COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff - Appellee -vs- STEVEN P. BUBENCHIK, JR. Defendant - Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2014CA00020 OPINION
CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013CR1293 Heath
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	

APPEARANCES:

For Plaintiff-Appellee JOHN D. FERRERO Prosecuting Attorney By: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney 110 Central Plaza, South, Suite 510 Canton, OH 44702	For Defendant-Appellant DEREK LOWRY Crawford, Lowry & Associates 116 Cleveland Ave., NW Suite 800 Canton, OH 44702

APP. A

Baldwin, J.

{¶1} Appellant Steven P. Bubenchik, Jr. appeals a judgment of the Stark County Common Pleas Court convicting him of attempted murder (R.C. 2903.02(A)) with a repeat violent offender specification and a firearm specification, two counts of felonious assault (R.C. 2903.11(A)(2)) with repeat violent offender specifications and firearm specifications, and having weapons under disability (R.C. 2923.13(A)(2)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} During the evening of August 8, 2013, the Massillon Police Department received a call from appellant's wife, who was not living with him at the time. She told police that she received a voice mail message from appellant, stating that he would see her in the next lifetime. Massillon police officers Rogers, Alexander and Riccio went to appellant's home for a "welfare check." They knocked on doors, shined lights in the windows, and attempted to make contact with anyone who might be inside. Although two vehicles were in the driveway, officers saw no lights on in the home and no movement inside. The officers left.

{¶3} Appellant's wife called the police department again, expressing concern that appellant had harmed himself. Sgt. Kenneth Smith asked dispatch to try to find a family member, and dispatch reached appellant's parents. Officers Smith, Rogers, Riccio and Alexander went back to appellant's home with appellant's parents. Sgt. Smith learned that appellant had been questioned earlier that day by Det. Bobby Grizzard, who investigates child sexual abuse cases.

{¶4} The officers and appellant's parents walked around the house, knocked on the door, shined lights in the windows, and called out to whoever might be inside. No one inside responded, and after about ten minutes, appellant's parents asked police to leave, believing appellant might come out if the police were not present. The officers left, parked their cruisers several blocks away, and waited.

{¶5} After waiting ten minutes, the officers returned and met appellant's parents in the driveway. The parents were unable to make contact with appellant and wanted police to enter the home.

{¶6} The officers found an open window on the front porch and pushed up the screen. Officer Riccio entered the residence through the window and began moving to the front door to unlock it for the other officers. He announced himself as a Massillon Police Officer when he entered through the window, and Sgt. Smith also yelled, "We're here to check on your welfare, we want to make sure you're okay."

{¶7} After Officer Riccio entered through the window, the officers on the porch heard a gunshot from inside. Riccio came back outside through the window and the officers scattered, seeking cover. A man ran out the front door and was taken to the ground and handcuffed. The man was later identified as appellant's brother.

{¶8} Officers took cover behind their cruisers. Sgt. Smith saw appellant leaning out a window with his firearm, yelling, "I'm going to kill you mother fuckers." Appellant began shooting at the officers from the window. The officers did not return fire, fearing someone else was inside. A SWAT team was called and negotiations began with appellant. After about three hours, appellant put down his pistol, exited the home and surrendered to police.

{¶9} Appellant was charged with three counts of attempted murder and three counts of felonious assault, all with repeat violent offender specifications and firearm specifications, and having weapons under disability. He filed a motion to suppress which was overruled by the court. The case proceeded to jury trial. The jury found him not guilty of attempted murder as to Officer Riccio and Sgt. Smith, guilty of attempted murder as to Officer McConnell, guilty of felonious assault as to all three officers, and guilty of having weapons under disability. The court merged the felonious assault conviction with the attempted murder conviction as to Officer McConnell. Appellant was sentenced to 11 years incarceration for attempted murder, 11 years incarceration for each felonious assault, 36 months incarceration for having weapons under disability to run concurrently, 9 years incarceration on the three firearm specifications and two years incarceration on each repeat violent offender specification, for a total sentence of 48 years.

{¶10} Appellant assigns a single error on appeal:

{¶11} "THE TRIAL COURT'S DENIAL OF THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS WAS AN ERROR OF LAW."

{¶12} Appellant argues that the court erred in overruling his motion to suppress. He argues that appellant's wife's call to the police did not constitute exigent circumstances justifying a warrantless entry into the home, and that his acts of shooting at the officers did not constitute a new criminal act.[1]

{¶13} A warrantless police entry into a private residence is not unlawful if made upon exigent circumstances, a "specifically established and well-delineated exceptio[n]"

[1] Although the State argued in the trial court that the exclusionary rule did not apply because appellant's actions constituted a new criminal act, the trial court did not address this argument and instead found the warrantless entry justified by exigent circumstances.

to the search warrant requirement. *State v. Applegate*, 68 Ohio St.3d 348, 349-50, 626 N.E.2d 942, 944 (1994), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 392–393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978).

{¶14} The emergency aid exception does not require probable cause, but the officers must have reasonable grounds to believe there is an immediate need to act in order to protect lives or property, and there must be some reasonable basis for associating an emergency with the location. *State v. Gooden*, 9th Dist. Summit No. 23764, 2008-Ohio-178, ¶10.

{¶15} In *State v. Bethel*, 5th Dist. Tuscarawas No. 10-AP-35, 2011-Ohio-3020, a 911 call was placed by Community Mental Health, reporting that the defendant was talking about weapons and shooting someone. Police responded to a dispatched call that the defendant had guns in the house and had threatened to commit suicide or hurt others. When officers arrived, they saw the defendant exit the home, and they secured him. However, they entered the home to determine if there were other people in the residence. Once inside, they observed drugs and drug paraphernalia. The trial court found that exigent circumstances did not support the entry and search of the home. This Court reversed, finding that the entry into the home was necessary to protect others possibly in the residence, was reasonably related to those circumstances, and was necessary to verify the defendant's reports to Community Mental Health. *Id.* at ¶30.

{¶16} In the instant case, police received a call from appellant's wife reporting that appellant left her a voice message saying he would see her in the next lifetime. Although two vehicles were in the driveway, officers who responded to the initial report were unable to get a response from inside the home.

{¶17} Appellant's wife called a second time, asking police to go to appellant's house again. Appellant's parents accompanied police. There were still two vehicles in the driveway. Police and appellant's parents were unable to get a response from anyone inside the house, even though they made enough noise that neighbors began coming outside to see what was happening. Police left, and appellant's parents were unable to get appellant to answer the door in the absence of a police presence at the scene. Sgt. Smith knew that appellant had been questioned earlier in the day by Massillon Police Detective Bobby Grizzard who, according to Sgt. Smith, generally handles serious charges involving child sexual abuse. According to Smith's testimony at the suppression hearing, when police returned and met with appellant's parents, Smith believed "it was starting to dawn on them" that appellant might have harmed himself. Tr. 19. He then asked the parents if they wanted police to try to get inside. He told them he'd "hate to leave the scene if this guy did something to himself and he's in there and he still could be saved." Tr. 19.

{¶18} Based on the evidence presented at the suppression hearing, the facts known to the police at the time Officer Riccio entered the home gave them reasonable grounds to believe that entry into the home was necessary to insure that appellant had not attempted to harm himself. The trial court did not err in finding the warrantless entry to be justified based on the exigent circumstances exception.

{¶19} Because we find the trial court did not err in overruling the motion to suppress on the basis of exigent circumstances, we need not reach the issue of whether appellant's actions in shooting at the police officers constituted a separate act.

{¶20} The assignment of error is overruled. The judgment of the Stark County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.

HON. CRAIG R. BALDWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

CRB/rad

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

STEVEN P. BUBENCHIK, JR.

Defendant - Appellant

JUDGMENT ENTRY

Case No. 2014CA00020

Appellant, Steven P. Bubenchik, Jr., filed a pro se application for reopening pursuant to App. R. 26(B). Appellant is attempting to re-open the appellate judgment that was rendered by this Court on November 10, 2014, in *State v. Bubenchik*, 5th Dist. Stark No. 2014CA00020, 2014-Ohio-5056, which affirmed a judgment of the Stark County Common Pleas Court convicting appellant of attempted murder (R.C. 2903.02(A)) with a repeat violent offender specification and a firearm specification, two counts of felonious assault (R.C. 2903.11(A)(2)) with repeat violent offender specifications and firearm specifications, and having weapons under disability (R.C. 2923.13(A)(2)).

App.R. 26(B) states that a defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. See also, *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992).

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APP. B.

In *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458 (1996), the Supreme Court held that the two prong analysis found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to assess a defense request for reopening.

In *Strickland v. Washington*, the United States Supreme Court held that in order to establish a claim for ineffective assistance of counsel the appellant must show (1) that counsel's performance was deficient, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, (2) that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. *Id.* at paragraph six of syllabus.

Appellant first argues that the trial court abused its discretion in denying his motion to suppress. This argument was raised and considered by this Court on direct appeal.

Appellant next argues that his conviction is void ab ignitio due to police and prosecutorial misconduct. He specifically argues that he did not shoot at the police vehicle, and that the police officer perhaps shot at the vehicle himself before photographing the car. He argues that his conviction is supported by the officers' false testimony. The record does not support appellant's claims, and counsel was not ineffective for failing to raise these arguments on direct appeal.

Appellant argues that his trial counsel put forth no effort in preparing for trial, and held back evidence that would prove that appellant was truthful in his testimony. He argues that counsel had appellant incriminate himself when there was no evidence of a

crime. The record does not demonstrate this claim of ineffective assistance of trial counsel, and appellate counsel was therefore not ineffective for failing to raise this argument on direct appeal.

Appellant's application for reopening is denied. Costs are assessed to appellant.

HON. CRAIG R. BALDWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

STEVEN P. BUBENCHIK, JR.

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2016 CA 00086

OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2013 CR 01293

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 11, 2016

APPEARANCES:

For Plaintiff-Appellee

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App. C.

Wise, J.

{¶1} Appellant Steven P. Bubenchik, Jr. appeals from the decision of the Court of Common Pleas, Stark County, which denied his petition for post-conviction relief and his two ancillary motions, pertaining to his 2013 convictions for attempted murder, felonious assault, and other offenses and/or specifications. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} On the evening of August 8, 2013, officers from the Massillon Police Department went to appellant's residence to conduct a check on his welfare, having been informed by appellant's estranged wife that she had received a potentially suicidal voice mail message from him about seeing her in the "next lifetime." Officers Rogers, Alexander and Riccio responded to the Geiger Avenue SW address, but they left after seeing no lights on and no movement inside. Later that evening, obtaining the assistance of appellant's parents, the officers returned, with Sergeant Smith in charge. Ultimately, the parents indicated that they wanted the officers to enter appellant's house.

{¶3} As the officers commenced their entry procedures, a gunshot sounded from inside. Officer Riccio came back outside, and all the officers scattered for cover. A man, later identified as appellant's brother, ran out the front door and was taken to the ground and handcuffed. In the meantime, appellant leaned out a window with a firearm, yelling that he was "going to kill you motherfuckers." Appellant then began shooting at the officers from the window. The officers did not return fire, fearing someone else was inside. A SWAT team was called, and after about three hours of negotiations, appellant put down his pistol and surrendered.

{¶4} Appellant was subsequently charged with three counts of attempted murder and three counts of felonious assault, all with repeat violent offender specifications and firearm specifications, and one count of having weapons under a disability.[1] Prior to trial, appellant filed a motion to suppress, which was overruled by the trial court.

{¶5} The case proceeded to a jury trial commencing on December 10, 2013. The jury subsequently found appellant not guilty of attempted murder as to Officer Riccio and Sergeant Smith, guilty of attempted murder as to Officer McConnell (another officer who had reported to the scene), guilty of felonious assault as to all three officers, and guilty of having weapons under a disability. The trial court merged the felonious assault conviction with the attempted murder conviction as to Officer McConnell. Appellant was sentenced to eleven years in prison for attempted murder, eleven years for each felonious assault, thirty-six months for having weapons under a disability (to run concurrently), nine years in prison on the three firearm specifications and two years in prison on each repeat violent offender specification, for a total sentence of forty-eight years.

{¶6} Appellant then filed a direct appeal to this Court, challenging as his sole assigned error the trial court's decision to overrule his motion to suppress. On November 14, 2014, we affirmed appellant's convictions. *See State v. Bubenchik*, 5th Dist. Stark No. 2014CA00020, 2014-Ohio-5056. The Ohio Supreme Court thereafter declined to accept the case for further appeal.

{¶7} On December 8, 2014, appellant filed in the trial court a *pro se* petition for post-conviction relief, as well as a request for appointed counsel and a ballistics expert.

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[1] Two additional counts related to events from a different time frame were on the indictment, but these were handled separately via a plea.

On August 13, 2015, appellant filed a motion to amend his prior petition. In both instances, appellant asserted ineffective assistance of trial counsel. On January 29, 2016, the State filed a response to the petition, as well as a motion to dismiss and a motion for summary judgment.[2] Appellant filed a reply on March 1, 2016.

{¶8} On April 5, 2016, the trial court issued a judgment entry denying appellant's petition and corresponding motions, essentially finding that he had failed to support his post-conviction claims and that his arguments were additionally barred by the doctrine of *res judicata*.

{¶9} On April 25, 2016, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶10} "I. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION IN NOT HOLDING AN EVIDENTARY [SIC] HEARING."

I.

{¶11} In his sole Assignment of Error, appellant contends the trial court erred in not granting him an evidentiary hearing on his PCR petition and amended petition. We disagree.

{¶12} A defendant is entitled to post-conviction relief under R.C. 2953.21 only upon a showing of a violation of constitutional dimension that occurred at the time the defendant was tried and convicted. *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13, 16. A petition for post-conviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Wilhelm,* 5th Dist. Knox No. 05–CA–31,

[2] In said response, the State did not contest the timeliness of appellant's PCR petition(s).

2006–Ohio–2450, ¶ 10, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819. In reviewing a trial court's denial of an appellant's petition for post-conviction relief, absent a showing of abuse of discretion, we will not overrule the trial court's finding if it is supported by competent and credible evidence. *State v. Delgado, 8th Dist.* Cuyahoga No. 72288, 1998 WL 241988, citing *State v. Mitchell* (1988), 53 Ohio App.3d 117, 559 N.E.2d 1370. 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 the petitioner is not entitled to relief." *See* R.C. 2953.21(E). We apply an abuse of discretion standard when reviewing a trial court's decision to deny a post-conviction petition without a hearing. *State v. Holland*, 5th Dist. Licking No. 12–CA–56, 2013-Ohio-905, ¶ 17. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} The test for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *See, also State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. There is essentially a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, the trial court must determine whether counsel's assistance was ineffective; *i.e.*, whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If the court finds ineffective assistance of counsel, it must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial

is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶14} In the case *sub judice*, appellant first contends that information from the BCI investigation reports, certain photographs and/or diagrams (allegedly "withheld" by his trial counsel), and testimony from one of the police officers during the preliminary hearing would support his ineffective assistance claims. He also makes a cryptic assertion that "[t]estimony appellant gave during trial is consistent with the B.C.I. Report and was not presented to the Jurors." Appellant's Brief at 4.

{¶15} However, under the doctrine of *res judicata*, a final judgment of conviction bars a defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at the trial which resulted in that judgment of conviction or on an appeal from that judgment. *State v. Callahan*, 7th Dist. Mahoning No. 12 MA 173, 2013-Ohio-5864, ¶ 9, quoting *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). Conversely, issues properly raised in a post-conviction petition are those that could not have been raised on direct appeal because the evidence supporting the issue is outside the record. *State v. Snelling*, 5th Dist. Richland No. 14CA19, 2014-Ohio-4614, ¶ 30. In other words, "[u]nder Ohio law, where a defendant, 'represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief.' " *State v. Dickerson*, 10th Dist. Franklin No. 13AP-249, 2013-Ohio-4345, ¶ 11, quoting *State*

v. Cole, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus, modifying *State v. Hester,* 45 Ohio St.2d 71, 341 N.E.2d 304 (1976).

{¶16} In its response brief, the State directs us to the discovery receipt document from the trial court file, dated October 21, 2013, which indicates the crime scene photographs and/or diagrams were provided by the State in pre-trial discovery. Furthermore, a large number of such photographs and a "scene diagram" were submitted to the trial court as part of the State's exhibits, and as such would not be *dehors* the record. *See* Tr. at 722-726. Finally, appellant does not reveal why the referenced preliminary hearing or trial testimony should be considered as outside of the trial court record. We therefore find no abuse of discretion in the trial court's application of the doctrine of *res judicata* to deny the aforesaid claims without a hearing.

{¶17} In regard to the aforesaid BCI reports, the record would again reflect that these documents were provided in discovery, although we do not presently ascertain that they were referenced as part of the trial exhibits. Appellant herein essentially asserts that said investigative reports reveal several discrepancies in the State's case as to where certain bullet fragments were found and which officers and police vehicles were targeted. However, assuming arguendo this information is indeed *dehors* the record and not blocked by *res judicata*, appellant fails to persuade us that his defense was thereby prejudiced on this point. *Strickland, supra.* It has been aptly stated that "the evidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond

mere hypothesis and a desire for further discovery." *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756.

{¶18} Appellant secondly contends that his trial counsel was ineffective for allegedly failing to interview various witnesses and/or police officers, procure a ballistics expert, and adequately communicate with appellant. Assuming *arguendo* trial counsel did not pursue sufficient pretrial investigation as alleged herein by appellant, a particular decision by a trial attorney not to investigate an issue must be assessed for reasonableness in light of all the circumstances, with the application of "a heavy measure of deference to counsel's judgments." *See Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574. Furthermore, this Court has recognized that "* * * complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *State v. Phillips*, 5th Dist. Stark No. 2010CA00338, 2011–Ohio–6569, ¶ 26, quoting *Buckelew v. United States* (5th Cir.1978), 575 F.2d 515, 521 (internal quotation marks omitted).

{¶19} We find appellant in this regard has chiefly relied on the self-serving memorandum he presented with his petition and his present undeveloped suggestion that the aforesaid evidence would have revealed discrepancies in his case. Appellant thus fails to demonstrate in what manner he was prejudiced by trial counsel's performance. Upon review of the record and the post-conviction pleadings, we hold the trial court did not abuse its discretion in denying appellant's petition and amended petition for post-conviction relief without conducting an evidentiary hearing.

{¶20} Appellant's sole Assignment of Error is therefore overruled.

{¶21} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

HON. JOHN W. WISE

HON. SHEILA G. FARMER

HON. W. SCOTT GWIN

JWW/d 0928

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEVEN P. BUBENCHICK, JR., *Pro Se,*	)	Case No.: 5:17 CV 1890
	)	
Petitioner	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
WARDEN ED SHELTON,	)	
	)	
Respondent	)	ORDER

Currently pending before the court in the above-captioned case is *Pro Se* Petitioner Steven Bubenchik's Amended Petition for Writ of Habeas Corpus (ECF No. 31). Pursuant to Local Rule 72.2, the matter was referred to Magistrate Judge James R. Knepp II for a Report and Recommendation ("R & R"). For the following reasons, the court adopts Judge Knepp's R & R that the Petition be denied in its entirety.

On September 8, 2017, Petitioner filed a Petition for Writ of Habeas Corpus (ECF No. 1), pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence in state court on one count of attempted murder with firearm and repeat violent offender specifications, three counts of felonious assault with firearm and repeat violent offender specifications, and one count of having weapons under a disability. (R & R at 3–4, ECF No. 36.) As a result of the conviction, Petitioner was sentenced to an aggregate of forty-eight (48) years' imprisonment. (*Id.* at 4.) Petitioner asserted the following four grounds for relief and supporting facts in his Petition:

GROUND ONE: Trial court's denial of Appellant's suppression hearing was an error of law.

APPX 61

Amendment rights.

GROUND FOUR: Appellate counsel violated Petitioner's Sixth and Fourteenth Amendment rights.

(Am. Pet. at 10–18, ECF No. 31.) Petitioner lays out supporting facts for each ground in the Amended Petition and in an attached memorandum of law (ECF No. 31-1). Respondent filed an Answer/Return of Writ (ECF No. 32) on July 31, 2018, and Petitioner filed a Reply/Traverse (ECF No. 34) on September 5, 2018.

Judge Knepp submitted his R & R on July 12, 2019, recommending that the court deny and dismiss the Amended Petition in its entirety. The R & R finds that "Ground One is not cognizable in a habeas proceeding"; "Ground Two is procedurally defaulted"; "Ground Three is partially procedurally defaulted, and partially meritless"; and "Ground Four fails on the merits." (R & R at 26, ECF No. 36.) After Petitioner sought additional time to file an objection (Petr's Mot. Extension of Time, ECF No. 37), the court granted an extension until August 20, 2019.

On August 16, 2019, Petitioner timely filed an Objection to Judge Knepp's R & R. (Petr's Obj., ECF No. 39.) However, the Objection does not raise any new arguments, nor does it directly address the factual findings and legal conclusions in Judge Knepp's R & R. Petitioner instead reiterates the arguments he raised in his Petition and Reply/Traverse. (*See* ECF Nos. 31, 34.) An objection that summarizes what has already been presented, or merely states a disagreement with a magistrate's conclusion, is not an objection. *See Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004).

After a careful *de novo* review of Judge Knepp's R & R, as well as Petitioner's Objection and all other relevant documents in the record, the court finds that Judge Knepp's recommendations are fully supported by the record and controlling case law. *See Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004). Petitioner has not established that his federal rights were violated. Accordingly,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEVEN P. BUBENCHICK, JR., *Pro Se*,	)	Case No.: 5:17 CV 1890
Petitioner	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
WARDEN ED SHELTON,	)	
Respondent	)	JUDGMENT ENTRY

The court, having dismissed Petitioner Steven P. Bubenchick's ("Petitioner") Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (Pet., ECF No. 1), in a separate Order on this same date, hereby enters judgment for Respondent Warden Ed Sheldon and against Petitioner. The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

September 19, 2019

No. 20-3438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVEN P. BUBENCHIK, JR.,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
DOUGLAS FENDER, Warden,)
)
Respondent-Appellee.)

APP. E.

Before: THAPAR, Circuit Judge.

Steven P. BuBenchik, Jr., a pro se Ohio prisoner, appeals a district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. This court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He moves for appointed counsel and to proceed in forma pauperis ("IFP") on appeal. *See* Fed. R. App. P. 24(a)(5).

Upon receiving BuBenchik's voice mail message that he would see her in the next lifetime, his estranged wife twice called the police out of concern for his welfare. Police, in turn, twice went to BuBenchik's house, knocked on doors, and shined lights in the windows, but received no response. When Officer Riccio entered through a window and announced that he was there to check on BuBenchik's welfare, a gunshot rang out, and Riccio fled the house. BuBenchik leaned out of a window, yelled "I'm going to kill you m*** f***s," and continued shooting. Three hours later, BuBenchik surrendered.

As relevant here, a grand jury indicted BuBenchik on three counts of attempted murder, three counts of felonious assault, firearm and repeat violent offender specifications, and having weapons while under a disability. BuBenchik moved to suppress evidence and statements made to police. The trial court held a hearing and denied the motion, reasoning that exigent

circumstances justified the warrantless entry because the police had a reasonable belief that BuBenchik was suicidal.

At trial, BuBenchik testified on his own behalf. The jury convicted him of one count of attempted murder, three counts of felonious assault, and the weapons charge. The trial court found him guilty of the specifications at a bench trial and sentenced him to a total of forty-eight years in prison. The Ohio Court of Appeals affirmed his convictions and sentence. *State v. BuBenchik*, No. 2014 CA00020, 2014 WL 6066188 (Ohio Ct. App. Nov. 10, 2014), *perm. app. denied*, 29 N.E.3d 1005 (Ohio 2015).

During the pendency of his direct appeal, BuBenchik simultaneously pursued two forms of collateral relief. On December 8, 2014, he petitioned to vacate or set aside his conviction. The trial court denied the petition, and the Ohio Court of Appeals affirmed the decision. *State v. BuBenchik*, No. 2016 CA00086, 2016 WL 5930314 (Ohio Ct. App. Oct. 11, 2016), *perm. app. denied*, 72 N.E.3d 658 (Ohio 2017). On February 9, 2015, BuBenchik moved to reopen his direct appeal pursuant to Ohio Appellate Rule 26(B). The Ohio Court of Appeals denied his application, and the Ohio Supreme Court declined to accept jurisdiction.

In his § 2254 petition, as amended, BuBenchik asserted that: (1) the trial court violated his Fourth Amendment rights by denying his motion to suppress; (2) his Fourteenth Amendment rights were violated by police and prosecutorial misconduct; (3) trial counsel rendered ineffective assistance; and (4) appellate counsel rendered ineffective assistance by failing to raise the claims of police and prosecutorial misconduct and ineffective assistance of trial counsel.

A magistrate judge recommended denying the first claim as non-cognizable on habeas review and denying the remaining claims as procedurally defaulted, meritless, or both.

Over BuBenchik's objections and upon de novo review, the district court adopted the magistrate judge's report and denied the § 2254 petition. The court declined to issue a COA.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve

encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To determine if this standard is satisfied, this court conducts "an overview of the claims" and "a general assessment of their merits." *Id.* at 336. In the § 2254 context, a district court cannot grant relief from a merits adjudication of a constitutional claim unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2).

When the appeal concerns a district court's procedural ruling, a COA should issue if the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A prisoner must "demonstrate substantial underlying constitutional claims." *Id.*

Jurists of reason would agree that BuBenchik's claim regarding the denial of the motion to suppress is not cognizable on habeas review. Federal habeas relief may not be granted when a petitioner had a full and fair opportunity to litigate a Fourth Amendment claim in state court proceedings. *See Stone v. Powell*, 428 U.S. 465, 494 (1976). An "'opportunity for full and fair consideration' means an available avenue for the prisoner to present his claim to the state courts, not an inquiry into the adequacy of the procedure actually used to resolve that particular claim." *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013). Despite BuBenchik's assertions to the contrary, he had an available avenue and used that avenue to present his Fourth Amendment claim to the trial and appellate courts. BuBenchik had unsuccessfully pursued his claim before trial and on direct appeal.

Jurists of reason would agree that BuBenchik procedurally defaulted his second claim, in which he asserted that the police committed misconduct by falsely testifying that he shot at a police vehicle when an officer might have done so, and that the prosecutor committed misconduct by expressing doubt that this happened. State law required BuBenchik to raise the claim either on direct appeal, to the extent that he relied on evidence of record, or in his post-conviction petition, to the extent that he relied on evidence outside the record. *See State v. Milanovich*, 325 N.E.2d

540, 543 (Ohio 1975); *State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967); *see also State v. Jordan*, No. 109345, 2021 WL 926999, at *7 (Ohio Ct. App. Mar. 11, 2021). BuBenchik did neither. He instead indirectly raised the issue in his Rule 26(B) application by arguing that appellate counsel rendered ineffective assistance by failing to raise the claim on direct appeal. However, raising a claim of ineffective assistance of appellate counsel in state court does not preserve the underlying issue for federal habeas review. *See Scott v. Houk*, 760 F.3d 497, 505 (6th Cir. 2014); *Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008).

Moreover, BuBenchik has failed to show cause and prejudice or actual innocence to excuse his default. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). Although he argues that the default should be excused due to ineffective assistance of trial and appellate counsel, counsel cannot be deemed ineffective for failing to raise frivolous issues. *See Goff v. Bagley*, 601 F.3d 445, 469 (6th Cir. 2010); *Norris v. Schotten*, 146 F.3d 314, 336 (6th Cir. 1998). The Ohio Court of Appeals found that police witnessed BuBenchik shooting his gun at them, took cover behind their cruisers, and did not return fire. *BuBenchik*, 2014 WL 6066188, at *1. BuBenchik's supposition about a police officer shooting his own car is speculative, and BuBenchik has not demonstrated a reasonable probability that the result of his criminal proceeding would have been different if trial or appellate counsel had advanced his theory. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In his third claim, BuBenchik argued that trial counsel rendered ineffective assistance when he did not provide or review with BuBenchik discovery such as photos, diagrams, and Ohio Bureau of Criminal Investigation ("BCI") reports; "denied Bubenchik [sic] [a] crime lab technician, Joshua Barr from the BCI"; and failed to interview police officers or other witnesses. The discovery and witnesses purportedly would have supported his theory of police misconduct by showing discrepancies in the record.

On review of the denial of his post-conviction petition, the Ohio Court of Appeals concluded that the doctrine of res judicata barred the part of the claim regarding discovery because discovery had been provided to the defense, submitted at trial as exhibits, or both. Thus, the evidence was a matter of record, and BuBenchik could have raised his assertion on direct appeal.

BuBenchik, 2016 WL 5930314, at *3. The court concluded that counsel's actions regarding witnesses were a matter of trial strategy, and that BuBenchik had not demonstrated prejudice as to any of counsel's alleged deficiencies, whether or not review was barred by res judicata.

Jurists of reason would agree that BuBenchik procedurally defaulted the part of the claim regarding counsel's alleged failure to provide discovery or review it with him. The state court's application of res judicata was an adequate and independent state law ground that barred habeas relief. *See Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012). And, as discussed above, ineffective assistance of appellate counsel would not excuse the default due to the frivolity of his theory of alleged police misconduct. Jurists of reason also would agree that the state court's dismissal on the merits of the remainder of the claim was not an unreasonable application of federal law. BuBenchik did not overcome the presumption that counsel's actions were sound trial strategy, and he did not make a substantial showing of prejudice to his defense. *See Strickland*, 466 U.S. at 687, 690.

Finally, jurists of reason would agree that appellate counsel did not render ineffective assistance by failing to raise the above claims of police and prosecutorial misconduct and ineffective assistance of trial counsel. As previously noted, counsel cannot be deemed ineffective for failing to raise frivolous issues. *See Goff*, 601 F.3d at 469.

Accordingly, the court **DENIES** BuBenchik's COA application. The motions for IFP status and for appointed counsel are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-3438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 03, 2021
DEBORAH S. HUNT, Clerk

STEVEN P. BUBENCHIK, JR.,

Petitioner-Appellant,

v.

DOUGLAS FENDER, Warden,

Respondent-Appellee.

ORDER

Before: ROGERS, LARSEN, and READLER, Circuit Judges.

Steven P. BuBenchik, Jr., a pro se Ohio prisoner, petitions this court to rehear its order of April 15, 2021, denying his application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

This court denied BuBenchik's COA application because he did not make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2).

After careful consideration, we conclude that the court did not overlook or misapprehend any point of law or fact when it denied BuBenchik's COA application. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** BuBenchik's petition for rehearing.

ENTERED BY ORDER OF THE COURT

APP. F.

Deborah S. Hunt, Clerk