[Cite as *State v. Miller,* 2009-Ohio-3621.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-148 (C.P.C. No. 02CR-01-246)
Chandale D. Miller,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 23, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Samuel H. Shamansky Co., L.P.A., Samuel H. Shamansky and *Lisa M. Tome*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Appellant, Chandale D. Miller, is appealing from the denial of his petition for post-conviction relief under R.C. 2953.21. He assigns two errors for our consideration:

> I. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT AND SENTENCE WITHOUT A HEARING WHEN APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO MEET WITH APPELLANT PRIOR TO AND DURING TRIAL.
>
> II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S PETITION TO VACATE OR

SET ASIDE JUDGMENT AND SENTENCE WITHOUT A HEARING WHEN APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO CALL A WITNESS.

{¶2} The remedy provided for in R.C. 2953.21 is statutory, not constitutional. It is not a direct appeal; it is "the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case." R.C. 2953.21(J).

{¶3} Both assignments of error assert ineffective assistance of counsel. The two-part test for this was laid out in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052: whether counsel seriously erred, and whether defendant was prejudiced by counsel's deficient conduct. A court need not address both components of the test if appellant fails to show either part of the test. Id. at 697.

{¶4} Cases in which the appellant has met the *Strickland* test burden involve clear error or omission on the part of counsel. For example, in *State v. Burke*, 10th Dist. No. 03AP-1241, 2004-Ohio-6519, we held that counsel's failure to follow the trial court's instructions on the proper method of appealing the case constituted unreasonable performance on the part of counsel that prejudiced the appellant's case. In *State v. Crawford*, 10th Dist. No. 01AP-1428, 2003-Ohio-1447, counsel failed to object to the trial court's omission of a mandatory jury instruction. In *State v. Biggers* (1997), 118 Ohio App.3d 788, defense counsel admitted outright that he had not prepared for trial. In each of these cases, we found that defendant's counsel had erred, and that the error was serious enough to have prejudiced the defendant.

{¶5} The history of the present case has been set forth in our opinion in Miller's recent appeal. We quote from that opinion:

> [A]ppellant was originally indicted on a total of ten charges on January 18, 2002. At his arraignment on January 23, 2002, he swore out an affidavit of indigency, which resulted in counsel being appointed to represent him. Counsel began preparing for trial.
>
> Five weeks later, appellant informed the lawyer that he wanted another lawyer to represent him, so the first lawyer filed a motion seeking leave to withdraw as counsel. A second experienced criminal defense lawyer was then appointed to represent appellant.
>
> Appellant was able to post bond and be released from custody, but violated an order to stay away from the victim of his crimes, resulting in his bond being revoked.
>
> Appellant then hired an experienced criminal defense lawyer to represent him in the summer of 2002. New counsel filed a series of motions, including a motion to suppress identification. After appellant and his family failed to pay retained counsel, the trial judge assigned to the case appointed the attorney rather than allow counsel to withdraw and appoint a fourth attorney.
>
> During this time frame, appellant's case was set for trial numerous times and continued numerous times for a variety of reasons, including the changes in counsel.
>
> In May 2003, the trial court allowed the third attorney to be replaced and appointed yet another experienced criminal defense lawyer to represent appellant. The trial was continued until July 7, 2003 and subsequently continued again to September 16, 2003 and October 20, 2003.
>
> The case finally proceeded to trial beginning October 20, 2003. On the second day of jury selection, appellant informed the court that he wanted to fire his fourth attorney, have his trial continued and then retain new counsel. The trial judge refused the request and had the trial proceed.

State v. Miller, 10th Dist. No. 04AP-37, 2008-Ohio-3284, ¶2-8.

{¶6} In order for us to determine that a trial court abused its discretion, we must find that the trial court made more than a simple error of law or judgment; that the court's

attitude was unreasonable, arbitrary, or unconscionable. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

{¶7} The assignments of error in the present appeal relate to the difficulties Miller experienced with the various counsel, but center on the problems he alleges he experienced with the last counsel. Specifically, he alleges that he had minimal communication with his lawyer before the trial began. He supported this allegation with records of his jail visitors, which indicate that his lawyer did not see him at the Franklin County Corrections Center. However, Miller had numerous other visitors, including his wife, grandmother, sister, friends, members of clergy, and other attorneys. We cannot know what the other visitors communicated to trial counsel and what trial counsel communicated to Miller via these other visitors.

{¶8} We also cannot tell from the record before us what other avenues of communication were or were not used. Jail inmates have the right to send letters involving their case to legal counsel and to receive confidential correspondence from legal counsel. Inmates also have access to telephones for direct calls to counsel and can use three-way calling via friends and/or family to communicate with counsel.

{¶9} During the trial of Miller's case, Miller indicated that he had talked to his lawyer on two occasions, a previous court date and the day his trial was scheduled to begin. Miller stated, "I ain't even talked to him about nothing about my case or nothing. I don't feel like it would be a fair trial." (Tr. 10, Vol. VIII.)

{¶10} Miller went on to state:

> We didn't talk over nothing on my case at all. The whole time he's been on my case he just picked up the file from my last lawyer last week. So it's like how do he know anything about my case.

(Tr. 11, Vol. VIII.)

{¶11} Miller's statements at the time of trial were not under oath, so are not literally testimony or evidence. However, assuming they are true, counsel's failure to meet with Miller before trial does not literally mean that counsel rendered ineffective assistance. The trial court found that there was an "absence of evidence demonstrating the overall communications between petitioner and trial counsel was inadequate for a case like this one." (R. 820.) Therefore, Miller has not satisfied the first part of the *Strickland* test. In addition, the testimony at trial overwhelmingly establishes Miller's guilt. For counsel to be found to have rendered ineffective assistance, the outcome of the trial must have been affected. The outcome of the trial was not affected. Miller was a longtime seller of crack cocaine who was well known to his victims. He terrorized them for a long period of time, and shot them because he believed they had stolen his supply of crack cocaine. His identity as the shooter was not in serious debate. The fact he shot both victims, almost killing one of them, was clear. His use of a firearm when he was under a legal disability was clear. Counsel's failure to get Miller acquitted of attempted murder, felonious assault, kidnapping, gun specification and having a weapon under disability was not a reflection upon counsel's performance, but a reflection of the underlying facts. Thus, Miller has also failed to fulfill the second part of the *Strickland* test. Id.

{¶12} The first assignment of error is overruled.

{¶13} The second assignment of error alleges that trial counsel rendered ineffective assistance because counsel failed to call Miller's mother to the stand to testify that one of the victims, William Burton, solicited a bribe from her. A transcript from the

time of trial reflects the exact opposite, that Miller's mother approached Burton in the courthouse and offered Burton anything he wanted to disappear without testifying. Miller's mother also indicated that Miller had numerous cousins who were out looking for Burton and who would do serious harm to Burton if he testified against her son. Miller's mother showed Burton a piece of paper with the address of Burton's mother and said, "We know everything. They turned over all the information. They are not going to protect you. Take the money and walk away. You'll be safe. You're family will be safe." (Tr. 3, Vol. VI.)

{¶14} Given the context of the trial transcript, the affidavit of Miller's mother claiming that Burton had solicited a bribe was utterly lacking in credibility. Had trial counsel called Miller's mother to the witness stand, her testimony could have damaged Miller's own credibility, as minimal as it was. The trial court found that trial counsel might have decided that adding this evidentiary complexity was not worthwhile. (R. 820.) This was a credible strategic decision, and while Miller may disagree with the decision, we find no error in his trial counsel's action. The lack of error on the part of trial counsel means that Miller has failed to prove the first part of the *Strickland* test, and therefore under *Strickland*, his claim fails. See id. Trial counsel certainly did not render ineffective assistance by failing to put Miller's mother on the witness stand at trial.

{¶15} The second assignment of error is overruled.

{¶16} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and BRYANT, J., concur.

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