

[Cite as *State v. Cannon*, 2015-Ohio-1543.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101733

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEMETRICE CANNON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-574884-A

BEFORE: S. Gallagher, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: April 23, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Defendant Demetrice Cannon appeals the denial of his first motion for postconviction relief, which was filed concurrently with his direct appeal of his conviction in *State v. Cannon*, 8th Dist. Cuyahoga No. 100658, 2014-Ohio-4801. For the following reasons, we affirm.

{¶2} The facts made pertinent to the current appeal are as follows.

On June 18, 2013, Cannon was indicted on charges of aggravated murder, murder, two counts of felonious assault, and having a weapon while under disability. Appellant plead[ed] not guilty to the charges, waived his right to a jury trial, and the case proceeded to a bench trial. For the purposes of R.C. 2923.13(A)(3), Cannon stipulated to prior felony drug trafficking convictions.

Id. at ¶ 2. Cannon and the victim were shooting dice. Eventually a disagreement over money erupted between the two men. Angry words were exchanged, but initially there was no violence. Each man walked away from the other, and Cannon left the area altogether. After a few minutes, Cannon returned, flagged the victim down as he was attempting to drive away, and started the argument anew. This time, the disagreement led to violence. Cannon fired at least four shots, killing the victim. The police found four shell casings at the scene of the crime, and the medical examiner found four bullet wounds on the victim.

{¶3} At trial, Cannon claimed he acted in self-defense, based in part on the medical examiner's testimony that gunshot residue ("GSR") was found on the victim's left hand and back, but not around the leg wounds. The victim was shot directly in the left forearm and leg. A third shot, through the victim's back, pierced his aorta and lung. A ricochet also lodged in the victim's left thigh. No trace metal was found on the victim's left hand. At trial and in support of Cannon's self-defense theory, Cannon's attorney argued that the GSR found on the left hand was evidence that the victim fired a weapon, claiming that if the victim had been shot all four times from the same distance, the medical examiner should have discovered GSR around the front-facing wounds.

{¶4} Cannon was convicted of murder, with a three-year firearm specification, and of having a weapon while under disability. The trial court sentenced Cannon to an aggregate prison term of 19 years to life. A panel of this court affirmed the conviction. *Cannon*, 8th Dist. Cuyahoga No. 100658, 2014-Ohio-4801. In his direct appeal, Cannon assigned error to the effectiveness of his trial counsel, in part claiming his attorney was ineffective for failing to object to a single statement by the investigating police officer — claiming the victim's family stated that the victim was right-handed. *Id.* at ¶ 25. According to Cannon, the victim held a gun in his left hand, and therefore, the GSR must have been deposited when the victim fired a shot at Cannon, provoking his defensive fusillade. It was concluded that the victim's handedness was inconsequential in light of the substantial evidence of guilt:

We are unpersuaded by Cannon's argument. The record was rife with evidence suggesting that the gunshot residue on [the victim's] left hand was not from firing a firearm, but from being shot by Cannon. There was no trace metal found on either of [the victim's] hands that would indicate he held a firearm. The gunshot residue was consistent with being shot at a range of one to four feet or by [the victim] grabbing his left leg after being shot there at close range. The eyewitnesses testified to seeing Cannon shoot [the victim], but not to [the victim] shooting at Cannon. Therefore, we hold the failure to object to the hearsay statements was harmless in that there was no reasonable probability that, but for the error, the result of the trial would have been different.

Cannon at ¶ 28.

{¶5} Contemporaneously with his direct appeal, Cannon filed a petition for postconviction relief advancing the same ineffective assistance of counsel claim. In the petition, however, Cannon attached a photograph that depicted the victim handling a firearm with his left hand.¹ Cannon claimed that he presented the picture to his trial counsel, who refused to use it at trial. According to Cannon, the photograph was irrefutable proof that the victim was left-handed. The trial court denied Cannon's petition without a hearing, holding that his claim was precluded by res judicata. At the time of that decision, the trial court did not have the benefit of the *Cannon* decision.

{¶6} Cannon appealed, claiming the trial court erred because it failed to hold an evidentiary hearing on the petition for postconviction relief and because it determined that his claim was barred by the doctrine of res judicata. According to Cannon, his petition

¹The actual photograph is not part of the record. It appears there may have been a file formatting issue with the photograph that was attached as an exhibit to the electronically filed petition.

For the purposes of the current appeal, we can assume the picture depicts the victim holding a weapon in his left hand.

presented facts outside the record, and as a result, he could only advance the claim in his petition. Although Cannon is technically correct that his affidavit and the photograph presented facts outside the record, we find no merit to either of his assigned errors.

{¶7} A trial court's decision to deny a postconviction petition without a hearing is reviewed under the abuse of discretion standard. *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15. The trial court must determine whether there are substantive grounds for relief, when considering the supporting affidavit and other documentary evidence filed in support of the claim, prior to setting the matter for hearing. R.C. 2953.21(C) and (E). *State v. Betts*, 8th Dist. Cuyahoga No. 92780, 2010-Ohio-438, ¶ 26-27. The trial court, however, may dismiss a petition for postconviction relief without hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief or (2) the operation of res judicata prohibits the claims advanced in the petition. *Id.*

{¶8} In order to prevail on a claim of ineffective assistance of counsel, the appellant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Prejudice is established if the defendant proves the existence of a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Bradley* at 143.

{¶9} We are constrained by the *Cannon* decision in which a panel of this court held that the failure to object to the only evidence demonstrating the victim's handedness was not prejudicial error. In the *Cannon* decision, this court concluded that the victim's handedness was not a consequential fact prejudicing the outcome of trial, and therefore, we need not delve into the details of Cannon's current appeal. Without overturning the *Cannon* decision, we cannot now determine that the victim's handedness is a matter of consequence so that the failure of his attorney to introduce the picture deprived Cannon of a fair trial.

{¶10} Even if we were not so constrained, Cannon's claim is without merit. Cannon testified at trial. In his testimony, Cannon admitted that, although he acted in self-defense, he did not see in which hand the victim allegedly held the gun. Tr. 306:13-15. Moreover, the trial court, the trier of fact in this case, stated that the victim's handedness was not a dispositive factor in the guilty verdict. Tr. 391:1-13. Instead, the trial court's decision was premised on two facts that compelled the outcome: Cannon never saw the victim shoot a weapon (Cannon only claimed to have heard a shot); and no other witness saw the victim with a weapon at any time that evening. *Id.* Even if his counsel's performance could be deemed deficient, we cannot say such an error deprived Cannon of a fair trial. The officer's testimony as to the victim's handedness was not an issue at trial. Cannon's first and second assignments of error are overruled.

{¶11} The decision of the trial court denying Cannon's motion for postconviction relief without a hearing is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR