assist him because counsel did not file a motion for change of venue. This argument could have been raised on appeal.

**{¶20}** Finally, the defendant argues that even if each of his claims are insufficient individually, the cumulative effect of these errors are sufficient to demonstrate prejudice. "The doctrine of cumulative error holds that a judgment may be reversed when the cumulative effect of errors deprives a defendant of his constitutional rights, even though the individual errors may not rise to the level of prejudicial error." *State v. Bennett,* 4th Dist. Scioto No.05CA2997, 2006-Ohio-2757, 2006WL1495251, ¶50. Therefore, it is not applicable where the court does not find multiple instances of harmless error. *State v. Ruble*, 96 N.E.3d 792, 811, 2017-Ohio-7259 (4th Dist.), ¶76. "[B]ecause none of [the defendant's] individual claims of ineffective assistance has merit, he cannot establish a right to relief simply by joining those claims together." *State v. Dean*, 146 Ohio St.3d 106, 166, 54 N.E.2d 80, 2015-Ohio-4347, ¶296.

## CASE NO. 20160109

**{¶21}** In Case No. 20160109, the defendant was convicted by a jury of kidnapping, felonious assault, and assault, and sentenced to a total of 12 years in prison, consecutive to the prison term imposed in Case No. 20160037. The events giving rise to these charges took place in the Adams County jail while the defendant was incarcerated while awaiting trial in Case No. 20160037. The incident was recorded on a security camera.

**{¶22}** The defendant alleges that the state, in bad faith and with intent to impede the defendant's defense, failed to preserve video recording from another camera which would have provided another angle and would have shown that the victim was conscious and defending himself. Moreover, the defendant alleges that his trial counsel filed a motion to dismiss due to the failure to preserve this evidence, but that the defendant was not present for the hearing and did not waive his right to be present for the hearing. The defendant has already raised both of these issues on appeal. *State v. Blanton*, 4th Dist. Adams No. 16CA1035, 2018-Ohio-1278, 2018WL1612375, ¶86-107. The defendant argues that *res judicata* does not bar these claims because his affidavit, which avers that the missing video would have shown that the victim was conscious, was not available for consideration on appeal. However, in consideration of the defendant's arguments regarding the video, the court of appeals considered his statement at his sentencing hearing that the missing video would have shown that the victim was conscious. *Id.* at ¶97. The court held that "taking Appellant's statements at sentencing as truthful, that he saw the alleged materially exculpatory footage that was later unavailable, any evidence of Lunsford, the victim 'protecting himself and protecting [Appellant's] punches,' is irrelevant to Appellant's guilt on either the felonious assault or kidnapping counts." *Id.* at ¶98.

**{¶23}** The defendant also argues that he wanted to testify at trial, and that his attorney advised him that if he testified that the state would impeach him based on his conviction in 20160037. The defendant alleges that this advice was not correct and was misleading because he could have sought to exclude evidence as to his prior conviction. The defendant contends that he could not have raised this issue on appeal because his affidavit regarding the allegedly incomplete advice from his attorney was not in the record. The defendant argues that had the jury heard his account of the victim being conscious

and defending himself, there is a reasonable probability they would have acquitted him. The record indicated that the defendant did not testify. That the specific reasons for the decision not to testify were not in the record did not prevent the defendant from arguing that counsel was ineffective for failing to have him testify. Further, on appeal, the defendant argued that there was insufficient evidence to find him guilty of felonious assault. The court of appeals held, "Appellant's argument assumes that the only serious physical harm Lunsford suffered was a 'possible concussion' after the sucker punch which rendered him, via eyewitness and admittedly not expert opinion, unconscious. We disagree." *Id.* at ¶31. The court of appeals found that "[e]ven if Appellant was not responsible for the blow which may or may not have rendered Lunsford unconscious and caused a 'possible concussion,' we find sufficient evidence that Appellant caused serious physical harm." *Id.* at ¶34. Thus, the defendant's evidence does not overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and that the challenged action may be considered sound trial strategy, and does not show a reasonable probability that the results of the trial would have been different had he testified. *Strickland v. Washington*, 466 U.S. 668, 104 S.CT. 2015, 80 L.Ed.2d 674 (1984); *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078.

**{¶24}** Further, as discussed above, the defendant alleges that the judge was biased against him and that his attorney should have sought to have the judge recuse himself or filed an affidavit of disqualification with the Supreme Court of Ohio. For the reasons discussed above, this argument is not well-taken.

**{¶25}** Finally, the defendant argues that even if each of his claims are insufficient individually, the cumulative effect of these errors are sufficient to demonstrate prejudice. "The doctrine of cumulative error holds that a judgment may be reversed when the cumulative effect of errors deprives a defendant of his constitutional rights, even though the individual errors may not rise to the level of prejudicial error." *State v. Bennett,* 4th Dist. Scioto No.05CA2997, 2006-Ohio-2757, 2006WL1495251, ¶50. Therefore, it is not applicable where the court does not find multiple instances of harmless error. *State v. Ruble*, 96 N.E.3d 792, 811, 2017-Ohio-7259 (4th Dist.), ¶76. "[B]ecause none of [the defendant's] individual claims of ineffective assistance has merit, he cannot establish a

right to relief simply by joining those claims together." *State v. Dean*, 146 Ohio St.3d 106, 166, 54 N.E.2d 80, 2015-Ohio-4347, ¶296.

**CONCLUSION**

**{¶26}** The court finds that the defendant's claims are barred by *res judicata*. The information upon which the defendant bases his claims was available to him at trial and could have been raised on appeal. While the defendant submits evidence in support of his petitions for post-conviction relief, the evidence he presents does not demonstrate that he could not have appealed these claims based on the information available in the record. *State v. Dennison*, 4th Dist. Lawrence No. 18CA6, 2018-Ohio-4502, 2018WL5840666, ¶16. Further, the defendant's arguments all appear to allege ineffective assistance of counsel. The defendant was represented by new counsel on appeal. "A petition for post-conviction relief which alleges that the petitioner received ineffective assistance of counsel at trial is subject to dismissal on *res judicata* grounds where the petitioner had new counsel on direct appeal and where the ineffective assistance of counsel claim could otherwise have been raised on direct appeal without resort to evidence outside the record." *State v. Wright*, 4th Dist. Washington No. 06CA18, 2006-Ohio-7100, 2006WL3861078, ¶21.

**{¶27}** Accordingly, the defendant's petitions for post-conviction relief are not well-taken and are hereby denied.

**{¶28} IT IS SO ORDERED**.

**EUGENE A. LUCCI, JUDGE**
(By Assignment: 18JA0966, 18JA0977)

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FINAL APPEALABLE ORDER
Clerk to serve pursuant to
Civ.R. 58(B)