[Cite as *State v. Horton*, 2011-Ohio-1387.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-466
v.	:	(C.P.C. No. 05CR-146)
Richard H. Horton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 24, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

R. William Meeks Co., LPA, and *David H. Thomas,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Richard H. Horton, appeals from a judgment of the Franklin County Court of Common Pleas, dismissing his petition for post-conviction relief brought under R.C. 2953.21. Defendant assigns a single error:

> The trial court erred in dismissing Appellant's petition for post-conviction relief, where Appellant established that his trial counsel's failure to present expert testimony on the subject of eyewitness identification deprived him of his rights

> to a fair trial, the effective assistance of counsel, and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and comparable provisions of the Ohio Constitution.

Because defendant does not demonstrate his trial counsel's failure to present the testimony of an eyewitness expert fell below an objective standard of reasonable representation or prejudiced him, we affirm.

I. Facts and Procedural History

{¶2} An eleven-count indictment filed January 7, 2005 charged defendant with aggravated burglary, felonious assault, having a weapon under disability, and multiple counts of aggravated robbery, robbery and kidnapping, most with specifications. Because some of the evidence underlying defendant's convictions is pertinent to his current appeal, we address it in some detail.

{¶3} After cashing his paycheck at a convenience store on October 8, 2004, Richard McClanahan went to a corner store near his house to buy beer and to use the pay phone. McClanahan had to pull the cash received from cashing his paycheck, about $400 to $500, to get to his change to make the phone call. Defendant saw McClanahan at the pay phone and, seeing the cash McClanahan had in his hand, asked McClanahan to lend him $20; McClanahan refused. Defendant commented that McClanahan appeared to have just been paid, and McClanahan admitted he had.

{¶4} McClanahan knew defendant because McClanahan's niece sold defendant a car several years earlier, McClanahan put brakes on the car, and he met defendant during the transaction. McClanahan also had seen defendant around the neighborhood, about 20 to 30 times, in the previous several years.

{¶5} Defendant then asked to use the telephone before McClanahan did, but McClanahan refused, advising he had to make an important call. After completing the call, McClanahan returned home to spend the evening with his girlfriend, Rhonda Curry, and her sister at the residence McClanahan and Curry shared.

{¶6} The next morning, an intruder forced his way into the McClanahan--Curry residence, held a gun to McClanahan's head, shot him in the leg, threatened to kill Curry, demanded money, and eventually left the residence with $40. While he was in the hospital, McClanahan told Detective Brenda Walker a man named "Richard" shot and robbed him. McClanahan explained he knew defendant from the car sale and would provide Detective Walker with the man's last name when McClanahan got out of the hospital. When police later separately showed Curry and McClanahan a photo array of possible defendants, both immediately identified defendant and said they were 100 percent certain he was the perpetrator.

{¶7} On February 3, 2006 the Franklin County Court of Common Pleas found defendant guilty, pursuant to jury verdict, of aggravated burglary, two counts of aggravated robbery, two counts of kidnapping, and felonious assault, all with firearm specifications. Pursuant to jury waiver, the court found defendant guilty of possessing a weapon while under disability. The court sentenced defendant to a total of 23 years. Defendant filed a direct appeal of his conviction, raising seven assignments of error. On August 30, 2007, we overruled all of defendant's assignments of error and affirmed the judgment of the trial court. *State v. Horton*, 10th Dist. No. 06AP-311, 2007-Ohio-4309.

{¶8} On January 2, 2007, during the pendency of the direct appeal, defendant filed a petition, and later an amended petition, to vacate or set aside his convictions

pursuant to R.C. 2953.21. Although defendant's petition raised four claims for relief, the trial court determined only the first claim was properly raised in a post-conviction petition, as res judicata barred the other three. Defendant's first claim for relief asserted his trial counsel was ineffective for failing to obtain or present an expert witness on the topic of eyewitness identification. On February 2, 2007, the state filed an answer to the petition, disputing all of defendant's claims of ineffective assistance of counsel but acknowledging an evidentiary hearing was appropriate.

{¶9} During the August 27 hearing on his petition, defendant presented the testimony of Dr. John L. Tilley. A forensic psychologist who received training in eyewitness identification in graduate school and in post-doctorate continuing education courses, Dr. Tilley also taught forensic psychology at Capital University. Based on Dr. Tilley's qualifications as a forensic psychologist, the court allowed him to testify as an expert. Both parties questioned Dr. Tilley concerning the eyewitness identification testimony he would have presented to the jury had he been called in defendant's trial.

{¶10} On April 16, 2010, the trial court filed a Decision and Entry Denying Motion of Defendant for Post-Conviction Relief. The court noted the relevant portions of Dr. Tilley's testimony at the evidentiary hearing and concluded "[t]he fact that trial counsel did not call an expert to challenge the reliability of eyewitness identification [did] not demonstrate ineffective assistance of counsel," as the decision not to call such an expert was a result of trial strategy. (Decision, 5.) Accordingly, the trial court did not deem defense counsel deficient in not calling an expert on eyewitness identification. Nor did the court feel the decision had any effect on the fairness of the trial defendant received.

Rather, the court concluded Dr. Tilley's testimony created "just as many questions as it may have answered, if not more." (Decision 6.)

II. Ineffective Assistance of Counsel - Failure to Call Eyewitness Expert

{¶11} Defendant's single assignment of error asserts his trial counsel's performance was deficient in failing to present the testimony of an expert witness on eyewitness identification, as the decision was not a matter of trial strategy. Moreover, because Curry's and McClanahan's identifications were the sole evidence linking defendant to the crimes, defendant contends his counsel's failure to call an expert on eyewitness identification prejudiced him.

{¶12} The post-conviction relief process is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained" in the trial court record. *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. Post-conviction review is not a constitutional right but, rather, a narrow remedy that affords a petitioner no rights beyond those the statute grants. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 282. Nor does it provide a petitioner a second opportunity to litigate his or her conviction. *State v. Hessler,* 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶32; *Murphy*.

{¶13} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377,

2006-Ohio-6679, ¶58; *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (noting "[t]he term 'abuse of discretion' connotes more than an error of law or of judgment" and "implies that the court's attitude is unreasonable, arbitrary or unconscionable").

{¶14} To prevail on his claim of ineffective assistance of counsel, defendant was required to demonstrate (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving him or her of a trial whose result is reliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258; *Calhoun* at 289 (noting the petitioner for post-conviction relief has the burden of demonstrating counsel's ineffectiveness, "since in Ohio a properly licensed attorney is presumably competent").

{¶15} An attorney's performance is deficient if it falls below an objective standard of reasonable representation. A defendant can show prejudice resulting from the deficient performance only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bradley* at 142, quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Unless defendant made both showings, he failed to demonstrate his convictions resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

A. *Counsel's Performance Not Deficient*

{¶16} "Judicial scrutiny of counsel's performance must be highly deferential, * * * [and] a court must indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance; that is, * * * the challenged action 'might be considered sound trial strategy.' " Id. 466 U.S. at 689, 104 S.Ct. at 2065; *Bradley* at 141. "Generally, 'the decision to forgo an eyewitness-identification expert is a recognized trial strategy.' " *State v. Mayrides*, 10th Dist. No. 03AP-347, 2004-Ohio-1623, ¶25, discretionary appeal not allowed, 103 Ohio St.3d 1426, 2004-Ohio-4524, quoting *State v. Keeling*, 1st Dist. No. C-010610, 2002-Ohio-3299, ¶8; see also *State v. Fisk*, 9th Dist. No. 21196, 2003-Ohio-3149, ¶9, discretionary appeal not allowed, 124 Ohio St.3d 1478, 2010-Ohio-354 (observing "an attorney's decision not to request * * * appointment of an expert witness to testify on a particular issue [is a] matter[] of trial strategy"); *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶90, citing *State v. Phillips* (1995), 74 Ohio St.3d 72, 85; *State v. Williams* (1991), 74 Ohio App.3d 686, 694 (stating "[d]ebatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available," as the "decision of whether to call a witness is generally a matter of trial strategy").

{¶17} Defendant contends *Mayrides* does not apply here, because the trial court in *Mayrides* did not hold an evidentiary hearing on the petition for post-conviction relief and determined Mayrides should have raised the issue of identification in the direct appeal. Although *Mayrides* determined the issue concerning the photographic array should have been raised on direct appeal, it addressed the issue of expert testimony on eyewitness identification and concluded Mayrides did not demonstrate his attorney "had no objectively reasonable basis for failing to retain an eyewitness-identification expert." Id. at ¶26. *Mayrides* further noted that, not only did counsel "thoroughly cross-examine[] the witnesses regarding their identification of appellant," but Mayrides did not demonstrate

that the failure to retain an expert resulted in prejudice. Id.; see *Samatar* at ¶90 citing *State v. Hartman*, 93 Ohio St.3d 274, 299, 2001-Ohio-1580 (observing "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel").

{¶18} Here, contrary to defendant's contentions, his trial counsel thoroughly cross-examined the victims on their ability to view the intruder. In cross-examining McClanahan, defense counsel asked if he saw the intruder's face, causing McClanahan to state the man "had a hood drawn all the way up" which allowed McClanahan to see only the perpetrator's eyes and eyebrows. (Tr. 69-70.) Similarly, defense counsel's cross-examination of Curry caused her to state that, even though she saw none of the perpetrator's face except his eyes, she nonetheless was "a hundred percent sure it was him." (Tr. 98.)

{¶19} In closing argument, defense counsel employed those facts, telling the jurors that if they could "determine that a reliable identification can be made beyond a reasonable doubt of a suspect whose face [was] covered by the hood of a sweat shirt except for his eyes, if you determine that is a positive identification, * * * you must live with that determination." (Tr. 301.) Counsel reminded the jury no fingerprints, DNA evidence, or gun connected defendant to the crime, making the state's case "strictly an I.D. case of a man who has his face covered with a sweat shirt and only his eyes showing." (Tr. 303.)

{¶20} Since the decision to call an expert witness falls under the ambit of counsel's trial strategy, defendant's attorney cross-examined the witnesses on each one's ability to see defendant, and counsel argued the problems inherent in their identifications in his closing argument, we cannot say defense counsel's decision not to call an expert

on eyewitness identification fell below an objective standard of reasonable representation. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10 (stating "trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance," including the decision to present expert testimony).

{¶21} Defendant nonetheless claims his attorney's decision not to call an expert witness was not trial strategy, because counsel did not discuss with him the possibility of retaining an expert to testify about eyewitness identification issues. (Aug. 27, 2008 Tr. 97.) Defendant, however, points to no authority indicating an attorney's failure to discuss with his or her client whether to call an expert witness removes the decision from the ambit of trial strategy. Cf. Prof.Con.R. 1.4(a)(2) (stating that in communication between a lawyer and client, the lawyer should "*reasonably* consult with the client about the means by which the client's objectives are to be accomplished"). Whatever the ethical considerations may be if counsel did not discuss the matter with defendant, the decision, in the circumstances of this case, remains one of trial strategy.

{¶22} The trial court did not err in concluding counsel's failure to call an expert to testify regarding eyewitness identification was a tactical decision that did not fall below an objective level of reasonable representation.

B. *Counsel's Performance did not Prejudice Defendant*

{¶23} Had the expert defendant presented at the evidentiary hearing on his petition for post-conviction relief testified at trial, the witness would have been permitted to testify generally as to "the variables or factors that may impair the accuracy" of typical eyewitness identification. *State v. Buell* (1986), 22 Ohio St.3d 124, paragraph one of the

syllabus, cert. denied, *Buell v. Ohio* (1986), 479 U.S. 871, 107 S.Ct. 240. The expert would not have been allowed to testify "regarding the credibility of the identification testimony of a particular witness * * *, absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events." Id. at paragraph two of the syllabus.

{¶24} Dr. Tilley identified four areas about which he would have testified: (1) the general unreliability of eyewitness identification, (2) how eyewitness competency is unrelated to eyewitness accuracy, (3) the possibility of "transference of memory," and (4) issues pertaining to photo arrays. (Tr. 55-56.) Although the witness stated "research indicates that eyewitness testimony is to a certain extent inherently unreliable," he testified eyewitness identification can be good and "[t]here are plenty of cases in which it was reliable." (Tr. 57, 82.)

{¶25} Concerning the first two areas, Dr. Tilley stated "witnesses tend to be overly confident in their reports," so "[a]n individual making a misidentification is just as confident in their choice as a person making a correct identification." (Tr. 59-60.) The witness opined "confidence inflation" occurred here, noting McClanahan initially could remember only defendant's first name, but later said he was 100 percent certain of the suspect's identity. (Tr. 61.)

{¶26} Apart from whether Dr. Tilley's specific testimony regarding McClanahan would have been admissible, the trial court pointed out the flaw in the witness' logic because McClanahan, while at the hospital, identified the man who shot him as "Richard," the person to whom his niece had sold a car several years back. McClanahan offered he could retrieve the last name for the detective once he was out

of the hospital. (Tr. 83-84.) As the trial court observed, the witness obviously knew the man he was trying to identify, and McClanahan's inability to remember the last name was a "ludicrous" basis on which to say McClanahan initially was not confident in identifying defendant. (Tr. 84.)

{¶27} The third point of Dr. Tilley's testimony addressed memory transference, which occurs where "an individual believes they're recalling someone from a particular situation, when in essence they are actually recalling them from a different situation." (Tr. 63.) According to Dr. Tilley, the individual's memory confuses the two events because they are similar in nature. Dr. Tilley stated factors influencing memory transference include a "high degree of stress" that occurred with respect to the event. (Tr. 64.) He also included factors such as whether "the crime or situation occurred briefly, if there was relatively little time, or a good viewpoint from which to make an identification, and also that there be some moderate to minimal familiarity with the individual." (Tr. 64.) Although Dr. Tilley testified being shot would be the high stress type of situation that would lead to memory transference, he also admitted some studies indicated a high degree of stress actually increases the likelihood a witness will correctly identify a suspect.

{¶28} The doctor also admitted that the longer a person spends with the suspect, the more likely the identification will be good. (Tr. 87.) Here, the robbery lasted between 15 and 25 minutes, so it was not a brief encounter that would increase the likeliness of memory transference. (Tr. 99.) Dr. Tilley also agreed the closer the witness was to the perpetrator and the greater the lighting in the area, the more likely the witness made an accurate identification. (Tr. 88.) Here, the robbery occurred in the morning, and the two

victims and the robber were all confined to the front room of the house, leaving little distance between the victims and the perpetrator. (Tr. 46, 50.)

{¶29} As to the fourth point of his testimony concerning the photo array, Dr. Tilley testified "misidentification tends to increase when, as here, photo line-ups are presented simultaneously" because, even if the culprit's picture is not in the array, the witness is inclined to pick the person whose appearance is closest to the culprit. (Tr. 71-72.) Dr. Tillley, however, admitted he had limited experience in working with crime victim eyewitness identifications. He further acknowledged college students conducted most of the studies he cited, and a "college student taking part in an event may have a different perspective than a crime victim testifying under oath with respect to an event." (Tr. 87.)

{¶30} As a result, Dr. Tilley's testimony on the factors or variables that may have influenced McClanahan's and Curry's identifications demonstrated potential problems in the identifications but also highlighted factors demonstrating the potential strengths of their identifications. Indeed, various aspects of Dr. Tilley's testimony may have been as helpful to the state as to defendant.

{¶31} In the final analysis, mistaken identity was highly unlikely because the victims and defendant knew each other. See *State v. Crosby*, 186 Ohio App.3d 453, 2010-Ohio-1584, ¶2-3, 30, 41, appeal not allowed, 126 Ohio St.3d 1549, 2010-Ohio-3855 (noting expert testimony on eyewitness identification may have confused the jury where mistaken identity was unlikely because the victim and defendant knew each other and, when the victim came out of a coma, he immediately identified the defendant as the gunman). Dr. Tilley admitted a witness will more easily identify someone he or she knows than a stranger, and the longer the witness has known someone, the more easily

he or she will identify them. (Tr. 91-92.) The victims here met defendant several years before the incident, and both testified they were familiar with defendant from seeing him around the neighborhood. (Tr. 55, 73, 99, 100-01.) Indeed, defendant testified he would readily recognize McClanahan or Curry, suggesting the reverse also would be true. The testimony supports that conclusion, as Curry and McClanahan arrived at the determination that defendant was the perpetrator independent from one another.

{¶32} Finally, other factors beyond eyewitness identification connected defendant to the crime. McClanahan testified that during the robbery the perpetrator said, "You just got paid yesterday. Get that god damn money." McClanahan told him he did not have the money, and the intruder retorted, "You got [sic] damn lie, you know where that money at. * * * Where is your telephone now, huh? Where is your telephone at?" (Tr. 49.) The perpetrator thus referred during the robbery to the previous day's comments about McClanahan's money and the pay phone, and he even used some of the same words the men exchanged the prior day.

{¶33} McClanahan also testified that, apart from physical features, he was able to identify defendant on the sound of his voice, which he recognized from the previous day's encounter with defendant. (Tr. 59, 70.) McClanahan further noted the perpetrator wore the same clothes defendant wore the day before at the phone booth. (Tr. 57.) As a result, the robber's voice, clothes, and words, compared to defendant's voice, clothes, and words from the day before at the phone booth, demonstrate that even if defense counsel called an expert witness to testify on eyewitness identification, the jury's verdict would have been the same. The trial court did not err in determining defendant suffered no

prejudice from his attorney's decision not to call an expert to testify to eyewitness identification.

{¶34} Accordingly, we overrule defendant's sole assignment of error and affirm the trial court's denial of defendant's petition for post-conviction relief.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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