

[Cite as *State v. Simpson*, 2016-Ohio-1268.]

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

STATE OF OHIO

Plaintiff-Appellee

V.

KERON D. SIMPSON

Defendant-Appellant

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Appellate Case No. 26633

Trial Court Case No. 10-CR-4101

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 25th day of March, 2016.

MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. No. 0020084, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellee

GARY W. CRIM, Atty. Reg. No. 0020252, 943 Manhattan Avenue, Dayton, Ohio 45406-5141
Attorney for Defendant-Appellant

HALL, J.

{¶ 1} Keron D. 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 five 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 contends the trial court erred in overruling his post-conviction motion for appointment of an eyewitness-identification expert. Fifth, 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 was convicted and sentenced in the above-captioned case on multiple counts of aggravated robbery, felonious assault, grand theft, theft, and accompanying firearm specifications. The convictions stemmed from Simpson's participation in the theft of an ATV and two dirt bikes in December 2010. Prior to trial, he pled no contest to charges related to the theft of the ATV. He proceeded to trial on charges related to the theft of the two dirt bikes. He ultimately was convicted of all charges. After merging certain counts, the trial court imposed concurrent prison terms totaling eight years. It imposed an additional three-year term for merged firearm specifications, resulting in an aggregate 11-year prison sentence. The trial court ordered that sentence to be served consecutively to the sentence imposed on Simpson in two other cases. This court affirmed on direct appeal in *State v. Simpson*, 2d Dist. Montgomery No. 25163, 2013-Ohio-1696.

{¶ 4} Simpson subsequently filed his petition for post-conviction relief. He raised three claims. First, he alleged 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 the 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.” (Doc. #8 at 10-11). 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.” (*Id.* at 12). Third, he asserted that his constitutional right against self-incrimination was violated because the voluntariness of various statements he made “was litigated without considering his mental status.” (*Id.* at 13). In connection with his petition, Simpson moved for the appointment of an expert witness to evaluate his mental status. (Doc. #11). He also moved for the appointment of an expert witness on the issue of eyewitness identification. (Doc. #12). The trial court overruled these motions. (Doc. #19). Thereafter, the State filed a combined motion for summary judgment/motion to dismiss. (Doc. #27). After briefing, the trial court entered summary judgment against Simpson on his petition. (Doc. #44). 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 and medical records relating to his social security disability claim. Mr. Simpson, however, has not provided any evidence concerning what [defense counsel Jeffrey] Gramza may have known about Mr. Simpson's mental status. Mr. Simpson, it seems, is not contending he was not competent to stand trial. Mr. Simpson, instead, asserts his low IQ affected his ability to knowingly and voluntarily waive his *Miranda* rights, to assist counsel, and to make required trial decisions, such as whether he should testify. The court, quite frankly, has great difficulty with the suggested distinction. The issues of a knowing and voluntary *Miranda* waiver, trial assistance, and trial decision making 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 understand and in a knowing and voluntary fashion waive his *Miranda* rights, to provide assistance to Mr. Gramza, or to make any decisions he had to make regarding the trial's conduction. Mr. Simpson, other than filing the documents, has presented no evidence that Mr. Simpson's mental status affected him as suggested. Mr. Simpson's contention is compromised, if not dispelled, by Mr. Simpson's video [captured] conduct and demeanor during video recorded interviews. Mr. Simpson, despite his suggestion to the contrary, was engaged and alert during the interviews. The interviews reveal no cause for concern regarding Mr. Simpson's mental status.

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. Mr. Simpson, additionally, has failed to present evidence demonstrating how a mental status evaluation would have affected the trial's outcome.

Mr. Simpson, in short, has failed in his initial burden to demonstrate substantial grounds for the conclusion that Mr. Gramza provided ineffective assistance by failing to have Mr. Simpson's mental status evaluated or that such an examination would have changed the trial's outcome. It is, therefore, appropriate to dismiss this contention without a hearing through

summary judgment.

(Doc. #44 at 5-6).

{¶ 7} On appeal, Simpson reiterates his claim that his mental status affected his ability to waive his *Miranda* rights as well as decisions such as whether to go to trial or whether to testify and his ability to assist trial counsel in presenting a defense. Therefore, he argues that his trial counsel should have investigated his mental status and retained an expert to evaluate that status. In connection with his argument, Simpson also asserts that developmental disability or “mental retardation,” which he purportedly suffers from, cannot be detected through observation by a lay person.

{¶ 8} Having reviewed Simpson’s argument and his evidentiary materials, we see no error in the trial court’s rejection of his claim without an evidentiary hearing. As a preliminary matter, Simpson does not challenge the trial court’s finding that his demeanor and conduct during recorded interviews gave no outward indication that his mental status was impaired. Moreover, we note that Simpson supported his post-conviction relief petition with an affidavit that he had filed in another case. That affidavit failed to allege that defense counsel in this case, Jeffrey Gramza, knew that Simpson had a learning disability or that he was “mentally retarded.” Based on our review of the record, we see nothing that reasonably should have alerted defense counsel of a need to have Simpson’s mental status evaluated. Therefore, counsel’s failure to do so could not have constituted ineffective assistance.

{¶ 9} In any event, we also agree with the trial court that the post-conviction evidence of Simpson’s low I.Q. and “mild mental retardation” fails to raise an issue as to his ability to assist trial counsel in making strategic decisions. The trial court found that

Simpson was not claiming to be incompetent to stand trial, and Simpson has not challenged that finding on appeal. But if Simpson does not claim his mental status rendered him legally incompetent, we fail to see the significance of, or the need for, trial counsel to have an expert evaluate his mental status. By definition, if Simpson was legally competent to stand trial, then he was sufficiently able to assist his attorney in making strategic decisions. We are unaware of any authority that would have imposed on Simpson's attorney an obligation to seek an expert opinion on his "mental status" under the circumstances before us. Moreover, we agree with the trial court that the evidentiary materials accompanying Simpson's petition—Dayton Public School and Social Security Administration records—did not provide a substantial basis for concluding that Simpson's mental status compromised his ability to knowingly and voluntarily waive his *Miranda* rights, to assist defense counsel, or to be involved in trial decisions. Finally, we have no way of knowing what result a mental-status evaluation would have produced or what conclusion a mental-health expert retained by Simpson's trial counsel would have reached. Simpson has provided no such expert opinion. Therefore, he also cannot establish that he was prejudiced by his attorney's failure to obtain a mental-status evaluation. The first assignment of error is overruled.

{¶ 10} In his second assignment of error, Simpson 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. It is unclear from Simpson's brief whether he believes such an expert should have been used at trial, in conjunction with his failed pretrial motion to suppress several photo-spread identifications, or both. Either way, we reject Simpson's argument. We do not know what such an expert would have concluded, or whether the

expert would have aided Simpson's defense, 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 assistance based on trial counsel's failure to secure an eyewitness-identification expert. Accordingly, the second assignment of error is overruled.

{¶ 11} In his third and fourth assignments of error, Simpson asserts that the trial court erred in overruling his post-conviction motions for appointment of experts to evaluate his mental status and to address eyewitness identification and perception. (Appellant's brief at 20). This argument concerns the trial court's rejection of his post-conviction 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 suffered from "mental retardation." His argument also concerns the trial court's rejection of his request for an order appointing an eyewitness-identification expert to support his post-conviction claim about allegedly faulty eyewitness-identification testimony at trial.

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 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.

{¶ 12} We see no error in the trial court's denial of Simpson's motions for the appointment of experts 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 experts 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 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").

{¶ 13} 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 and fourth assignments of error are overruled.

{¶ 14} In his fifth 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 24). This assignment of error lacks merit. Because Simpson’s post-conviction relief petition presented no evidence outside the record to support his eyewitness-identification challenge, res judicata applies. We dealt at length with the eyewitness identification in Simpson’s direct appeal where we affirmed his conviction. Only the same record is before us with no more or new evidence. Res judicata requires that the fifth assignment of error should be, and is, overruled.

{¶ 15} 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:

Mathias H. Heck, Jr.
Carley J. Ingram
Gary W. Crim
Hon. Michael Tucker