

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26632
	:	
v.	:	Trial Court Case No. 10-CR-4077
	:	
KERON D. SIMPSON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 25th day of March, 2016.

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HALL, J.

{¶ 1} Keron Simpson appeals from the trial court's entry of summary judgment

against him on his R.C. 2953.21 petition for post-conviction relief.

{¶ 2} Simpson advances four assignments of error. First, he contends the trial court erred in rejecting a post-conviction claim for relief based on his trial counsel's failure to obtain a review of his mental status by a qualified professional. Second, he claims the trial court erred in rejecting a post-conviction claim for relief based on his trial counsel's failure to obtain an expert on eyewitness identification. Third, he asserts that the trial court erred in overruling his post-conviction motion for appointment of an expert to evaluate his mental status. Fourth, he argues that the trial court erred in rejecting a post-conviction claim for relief based on allegedly faulty eyewitness identification.

{¶ 3} The record reflects that Simpson pled guilty to aggravated robbery with a firearm specification in the above-captioned case. He entered the plea after the trial court overruled a motion to suppress (1) a statement he had signed admitting the offense and (2) allegedly unreliable eyewitness-identification testimony. In exchange for the plea, Simpson received assurance of an aggregate prison sentence of less than 10 years. He subsequently received an aggregate six-year sentence, which the trial court ordered to be served consecutively to sentences imposed in two other cases. This court affirmed on direct appeal in *State v. Simpson*, 2d Dist. Montgomery No. 25202, 2013-Ohio-1695, overruling assignments of error challenging the consecutive sentences and the validity of the plea.

{¶ 4} Simpson subsequently filed his petition for post-conviction relief. He raised two claims. First, he argued that his trial counsel provided ineffective assistance by (1) failing to have an eyewitness-identification expert testify about an "improper lineup procedure and its impact on trial testimony of the witnesses," (2) failing to have an expert

evaluate his mental status, and (3) failing to interview witnesses “whose potential testimony contradicted the version presented at trial.” Second, he argued that his constitutional right to a fair trial was violated “buy [sic] the use of eyewitness identification that had a very substantial likelihood of irreparable misidentification.” (Doc. #3 at 4-7). In connection with his petition, Simpson moved for the appointment of an expert witness to evaluate his mental status. (Doc. #6). The trial court overruled the motion. (Doc. #13). Thereafter, the State filed a combined motion for summary judgment/motion to dismiss. (Doc. #22). After briefing, the trial court entered summary judgment against Simpson on his petition. (Doc. #39). This appeal followed.

{¶ 5} In his first assignment of error, Simpson contends the trial court erred in rejecting his post-conviction claim for relief based on trial counsel’s failure to have an expert review his mental status. Simpson asserts that he has an intellectual disability, namely “mental retardation,” that his trial counsel failed to recognize this disability or to make any “adjustment” for it, and that counsel should have retained a mental-health expert to evaluate him. He argues that counsel’s failure to do so constituted ineffective assistance. In support of his post-conviction claim about the need for an evaluation of his mental status, Simpson provided the trial court with his Dayton Public School records and Social Security Administration records. Those records show that he received low grades in school, that he participated in a special-education program, that he had a full-scale I.Q. of 53, and that he was classified as “mildly mentally retarded.”

{¶ 6} The trial court rejected Simpson’s claim for post-conviction relief based on counsel’s failure to have an expert review his mental status. In support of its decision, the trial court reasoned:

Keron Simpson, in support of his contention, has filed school records and medical records relating to Mr. Simpson's social security disability claim. Mr. Simpson, however, does not provide any evidence concerning what [defense counsel Jeffrey] Gramza may have known about Mr. Simpson's mental state.

Mr. Simpson, it seems, is not contending he was not competent. Mr. Simpson, instead, asserts his low IQ affected his ability to assist counsel, and to make decisions regarding his case. The court, quite frankly, has difficulty with the suggested distinction. These issues relate to competence, yet Mr. Simpson does not suggest such incompetence.

The court, in any event, has carefully reviewed the submitted documents. The documents do not demonstrate that Mr. Simpson's level of mental functioning affected his ability to assist counsel, to intelligently enter a plea, or to make decision[s] concerning his case.

Mr. Simpson's contention is compromised, if not dispelled, by the Criminal Rule 11 plea procedure. Nothing occurred during the Rule 11 process that gave rise to the concerns Mr. Simpson is now asserting. The court, based upon the Rule 11 procedure, had no concerns regarding Mr. Simpson's ability to knowingly and intelligently enter a plea of guilty.

Mr. Simpson, going first to the issue of ineffective assistance, has produced no evidence that Mr. Gramza knew or should have known about Mr. Simpson's low IQ. Further, there is nothing in the record to suggest how

Mr. Gramza would have been alerted to this issue. The court, based upon the presented record, cannot conclude that Mr. Gramza's failure to have Mr. Simpson's mental status evaluated constituted ineffective assistance. Further the record is silent concerning how a mental status evaluation would have affected the case's outcome.

Mr. Simpson, in short, has failed in his initial burden to demonstrate substantial grounds upon which it could be concluded that Mr. Gramza provided ineffective assistance by failing to have Mr. Simpson's mental status evaluated or that such an examination would have affected the course of events. It is, therefore, appropriate to dismiss this contention without a hearing through summary judgment.

(Doc. #39 at 5-6).

{¶ 7} We see no error in the trial court's ruling. We note a guilty plea generally "waives the right to allege ineffective assistance of counsel, except to the extent that the errors caused the plea to be less than knowing and voluntary." *State v. Storck*, 2d Dist. Clark No. 2014-CA0130, 2015-Ohio-2880, ¶ 9, citing *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992). The question, then, is whether trial counsel's failure to obtain an expert to evaluate Simpson's mental status caused his guilty plea to be less than knowing or voluntary. Simpson's post-conviction materials fail to make such a showing for several reasons.

{¶ 8} First, we agree with the trial court that the record below contains nothing that reasonably should have alerted defense counsel of a need to have Simpson's mental status evaluated by an expert. Simpson responded appropriately to all questions during

the Crim.R. 11 plea colloquy. Among other things, he indicated that he had attended the tenth grade, that he could read and understand the plea form, and that he did not have any mental problem that would impact his ability to understand what was happening. (Plea Tr. at 5). Because nothing in the record reasonably should have caused defense counsel to question Simpson's mental status, the failure to have his mental status evaluated could not have constituted ineffective assistance.

{¶ 9} Second, Simpson's particular ineffective-assistance claim concerns trial counsel's failure to obtain an expert witness to evaluate his mental status. But we have no way of knowing what such an expert would have concluded, or whether such an expert would have aided his defense, because his petition for post-conviction relief is devoid of an evaluation from such an expert.

{¶ 10} Third, the records accompanying Simpson's petition do not themselves establish that his guilty plea was less than knowing and voluntary. It does not follow from the fact that Simpson may have a low I.Q. and suffer from "mild mental retardation" that he necessarily was incapable of entering a valid plea.

{¶ 11} Fourth, Simpson does not contend he was legally incompetent to stand trial. Rather, he suggests that he had an intellectual disability that, while not rendering him incompetent, affected his ability to make various decisions, including the decision to plead guilty. We note, however, that the competency standard for standing trial is no different from the competency standard for pleading guilty or waiving other constitutional rights. *Godinez v. Moran*, 509 U.S. 389, 397-398, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); see also *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 57 ("The competency standard for standing trial is the same as the standard for pleading guilty or

waiving the right to counsel.”). “[W]hile the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.” *Godinez* at 398. As a result, there is “no basis for demanding a higher level of competence for those defendants who choose to plead guilty.” *Id.* at 399. Of course, a competent defendant’s decision to plead guilty still must be knowing and voluntary. *Id.* at 400-401. But the Crim.R. 11 hearing satisfied that requirement in Simpson’s case. The fact that he may have a learning disability or suffer from “mild mental retardation” does not negate the potential for a knowing and voluntary plea. For the foregoing reasons, we overrule his first assignment of error.

{¶ 12} In his second assignment of error, Simpson claims the trial court erred in rejecting his post-conviction claim for relief based on his trial counsel’s failure to retain an eyewitness-identification expert. This assignment of error appears to address trial counsel’s failure to hire an expert in conjunction with Simpson’s failed motion to suppress, which challenged the eyewitness-identification process.

{¶ 13} We reject this argument for at least two reasons. First, we do not know what such an expert would have concluded, or whether the expert would have aided Simpson’s motion, because his petition for post-conviction relief is devoid of any evidence outside the record from such an expert.¹ Therefore, Simpson cannot establish ineffective

¹ We note that the present case is distinguishable from cases such as *State v. Chinn*, 2d Dist. Montgomery No. 16764, 2000 WL 1458784 (Aug. 21, 1998). In that case, the appellant filed a post-conviction-relief petition arguing ineffective assistance of counsel based on his attorney’s failure to present expert testimony at trial concerning eyewitness identification and “mental retardation.” *Id.* at *3. Unlike Simpson, the appellant in *Chinn*, a death-penalty case, supported his petition with affidavits from an eyewitness-identification expert and a “mental-retardation” expert. *Id.* Based on the information

assistance based on trial counsel's failure to secure an eyewitness-identification expert to support his suppression motion. Second, the record reflects that Simpson pled guilty, thereby admitting his guilt and effectively negating any conceivable prejudice resulting from the eyewitness-identification issue. The second assignment of error is overruled.

{¶ 14} In his third assignment of error, Simpson asserts that the trial court erred in overruling his post-conviction motion for appointment of an expert to evaluate his mental status. This argument concerns the trial court's rejection of Simpson's request for an order appointing Julie Gentile, M.D., to provide a preliminary review of documents concerning his "mental status." In particular, Simpson wanted Gentile to review the Dayton Public School and Social Security Administration records mentioned above to bolster his post-conviction claim that he has a developmental disability.

{¶ 15} We see no error in the trial court's denial of Simpson's motion for the appointment of an expert in connection with his petition for post-conviction relief. The short answer to his argument is that he had no right, statutory or constitutional, to the appointment of an expert to assist in his post-conviction relief petition. This court has held that "indigent prisoners are not entitled to funding for experts when pursuing collateral attacks on their convictions." *State v. Hooks*, 2d Dist. Montgomery Nos. 16978, 17007, 1998 WL 754574, *3 (Oct. 30, 1998). This is so because "[p]ost-conviction relief is not a constitutional right, and it affords a petitioner no rights beyond those granted by the

contained in the affidavits, this court held that the appellant was entitled to a hearing on the issues raised in his petition (although he subsequently failed to prevail on the merits in a later appeal). Here, however, Simpson's post-conviction claim about allegedly faulty eyewitness-identification testimony is not supported by an expert's affidavit or other evidence outside the record, which this court explicitly found necessary in *Chinn. Id.* at *3.

controlling statute, R.C. 2953.23.” *State v. Osie*, 12th Dist. Butler No. CA2014-10-222, 2015-Ohio-3406, ¶ 31. “[I]t is not error for a trial court to deny a request * * * for the appointment of an expert in a post-conviction relief petition because Ohio’s statute, R.C. 2953.21, does not provide * * * a right * * * to expert assistance.” *Id.* at ¶ 40; see also *State v. Bennington*, 4th Dist. Adams No. 12CA956, 2013-Ohio-3772, ¶ 25, fn. 4 (citing cases for the proposition that “R.C. 2953.21 does not provide a right to funding or appointment of expert witnesses or assistance in a post-conviction petition”).

{¶ 16} In opposition to the foregoing conclusion, Simpson cites *State v. Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932 (1998), *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), and *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). None of these cases, however, involved a petition for post-conviction relief. *Mason*, *Broom*, and *Ake* were capital cases that involved the appointment of experts to assist at the trial level. Therefore, they are inapposite. The third assignment of error is overruled.

{¶ 17} In his fourth assignment of error, Simpson argues that the trial court erred in rejecting his post-conviction claim for relief based on allegedly faulty eyewitness identification. Specifically, he complains that his “right to a fair trial” was violated “by the admission of an unfair eyewitness identification procedure.” (Appellant’s brief at 18).

{¶ 18} This assignment of error lacks merit for multiple reasons. First, there was neither a trial in this case nor the “admission” of any eyewitness identification. As noted above, Simpson pled guilty, waiving an appeal to the motion to suppress ruling. Second, Simpson did challenge the reliability of eyewitness identification process in a suppression motion filed prior to his plea. The issue was resolved against him, however, and in his direct appeal he did not raise that the issue should have been preserved by a no contest

plea, despite being represented by different counsel in the appellate proceeding. Because Simpson's post-conviction relief petition presented no evidence outside the record to support his eyewitness-identification challenge, res judicata applies. Third, the record reflects that Simpson pled guilty, thereby admitting his guilt. The fourth assignment of error is overruled.

{¶ 19} The judgment of the Montgomery County Common Pleas Court is affirmed.

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DONOVAN, P.J., and WELBAUM, J., concur.

Copies mailed to:

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