

[Cite as *State v. Cox*, 2015-Ohio-894.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26136
Plaintiff-Appellee	:	
	:	Trial Court Case No. 11-CR-2557
v.	:	
	:	(Criminal Appeal from
VERNON LEE COX, JR.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of March, 2015.

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Attorneys for Plaintiff-Appellee

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Defendant-Appellant, *pro se*

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HALL, J.

{¶ 1} Vernon Lee Cox, Jr. appeals pro se from the trial court's denial of his R.C.

2953.21 petition for post-conviction relief.

{¶ 2} Although Cox's appellate brief lacks proper assignments of error,¹ he argues that the trial court erred in denying his petition without a hearing where the petition established ineffective assistance of counsel.

{¶ 3} The record reflects that Cox was convicted in 2012 on multiple counts of rape, sexual battery, and gross sexual imposition involving a child under the age of thirteen. The offenses involved sexual activity with his step-daughter over a period of years at different locations. After the merger of some counts, he received an aggregate thirty-year prison sentence. On direct appeal, this court overruled nine assignments of error addressing a variety of issues and affirmed. See *State v. Cox*, 2d Dist. Montgomery No. 25477, 2013-Ohio-4941.

{¶ 4} On July 9, 2013, Cox filed a petition for post-conviction relief under R.C. 2953.21. (Doc. #5). After summarizing the factual and procedural history of his case as well as the applicable legal standards, Cox's petition advanced the following brief argument:

Of pertinence to this Petition are the facts that Trial Counsel was informed of information essential to the defense of this matter and failed to pursue it. Specifically, Counsel was provided with work records that demonstrated that it was impossible for the Petitioner to have been present for the incidents claimed by the Complainant (Affidavit of Vernon Cox), that he was diagnosed with herpes in 2004 and gave herpes to every

¹ Cox's "appellate brief" actually is a March 18, 2014 memorandum he filed with his notice of appeal. On October 21, 2014, this court filed a decision and entry construing the memorandum, which is styled as a "Petition for Post Conviction Relief On Appeal From Montgomery County Court of [C]ommon [P]leas," as an appellate brief.

subsequent woman he was involved with . . . except the Complainant (Affidavits of Vernon Cox and Jane Cox, medical records attached hereto), that he wanted an expert on delayed reporting to be hired and so instructed Counsel (Affidavit of Vernon Cox), and that three specific jurors were sleeping during the trial (Affidavits of Vernon Cox and Jane Cox). Finally, Counsel did not obtain pictures from the listing of Petitioner's home showing that there was no television in his bedroom as claimed by the Complainant. (Affidavit of Jane Cox, Listing Photographs).

This matter involved allegations for which no specific dates were given. No physical medical evidence was offered. The case rested entirely on the credibility of the Complainant who needed a great deal of prompting. The evidence not pursued by Counsel would have shown that it was not possible for the allegations of penetration, or even of availability of the defendant, to have occurred. The failure to use this material fell below an objective standard of reasonable representation and the Defendant was convicted solely on the word of the Complainant to his prejudice.

(*Id.* at 5-6).

{¶ 5} In support of his petition, Cox provided his own affidavit. Therein, he averred (1) that he saw three jurors sleeping during his trial and that he informed his attorney, who “refused to say anything to the Court,” (2) that he gave his attorney records showing that he worked eight to ten hours a day, seven days a week, from 1992 until 2011 and that his attorney failed to use the records at trial, (3) that despite his request his attorney failed to subpoena medical records and his physician to show that he contracted herpes in 2004

and had given the virus to every woman with whom he had sexual relations, and (4) that despite his request his attorney failed to hire an expert to testify on “delayed reporting” of sexual abuse. Cox also provided an affidavit from his current wife, Jane Cox, who is not the mother of the victim. She averred (1) that she was present when Cox told his attorney “to get his work attendance records,” (2) that she was present when Cox told his attorney to subpoena his medical records and his physician, (3) that she was present when Cox told his attorney to hire an expert to testify on delayed reporting, (4) that she contracted herpes from Cox within one month of having sex with him, (5) that she saw three jurors sleeping and that she and Cox both told his attorney, and (6) that she obtained pictures of Cox’s house from a real-estate listing. The pictures, which accompanied her affidavit, showed a bedroom that did not appear to have a television present. The purpose of the pictures was to controvert the victim’s testimony that Cox’s bedroom had a television in it.

{¶ 6} The trial court denied Cox’s petition without an evidentiary hearing. In a February 18, 2014, decision, entry, and order, the trial court addressed and rejected each of his arguments. (Doc. #10). With regard to sleeping jurors, the trial court noted that it did not observe any sleeping jurors and found the averments from Cox and his wife not credible. The trial court also concluded that the claim failed because Cox had not identified what testimony the sleeping jurors missed. (*Id.* at 7-8). With regard to work records, the trial court reasoned that such had minimal relevance “because the records would not rebut Mr. Cox’s easy access” to the victim when he was not working. (*Id.* at 6). With regard to medical records and testimony from Cox’s physician, the trial court noted that other evidence was presented at trial about him having herpes and transmitting it to other people. (*Id.* at 6-7). With regard to the lack of a defense expert on delayed reporting,

the trial court noted the absence of any evidence from Cox about what such an expert would have said. (*Id.* at 7). Finally, with regard to the pictures from a real-estate listing, the trial court noted that the alleged sexual activity in the bedroom had occurred when the victim was eleven or twelve years old, which was six or seven years before trial. The trial court then reasoned: “There is no indication concerning when the pictures of the * * * bedroom were taken, and, therefore, there is nothing to indicate that the pictures depict the bedroom as it existed when the incident described by [the victim] occurred.” (*Id.* at 9).

{¶ 7} On appeal, Cox reiterates his arguments about the ineffectiveness of his trial counsel. He maintains that counsel provided prejudicially deficient representation by failing to call his physician as a witness to testify about his (Cox’s) infection with herpes. Cox claims such testimony and supporting medical records would have cast doubt on the testimony of the victim, who did not have herpes despite allegedly engaging in sexual activity with him. (Appellant’s brief at 6). In connection with this issue, Cox claims the testimony of a doctor who did testify at trial was inadequate because she examined him in 2012, which was after the alleged sexual abuse. (*Id.* at 6, 8-9). Cox also alleges ineffective assistance of counsel based on the failure to introduce his work records at trial. He contends the records would have shown that he “could not possibly have committed the sexual abuse” because he was at work. (*Id.* at 6-7). Cox next repeats his claim concerning his attorney’s failure to advise the trial court about sleeping jurors. (*Id.* at 7). He also mentions the failure to introduce the pictures of his bedroom and the failure to hire an expert on the issue of delayed disclosure. (*Id.* at 5). Finally, Cox argues that his attorney provided ineffective assistance during the plea-bargaining phase by failing to adequately convey a fifteen-year sentence offer. Specifically, he complains that counsel

presented the offer to him as an “unofficial” one while telling the prosecutor that he probably would refuse it. (*Id.* at 10).

{¶ 8} “To prevail on a petition for post-conviction relief, the defendant must establish a violation of his constitutional rights which renders the judgment of conviction void or voidable.” *State v. Simons*, 2d Dist. Champaign No. 2013 CA 5, 2013-Ohio-3654, ¶ 11. When a petition alleges ineffective assistance of trial counsel, “the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness.” *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983), quoting *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). A trial court may deny a petition without a hearing “where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus. We review a trial court’s denial of post-conviction relief for an abuse of discretion. *Simons* at ¶ 13. With the foregoing standards in mind, we see no abuse of discretion in the trial court’s denial of Cox’s petition without a hearing.

{¶ 9} On the sleeping-juror issue, Cox’s affidavits were insufficient to require a hearing, regardless of their credibility, because they did not set forth sufficient operative facts to establish grounds for relief. In particular, they failed to identify what portion of the trial the sleeping jurors missed. Cox’s failure to address this issue allowed the trial court to reject the claim without a hearing. *State v. Perkins*, 2d Dist. Montgomery No. 24397, 2011-Ohio-5070, ¶ 15, 27 (finding no hearing required on a post-conviction petition where

the defendant's affidavit failed to identify the "testimony that the sleeping juror missed"). As for Cox's work records, the trial court reasonably concluded that they had minimal relevance because he easily could have sexually abused his step-daughter when not at work. In this regard, we note (1) that the trial testimony was non-specific about when the abuse, which took place over a period of years, had occurred and (2) that Cox's own affidavit, which identifies several women he claims to have infected with herpes since 2004, refutes the notion that his long work hours precluded sexual activity.

{¶ 10} Cox's argument about his attorney's failure to introduce medical records and testimony from his physician is equally unpersuasive. In his direct appeal, Cox argued that the trial court had erred in limiting evidence that he had herpes, and had transmitted it to other women, and that the victim did not have herpes. *State v. Cox*, 2d Dist. Montgomery No. 25477, 2013-Ohio-4941, ¶ 70-73. In rejecting his argument, this court reasoned:

Upon review, the record establishes that Cox was permitted to thoroughly explore the topic of his herpes condition during trial. Specifically, defense counsel called Dr. Jodi Van Jura who testified that Cox tested positive for herpes Types 1e and 2 in June of 2012. Defense counsel also elicited testimony from [the victim's mother] that she was positive for herpes Type 2 which she stated that she had contracted prior to 2007. Defense counsel questioned the defendant's current wife, who testified that she, too, tested positive for the herpes virus. Lastly, defense counsel was permitted to elicit testimony from Dr. Lori Vavul-Roediger that C.F. had tested negative for the herpes virus on June 7, 2010.

Clearly, the trial court did not prevent defense counsel from making the argument to the jury that Cox must not have sexually abused C.F. because she wasn't infected with the herpes virus.

Upon review, we conclude that there is no evidence in the record which establishes that the trial court improperly limited defense counsel's ability to elicit testimony from the witnesses regarding Cox's herpes infection and those he may have or may have not passed it along to through sexual conduct.

Id. at ¶ 72-73.

{¶ 11} Cox reasons that testimony about him having herpes in 2012 was inadequate to support his defense because his alleged sexual abuse of the victim stopped around 2010. We note, however, that the record contains testimony about Cox having herpes during the relevant time period. The victim's mother testified that she contracted herpes around 2005 or 2006, which was during the time Cox's sexual abuse allegedly occurred. Cox's current wife, who he met in January 2010 and married about three months later, also testified that she had contracted herpes. She explained that she tested negative before meeting Cox but tested positive about two months into their relationship. Finally, Vavul-Roediger testified that she was told the victim's mother and Cox both had herpes. For that reason, she tested the victim, who tested negative. Vavul-Roediger explained, however, that a person with genital herpes, the type at issue here, is not necessarily contagious unless he or she has an actual sore or lesion and is actively "shedding" the virus. Vavul-Roediger added that the one-year transmission rate between monogamous couples regularly engaging in sexual activity was relatively low. In

closing argument, defense counsel told the jury:

And let's talk about herpes. My client has Herpes Simplex 1 and 2. Without question, contagious. The two people that we know have had sex with my client, presumably since they were married to him in the last ten years, both are positive for the herpes virus. The only person that is alleging sexual contact or conduct with my client that is not positive is [the victim]. Everybody else has it but her. The doctor said that this is only the second time she ran the [herpes] test [on an alleged sexual-abuse victim]. Because Mom was saying, "Look, she's alleging she's being abused by Vernon Cox. You know what? He's got herpes. I've got herpes. Test him." If she's got herpes, there's your evidence. There's your corroboration. There's your smoking gun. That's why they tested. That's why—for the—doctor said second time. It must have been significant to them to test because that child has herpes [sic]. Imagine what the government would be saying today if that child, [the victim], tested positive for herpes. They would tell you that is the smoking gun, without question. How is it any different when it's negative. Everybody else that had sexual conduct with my client got it but her. Maybe she didn't have sexual conduct. Maybe the fact that she's negative means that it does not corroborate her story.

(Trial Tr. Vol. III at 674-675.).

{¶ 12} Because the record contained sufficient evidence about Cox's history of herpes to enable defense counsel to make the foregoing argument, counsel reasonably may have elected, as a matter of trial strategy, not to introduce additional evidence on the

topic. Testimony and medical records from Cox's physician only would have confirmed what the record already reflected. And introducing evidence that Cox had transmitted the herpes virus to additional women other than his two wives would have reflected poorly on his character and potentially done more harm than good.

{¶ 13} We also agree with the trial court that Cox's argument about not hiring an expert to testify on delayed sexual-abuse reporting failed to set forth sufficient operative facts to establish substantive grounds for relief. This is so because Cox failed to identify a particular expert who should have been called and failed to set forth what the expert would have said. Without an affidavit identifying what the missing testimony would have been, we cannot conclude that defense counsel provided ineffective assistance in failing to retain an expert. *Cf. State v. Wynn*, 2d Dist. Montgomery No. 25730, 2014-Ohio-621, ¶ 13 (finding no error in denying a post-conviction petition without a hearing where the defendant presented no evidence as to what a missing witness's testimony would have been).

{¶ 14} The trial court also correctly found that the pictures of Cox's bedroom did not demonstrate substantive grounds for relief. The only indication of a date on the pictures accompanying Cox's motion is a printed notation "6/10/2013." Nothing in Cox's post-conviction materials suggests the pictures were taken contemporaneously with the alleged sexual abuse, which stopped around 2010. Therefore, the failure of the pictures to depict a television in Cox's bedroom did not controvert the victim's testimony about a television being there years earlier.

{¶ 15} Finally, Cox's argument about counsel's performance in the plea-bargaining process fails because he did not raise it below. His petition for

post-conviction relief did not mention plea bargaining. Nor was the issue addressed in the affidavits he filed below. Therefore, the issue is not properly before us.

{¶ 16} For the foregoing reasons, we find no error in the trial court's denial of Cox's petition for post-conviction relief without an evidentiary hearing. The judgment of the Montgomery County Common Pleas Court is affirmed.

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FAIN, J., and DONOVAN, J., concur.

Copies mailed to:

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