

[Cite as *State v. Hostacky*, 2016-Ohio-397.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103014

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DENNIS J. HOSTACKY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-567826-A

BEFORE: Stewart, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 4, 2016

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

Jeffrey Gamso
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

Mary McGrath
Christopher D. Schroeder
Assistant County Prosecutors
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} A jury concluded that petitioner-appellant Dennis J. Hostacky detained and robbed a coworker after learning that the coworker was carrying several hundred dollars in cash; the trial judge separately found that Hostacky had been in possession of a weapon while under disability. The verdicts necessarily rejected Hostacky's trial testimony that no crimes were committed because the coworker had voluntarily accompanied Hostacky to drink and smoke crack cocaine. This court affirmed his convictions on direct appeal (the case was remanded solely for the court to merge the disability counts). *See State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014-Ohio-2975.

{¶2} While his direct appeal was pending in this court, Hostacky filed a petition for postconviction relief. The petition listed two grounds as a basis for relief: that trial counsel was ineffective for failing to call Hostacky's wife as a witness and trial counsel was ineffective for failing to obtain a complete copy of a convenience store surveillance video that Hostacky maintains would have shown the coworker buying a scouring pad often used by people to smoke crack. The court denied the petition without a hearing, finding that Hostacky failed to demonstrate substantive grounds for relief because he did not submit evidentiary documents containing sufficient operative facts to demonstrate both the lack of competent trial counsel and that the defense was prejudiced by trial counsel. The sole assignment of error contests the court's ruling.

{¶3} R.C. 2953.21(A)(1)(a) permits a person who has been convicted of a criminal offense and who claims that there was a constitutional violation that rendered the judgment void or voidable, to file a petition asking the court to set aside the judgment or grant other appropriate

relief. If timely filed, the court shall consider the petition and determine whether there are substantive grounds for relief. *See* R.C. 2953.21(C). “Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.” R.C. 2953.21(E).

{¶4} The word “hearing” as used in R.C. 2953.21(E) does not mean an evidentiary hearing. It is well established that “courts are not required to hold a hearing in every postconviction case.” *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, 833 N.E.2d 291, ¶ 10. The court acts as a gatekeeper in reviewing the evidence to determine if there are substantive grounds for relief. *See State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 51. 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, the court may dismiss a petition for postconviction relief without a hearing. *See State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905, paragraph two of the syllabus; *State v. Moon*, 8th Dist. Cuyahoga No. 101972, 2015-Ohio-1550, ¶ 22. We review the court’s decision to grant or deny a petition for postconviction relief for an abuse of discretion. *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 45.

{¶5} A person claiming ineffective assistance of counsel bears the burden of establishing two elements: (1) that trial counsel’s performance fell below objective standards for reasonably effective representation, and (2) that counsel’s deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶6} To satisfy the first element of the *Strickland* test, Hostacky must direct the court to specific acts or omissions by his trial counsel. *Id.* at 690. We consider whether, in light of all the circumstances, counsel’s performance was outside the wide range of professionally

competent assistance. *Id.* Our assessment of trial counsel’s performance is “highly deferential” so we indulge in “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance * * *.” *Id.* at 689. Further, trial counsel’s performance is evaluated in light of an attorney’s discretion to develop appropriate trial strategies according to the attorney’s independent judgment, given the facts of the case. *Id.* at 689-690.

{¶7} To satisfy the second *Strickland* element, Hostacky must show that there is a reasonable probability that, but for trial counsel’s errors, the result of the proceedings would have been different. *Id.* at 694. A “reasonable probability” is defined as one that is “sufficient to undermine confidence in an outcome.” *Id.*

{¶8} The first of Hostacky’s two claims of ineffective assistance of counsel is that trial counsel failed to offer any evidence to corroborate his trial testimony. Both Hostacky and the coworker gave similar testimony to the underlying facts of the case: they had both been hired as day laborers to distribute leaflets for a landscaping company; the coworker did not drive (he rode a bicycle), so Hostacky drove them in his van to the area where they would distribute the leaflets; and when they finished, Hostacky did not take the coworker back to his bicycle, but instead drove to a bar.

{¶9} At that point their stories diverged. The coworker testified that while at the bar, he drank water and listened to Hostacky say that he and his wife used heroin. When they left the bar, Hostacky picked up a woman who sat in the front seat while the coworker moved to the back of the van. The coworker saw Hostacky and the woman whispering, but he could not hear what they were saying because he was wearing headphones. Hostacky pulled the van into a store parking lot, pulled a gun from beneath the driver’s seat, pointed it at the coworker’s head, and demanded money saying, “[d]on’t lie to me, I seen all the money you got in your pocket.” The

coworker testified that he was carrying several hundred dollars and surmised that Hostacky had seen that money in his wallet when he paid for his food during their lunch break. After taking the money, Hostacky pushed the coworker out of the van. As he did so, Hostacky grabbed the sleeve of the coworker's jacket, causing the jacket to come off. In addition to his jacket, the coworker left several items behind in the van, including his music device, headphones, cell phone, and a vintage newspaper delivery bag. The coworker called the police and spent several hours with a police officer trying to locate the van. The following day, the police located Hostacky's van and recovered the belongings the coworker had to leave behind when he was forced from the van.

{¶10} Hostacky had a far more salacious account of the events. He testified that the coworker drank alcohol at the bar and told Hostacky that he planned to smoke a marijuana blunt that evening. Hostacky mused with him that he would enjoy marijuana as well, but was on probation and drug tests would show that he had ingested. Hostacky said that he instead smoked crack. Upon hearing this admission, the coworker's eyes "lit up" and he asked Hostacky if he knew where to find some. They drove to a convenience store where they bought glass pens that could be converted into pipes and used to smoke crack cocaine and a metallic scouring pad to use with the pipe. They bought some crack cocaine and smoked it. They then bought more crack cocaine. The coworker asked Hostacky if he knew any women. Hostacky did not want to introduce the coworker to the women he knew, so they picked up a prostitute. The prostitute serviced the coworker in the back of the van. Although out of cash, they decided to buy even more crack cocaine by having the coworker sell food stamps at a convenience store. Hostacky testified that while the coworker was selling his food stamps for cash, he called his wife, who

had been messaging him and asking where he was. He told his wife he would be home “in a minute,” and drove off with the prostitute, abandoning the coworker at the convenience store.

{¶11} During closing argument, the state questioned Hostacky’s credibility, noting that Hostacky himself admitted that “when it comes to lying, yeah, I’m more — I’m a liar when I’m high.” The state went on to argue: “And you know, the defendant claims he went home at that point. You know, it would have been easy when talking about getting witnesses, I would have looked forward to seeing somebody, his wife.”

{¶12} Hostacky argues that his wife could have corroborated that part of his testimony about returning home — in an affidavit attached to the petition, the wife averred that Hostacky came home at around 7 p.m., that they argued and he left the house, and that he did not return home until around 10 or 11 p.m. She also claimed that when she recovered the van from the police (it was impounded and photographed), she discovered crack cocaine in the front ashtray and both crack and a scouring pad in the rear cupholder. The wife said that she told trial counsel all of this the day before trial and that she was willing to testify, but that she was not called as a witness.

{¶13} It is unclear why Hostacky believes the wife’s testimony would have assisted him. The coworker testified that Hostacky robbed him around 5:30-5:45 p.m. Because his cell phone had been in the van, he tried asking passersby for help, but with no success. He testified that he tried to flag down a passing police car, but the police car “swerved around me and kept going.” Being on foot and without any money, he eventually entered a barbershop and was allowed to call the police; records showed that the victim made the call at 6:23 p.m. The time frame described by the coworker meant that Hostacky could easily have dropped off his female passenger and made it home consistent with what the wife represented in her affidavit.

{¶14} It is true that the state said in closing argument that it “would have looked forward to seeing somebody, [Hostacky’s wife]” testify. Its reasons for saying this are unclear — Hostacky did not deny being with the coworker, so the time he arrived home after robbing the coworker would have added nothing to the defense. The state offered the 911 call by the coworker as evidence, so trial counsel no doubt had been aware of the timing of the call to the police before trial. Trial counsel could easily have concluded that the wife’s testimony would not have aided the defense. Indeed, trial counsel may well have concluded that the wife’s testimony would be so self-serving that it would undermine the defense. So we conclude under the first *Strickland* prong that trial counsel had no duty to offer the wife’s testimony. We likewise conclude under the prejudice prong of *Strickland* that, even assuming that trial counsel should have offered the wife’s testimony, there is no reasonable probability that, but for trial counsel’s error, the result of the proceedings would have been different. We thus have no basis to find that the court abused its discretion by concluding that Hostacky did not offer sufficient evidence to prove his first ineffective assistance of counsel claim.

{¶15} The second ineffective assistance of counsel claim concerns an alleged videotape purporting to show the coworker purchasing a scouring pad. Trial counsel offered the recording for the purpose of establishing that the coworker entered the convenience store to buy the scouring pad to prepare the crack cocaine for smoking. By Hostacky’s own admission, however, the recording did not clearly show the face of a person, but “showed only someone who generally looked like [the coworker] getting out of a van and going inside.” Petition for Postconviction Relief at 8. In his petition, Hostacky offered the affidavit of his aunt, who claimed that she had gone to the convenience store shortly after Hostacky had been released on bail and watched a surveillance recording showing the coworker “getting out of the van, and walking into the store,

then it shows him making purchases from where the [scouring pads were] located, and returning to the van with a bag in his hand.” She said that she obtained a copy of the recording and showed it to defense counsel, but that the copy was incomplete because it only showed a person getting out of a van and going into a store. She returned to the convenience store to obtain a full copy of what she saw, but was told that the recording had been erased “just days before.” Hostacky argues that trial counsel was ineffective because had he timely investigated the case, he would have obtained the entire recording.

{¶16} Even if we assume for purposes of this argument that trial counsel had the duty to investigate whether a surveillance video recording existed, there was no reasonable probability that the full video would have changed the outcome of the trial. When shown the video, Hostacky agreed that the jacket shown on the male depicted in the video appeared different than the jacket recovered from Hostacky’s van — the coworker’s jacket recovered from Hostacky’s van and produced at trial had a white stripe on the sleeve; Hostacky conceded that the jacket shown on the video had “whole white sleeves.” So by Hostacky’s own concession, it was unclear whether the individual shown in the recording was the coworker.

{¶17} In addition to Hostacky’s concession about the differences between the jacket recovered from the van and the jacket shown in the video recording, the aunt’s affidavit did not establish that the individual shown in the recording bought a scouring pad. The aunt’s affidavit was carefully worded to say that the recording showed an individual making a purchase from where the scouring pads were located. This was not an express assertion that the individual actually purchased a scouring pad — only that the individual was in an area of the store where scouring pads were displayed for sale. As worded, the affidavit subtly invites the reader to draw a conclusion that was not expressly asserted. Because careful scrutiny of the affidavit does

not definitively establish that the coworker bought a scouring pad consistent with Hostacky's version of events, there is no reasonable probability that the full surveillance recording would have changed the outcome of trial.

{¶18} With Hostacky having failed to offer documentary evidence setting forth sufficient operative facts to establish substantive grounds for an ineffective assistance of counsel claim, the court did not abuse its discretion by denying the petition for postconviction relief without first holding an evidentiary hearing. The assigned errors are overruled.

{¶19} Judgment affirmed.

It is ordered that appellee recover of said 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.

MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., A.J., and
PATRICIA ANN BLACKMON, J., CONCUR