

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-13-050

Appellee

Trial Court No. 2011CR0177

v.

Ronald Pheils

DECISION AND JUDGMENT

Appellant

Decided: April 4, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebbers, Chief Assistant Prosecuting Attorney,
and David E. Romaker Jr., Assistant Prosecuting Attorney,
for appellee.

Timothy Young, State Public Defender, and Francisco E.
Lüttecke, Assistant State Public Defender, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the order of the Wood County Court of Common Pleas denying without a hearing his petition for postconviction relief. Because we find the trial court's decision to deny the hearing was erroneous, we reverse.

{¶ 2} In 2011, three-year-old Joshua Cox lived with his mother and two older brothers in Perrysburg Township. Beginning in December 2010, Joshua became ill. He was vomiting, running a fever and lost his appetite even for his favorite foods. This illness continued on-again-off-again until early March 2011. On March 8, his father took him to a pediatrician who found Joshua had influenza, types A and B. On March 12, Joshua returned to the doctor, still ill and lethargic. The pediatrician admitted Joshua to the hospital where he remained for three days. After release, the symptoms continued. On a March 21 doctor's visit Joshua was diagnosed with a sinus infection and prescribed an antibiotic.

{¶ 3} Joshua's mother left for work early. She employed two babysitters to get the older boys off to school and to mind Joshua during the day. On March 23, 2012, the babysitter was a 19-year-old neighbor, appellant Ronald Pheils. On this day, minutes after appellant sent the two older boys to the school bus, something happened to Joshua.

{¶ 4} According to appellant, Joshua was disoriented and asked to be placed in bed. Appellant complied and left the room. Minutes later, appellant later testified, he heard a thump from the bedroom. When appellant went into the bedroom, he found Joshua on the floor, gasping for breath.

{¶ 5} Appellant reported that he moved the boy to a couch and called Joshua's mother at work. Joshua's mother returned home to find the boy unresponsive. She called 9-1-1. Paramedics arrived in minutes and concluded the boy was in serious condition. Joshua was taken by ambulance to a Toledo hospital. He died three days later.

{¶ 6} An autopsy was conducted by a Lucas County deputy coroner who observed that Joshua had subgaleal and subarachnoid hemorrhaging. The coroner also observed that bridging vessels between the dura and the brain were sheared, resulting in subdural bleeding. She also noted axonal injuries. The coroner concluded that these injuries were due to what was formerly called “shaken baby syndrome,” now called “whiplash syndrome” or “abusive head trauma.” The coroner ruled Joshua’s death a homicide, resulting from child abuse.

{¶ 7} On April 6, 2011, a Wood County Grand Jury handed down a single count indictment charging appellant with reckless homicide. Appellant pled not guilty.

{¶ 8} Appellant’s parents initially hired trial counsel. Counsel subsequently moved to be appointed when the family could no longer afford him. The trial court found appellant indigent and granted the motion. The court also approved funds for an investigator and an expert witness.

{¶ 9} The matter proceeded to trial, at which the deputy coroner testified that Joshua’s fatal injuries were due to abusive head trauma caused by violent shaking. One of appellant’s fellow inmates during the time appellant was awaiting trial testified that appellant had told him he had shaken the child. A coroner’s office investigator testified that appellant admitted shaking the child. Appellant testified that although he had lifted the boy a few times that he had never shaken him. He denied making statements to the inmate or coroner’s investigator. The defense called no medical expert.

{¶ 10} Appellant was convicted of reckless homicide and sentenced to a 36 month term of imprisonment. Appellant appealed, citing, among other assignments of error, ineffective assistance of trial counsel for failing to timely locate an expert witness. We affirmed appellant's conviction. *State v Pheils*, 6th Dist. Wood. No. WD-12-010, 2013-Ohio-2252.

{¶ 11} Subsequently, appellant filed the petition for postconviction relief that is the topic of this appeal. Again, appellant asserted ineffective assistance of counsel and supported his claim with the affidavit of trial counsel who averred that, although his investigator had identified several potential experts, he had never spoken to any of them. According to trial counsel, he asked the court for a continuance, advising the court that, absent an expert witness, he would be "rendered ineffective." Alternatively, trial counsel moved to withdraw as counsel. The trial court denied both motions. Finally, trial counsel averred that one of the jurors he spoke to after trial told him that the lack of a rebuttal witness to the coroner's testimony was dispositive in deliberations.

{¶ 12} In addition to trial counsel's affidavit, appellant submitted the report of forensic pathologist Thomas W. Young, M.D. Dr. Young had reviewed the investigative records and the autopsy report and came to a different conclusion. According to Dr. Young, one of the complications that may be attendant to influenza is an inflammation of the heart muscle known as myocarditis. The autopsy report shows clear signs of this condition, Dr. Young concluded.

{¶ 13} Myocarditis, Dr. Young stated, explains what happened to Joshua, as the condition can cause seizures and temporary cardiac arrest. Cardiac arrest can result in a lack of oxygen and blood flow to the brain and explains the brain swelling. Moreover, restoration of blood flow to the brain in children can lead to subdural hemorrhages and to retinal and optic nerve sheath hemorrhages. The autopsy report in this matter is consistent with this process, Dr. Young opined, to a reasonable degree of medical certainty. Dr. Young would state the cause of Joshua's death as "Complications of viral myocarditis" and the manner of death as "natural."

{¶ 14} The trial court rejected appellant's postconviction petition without a hearing. From this judgment, appellant now brings this appeal. Appellant sets forth a single assignment of error:

The trial court erred in dismissing Ronald Pheil's petition without an evidentiary hearing because Ronald Pheils presented sufficient evidence that he was denied the effective assistance of counsel and was denied due process of law and a fair trial.

{¶ 15} The only question before this court is whether, given the material before it, the trial court properly dismissed appellant's petition without granting a hearing.

{¶ 16} A petition for postconviction relief, pursuant to R.C. 2953.21, is a collateral civil attack of a criminal judgment. It is not an appeal from that judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). Postconviction relief offers a means to reach constitutional issues that might otherwise evade consideration because the

evidence supporting those issues exists outside the record. The statutory provision provides relief, “only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph four of the syllabus.

{¶ 17} An evidentiary hearing on a petition for postconviction relief is not automatic. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999). A petition for postconviction relief may be dismissed without a hearing when the petitioner fails to set forth sufficient grounds for relief or the operation of the doctrine of res judicata bars the constitutional claims raised. *Id.* at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 530, 639 N.E.2d 784 (1994).

{¶ 18} Before granting an evidentiary hearing, the court must determine whether the petitioner has demonstrated grounds to believe that there was a denial or infringement of the petitioner’s rights so as to render his or her conviction void or voidable under the Ohio or federal constitution. *Calhoun* at 282-283. Before a hearing is granted on a petition claiming ineffective assistance of trial counsel, the petitioner bears the initial burden to submit evidentiary material which contains sufficient operative facts to demonstrate a substantial violation of defense counsel’s essential duties to his client and that this ineffectiveness operated to the client’s prejudice. *State v. Jackson*, 63 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus. *See also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 693(1984). “Prejudice” exists only when the

lawyer's performance renders the result of the trial unreliable or the proceeding unfair.

State v. Stevenson, 5th Dist. Stark No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43.

Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *Strickland* at 694.

{¶ 19} In this matter, the testimony of the Lucas County deputy coroner is dispositive of the prosecution's case. Irrespective of what appellant told anyone in jail or elsewhere, there is no crime if Joshua's death was from natural causes. It is plain from the references in the defense pleadings throughout the case that defense counsel was aware of this. Yet, according to trial counsel's affidavit, he failed to discuss the coroner's findings with any medical expert. In a case in which the totality of the state's case is based on expert medical testimony, this is an inexcusable omission.

{¶ 20} Still, this deficient representation might not constitute constitutionally ineffective assistance unless there is evidence that counsel's performance altered the outcome of the trial. That element is provided by the report and opinion of veteran forensic pathologist Thomas Young who examined the Lucas County deputy coroner's report and the other documents in the case, and concluded that Joshua Cox died, not from abusive head trauma, but from complications from the child's continuing long term illness. If believed, Dr. Young's opinion would have had the capacity to alter the results of the trial.

{¶ 21} At a minimum, appellant has put forth evidentiary material which contains sufficient operative facts to demonstrate a substantial violation of defense counsel's

essential duties to his client and that this ineffectiveness operated to the client's prejudice. Accordingly, the trial court erred in denying appellant an evidentiary hearing on his petition. Appellant's sole assignment of error is well-taken.

{¶ 22} On consideration, the judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to said court to conduct a hearing on appellant's petition for postconviction relief. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
