

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 16, 2021

[Cite as *04/16/2021 Case Announcements #2, 2021-Ohio-1204.*]

APPEALS NOT ACCEPTED FOR REVIEW

2021-0062. State v. Burke.

Trumbull App. No. 2020-T-0013, 2020-Ohio-5474.

Donnelly, J., dissents, with an opinion joined by Brunner, J.

DONNELLY, J., dissenting.

{¶ 1} Over 20 years ago, in the context of a case that appears to have had very flimsy evidence in support of a postconviction petition filed under R.C. 2953.21, this court wanted to make clear that not *every* postconviction petition should proceed to an evidentiary hearing just because the petitioner’s affidavits present a bit of evidence outside the trial-court record supporting the claim. *See State v. Calhoun*, 86 Ohio St.3d 279, 284, 714 N.E.2d 905 (1999). In doing so, this court listed many factors for a trial court to consider when reviewing a supporting affidavit that might—depending on the record involved—justify the court’s conclusion that the statements in the affidavit are false and do not merit a hearing. *Id.* at 284-285. Included among those factors is whether the trial judge reviewing the petition also presided over the petitioner’s trial. *Id.* at 285.

{¶ 2} I fear that Ohio’s courts are now applying the *Calhoun* factors irrespective of the trial-court record and are using any one of those factors to justify the summary denial of an evidentiary hearing on a postconviction petition. I am particularly concerned about cases like this one, in which the appellate court gave deference to the trial judge because that same judge presided over the petitioner’s trial, even though the trial judge made credibility determinations and factual

assumptions about affiants who had not testified at the petitioner's trial and who provided new, relevant, and exculpatory information existing outside the record. *See* 2020-Ohio-5474, ¶ 36.

{¶ 3} There is an increasing divide in Ohio between the liberally worded statutory standards for granting hearings on petitions for postconviction relief and the standards that are actually being applied by our courts. When a trial court reviews a timely petition for postconviction relief to determine whether to hold a hearing on the petition, “the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner.” R.C. 2953.21(D). Unless that same information disproves the petitioner's claims, “the court *shall* proceed to a prompt hearing on the issue.” (Emphasis added.) R.C. 2953.21(F).

{¶ 4} Nowhere in those standards does it say that a trial court may summarily refuse to proceed to a prompt evidentiary hearing based on its review of sealed materials that are not in the record, that are not about the petitioner, and that have not been disclosed to the state and the defense. Nowhere in those standards does it say that a trial court may summarily refuse to proceed to a prompt evidentiary hearing merely because the affidavits of multiple new witnesses presenting information outside the record seem “unreliable,” 2020-Ohio-5474 at ¶ 10. Yet that is what happened in this case.

{¶ 5} To support his claims of ineffective assistance of trial counsel and other constitutional deprivations, appellant, Austin Burke, submitted the affidavits of six other people, none of whom appear to have testified at Burke's trial. *Id.* at ¶ 23-34. Among the many factual issues raised in those affidavits is whether a different person had confessed to committing the primary offense for which Burke was tried and convicted: the aggravated murder of Brandon Sample. *Id.* at ¶ 2, 23. The trial court was apparently curious about the veracity of the affiant who had made that assertion, but rather than ordering a statutorily required hearing to test the veracity of the facts alleged, the court conducted an in camera review of the juvenile-detention records relating to that alternative suspect, *id.* at ¶ 9. The court did not allow the state or the defense to review those materials, despite their being central to the court's finding that the affiant's claim was not true. *Id.* at ¶ 35. The trial court similarly rejected every other affidavit as “problematic” and summarily denied Burke's petition for postconviction relief without first holding an evidentiary hearing.

{¶ 6} One of the worst injustices that we judges can perpetuate is to let an innocent person remain in prison. Although it is disturbing to think that a wrongful conviction might have happened on our watch, we cannot and should not be so quick to deny that possibility. Postconviction proceedings are an important safeguard against wrongful convictions, and we need to ensure that petitioners are afforded a meaningful opportunity to attempt to prove cogent claims at evidentiary hearings. If a petitioner's claims appear to be true and an innocent person might be in prison, we need to set aside our dogged commitment to finality and make room to correct that injustice. The standards currently employed by Ohio's courts do not make such room.

{¶ 7} Because I believe that this court should accept jurisdiction over this appeal to clarify the standards that apply when determining whether a postconviction petition should proceed to an evidentiary hearing, I dissent.

BRUNNER, J., concurs in the foregoing opinion.
