



[Cite as *State v. Henry*, 2018-Ohio-787.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

)

CASE NO. 17 JE 0018

)

PLAINTIFF-APPELLEE,

)

)

VS.

)

OPINION

)

ELVIS HENRY,

)

)

DEFENDANT-APPELLANT.

)

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas of Jefferson County,
Ohio
Case No. 15-CR-120(A)

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Jane M. Hanlin
Jefferson County Prosecutor
Atty. Samuel A. Pate
Assistant Prosecuting Attorney
16001 State Route 7
Steubenville, Ohio 43952

For Defendant-Appellant:

Elvis Henry, *pro se*
#681-842
Belmont Correctional Institution
P.O. Box 540
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: February 23, 2018

{¶1} Defendant-Appellant Elvis Henry appeals the decision of Jefferson County Common Pleas Court denying his petition for postconviction relief without a hearing. The issue in this case is whether the trial court abused its discretion in denying the petition. For the reasons expressed below the trial court's decision is affirmed.

Statement of the Case

{¶2} Appellant was convicted of having weapons while under disability and possession of cocaine in excess of 100 grams, which included a major drug offender specification. The indictment and convictions arose from the search of a residence located at 740 North Fifth Street in Steubenville, Ohio. A search warrant was obtained to search that residence. The basis for the search warrant was two controlled buys involving confidential informant S.P. and the unwitting informant Bernice Pearson occurring on July 28, 2016. *State v. Henry*, 7th Dist. No. 16 JE 10, 2017-Ohio-7505.

{¶3} Appellant's convictions were upheld on direct appeal. *Id.*

{¶4} While the direct appeal was pending, Appellant filed a petition for post-conviction relief. 5/1/17 Postconviction petition. Attached to the petition were affidavits from Amber West, Bernice Pearson, April Jordan-Williams, and Appellant. Also attached was the subpoena for Bernice Pearson to testify at trial, the affidavit in support of the search warrant, the suppression hearing transcript, Officer Hanlin's police report, a report from a private detective, and filings from Steubenville Municipal Court.

{¶5} The state filed a motion in opposition. 5/8/17 State Contra Motion. Appellant moved to amend the petition to include a video of the second controlled buy. 5/11/17 Motion to Amend. The state filed an amended memorandum in opposition to Appellant's motion for postconviction relief. Appellant filed a reply to state's opposition motions. 6/5/17 State Motion.

{¶6} The trial court denied the petition without holding a hearing. 6/14/17 J.E. Appellant timely appealed the trial court's decision.

Assignments of Error

{¶7} The two assignments of error Appellant sets forth are:

“Trial counsel failed to effectively pursue alibi defense as to the whereabouts of Elvis Henry on July 28, 2015 through the testimony of Amber West.”

“Prosecutorial Misconduct”

{¶8} In general, Appellant argues trial counsel was ineffective for failing to raise certain issues during the suppression hearing and trial.

{¶9} Postconviction relief is a collateral civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). In order for the petition to be timely it must be filed no later than 365 days after the date the trial transcript is filed in the court of appeals in the direct appeal of the conviction. R.C. 2953.21(A)(2). Appellant’s postconviction petition was timely because it was filed within the 365 day deadline.

{¶10} A trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing 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. R.C. 2953.21(C) (prior version effective March 23, 2015 until April 5, 2017); *State v. Calhoun*, 86 Ohio St.3d 279, 291, 1999–Ohio–102, 714 N.E.2d 905.

{¶11} The trial court's gatekeeping role in the postconviction relief process is entitled to deference. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 52. This includes the trial court's assessment of the credibility of the affidavits submitted. *Id.*; *Calhoun*, 86 Ohio St.3d at 284 (“Unlike the summary judgment procedure in civil cases, in postconviction relief proceedings, the trial court has presumably been presented with evidence sufficient to support the original entry of conviction”). “[W]here a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential.” *Calhoun* at 284.

{¶12} The non-exclusive list of factors in assessing the credibility of affidavits are: (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. *Id.* at 285. “Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.” *Id.* A finding that the affidavits lack credibility is within the trial court's discretion. *Id.* If the trial court discounts the credibility of affidavits it should include an explanation of its basis for doing so. *Id.*

{¶13} We apply an abuse of discretion standard when reviewing a trial court's decision to deny a postconviction relief petition without a hearing. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58. An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 540 N.E.2d 1140 (1983).

{¶14} The arguments in Appellant's postconviction petition assert trial counsel was ineffective for various reasons, including failing to assert an alibi defense at the suppression hearing, and failing to introduce evidence at trial and the suppression hearing indicating he was not the seller during the controlled buy.

{¶15} In denying the postconviction petition, the trial court found the affidavits concerning the alibi defense were not credible; “[Appellant] cites Affidavits from various family members and long-time drug abusers to support his claim.” 6/14/17 J.E.

{¶16} The affidavits attached in support of his motion for postconviction relief were from Amber West, Bernice Pearson, April Jordan-Williams and himself.

{¶17} Amber West avowed she could testify Appellant was at her house from 11:30 a.m. until 5:00 p.m. on July 28, 2015; at 5:00 p.m. Appellant was picked up by

a silver car. This would provide an alibi for the time of the controlled buys. She was not called to testify at the suppression hearing, but she was called to testify at trial. West Affidavit. At trial, she was not asked about Appellant's alibi, rather she was asked if Appellant resided at Angela Gilliam's house. Tr. 214-215. One of Appellant's defenses at trial was he was not living at Angela Gilliam's house and therefore, the drugs found were not his. Amber West's trial testimony did indicate Appellant is her friend and the godfather to her child. Trial Tr. 214.

{¶18} Bernice Pearson avowed in her affidavit she was subpoenaed to testify at Appellant's trial. When she arrived at the courthouse someone asked her if she knew Appellant and if she bought drugs from him. She indicated she knew Appellant, he was like a nephew to her, and she never bought drugs from him. She was then told her testimony was not needed. Pearson Affidavit.

{¶19} April Jordan-Williams' affidavit indicates she is Appellant's mother. This affidavit discusses what trial counsel told her and many of the arguments Appellant presented in the petition for postconviction relief.

{¶20} The trial court determined the affidavits were not credible because they were from various family members and a long-time drug abuser. 6/14/17 J.E. The trial court's conclusion does not appear to be an abuse of discretion; the affidavits indicate they are from relatives or interested persons. Therefore, for that reason alone, the affidavits do not support Appellant's position that trial counsel was ineffective and that the alleged ineffectiveness is substantive grounds for relief.

{¶21} The other evidence allegedly supporting his postconviction petition are video of the second controlled buy, the affidavit supporting the search warrant, the suppression transcript, municipal court filings showing Angela Gilliam's criminal record, the municipal court charging instrument that allegedly has a different time stamp than defendant's trial exhibit B, and a report from a private detective.

{¶22} Appellant argues the video of the controlled buy, the suppression transcript, and the affidavit supporting the search warrant demonstrate counsel was ineffective at the suppression hearing because those items, when viewed with Amber West's and Bernice Pearson's affidavits, establish there was no probable cause

supporting the search warrant. This argument is meritless not only because the trial court found the affidavits credible, but also because the video supports the affidavit for the search warrant and thus, there was probable cause to issue the search warrant.

{¶23} The affidavit supporting the search warrant was a part of the record in the direct appeal. However, the suppression transcript and the video of the second controlled buy were not. During the suppression hearing, Officer Hanlin testified about the first controlled buy that occurred at 2:00 p.m. Suppression Tr. 7. That buy was not recorded because the equipment malfunctioned. The second controlled buy occurred around 4:30 p.m. Officer Hanlin was not on surveillance duty for the second controlled buy. Detective Ellis was on surveillance duty during the second controlled buy. Suppression Tr. 15.

{¶24} Appellant contends the video of the controlled buy should have been used at the suppression hearing and at trial to show he was not the person selling the drugs. This is important because the person leaving the house and selling the drugs was the basis for the search warrant. As was explained in the opinion of the direct appeal, the controlled buy was recorded, but there is no video of the actual buy. Two informants were used in the buy. One was S.P. and she was the one who informed the police she could buy cocaine from someone named “E.” However, she could not buy directly from him because he knew she was an informant. Therefore, an “unwitting” informant was used. This was Bernice Pearson. Bernice Pearson was not wearing a wire and allegedly did not know this was a controlled buy. The only video is of S.P. in the car with a driver.

{¶25} At the start of the video, Detective Hanlin states the date is July 28, 2015, the time is 4:26 p.m., and it is a \$200 controlled buy for cocaine from a suspect known as street name “E” at or around the vicinity of 740 North Fifth Street in Steubenville. The video indicates Detective Ellis and two others would be doing surveillance. The video indicates Bernice Pearson would do the buy and there is another confidential informant, who we now know is S.P. The time stamp date and

time on the video does not correspond to the date given by Detective Hanlin in the video. The time stamp date is July 29, 2015 4:36 p.m.

{¶26} In the video S.P. is heard talking on the phone to a detective or officer. She asks if the officer saw a man get into a gold car in front of “E’s” house. She states that man is wearing blue cameo pants and a white T-shirt. She indicates that person is not “E;” she states that man is too big to be “E” and he might be the man that shows up for the buy. After she hangs up the phone she says the person who she was talking to indicated “E” left the house. About 7 minutes later S.P. drives to pick up Bernice Pearson. S.P. is on the phone again with the detective during this drive. She states, “‘E’ just walked off the bricks. ‘E’ is right now cutting to turn on Madison toward his house. I’m picking Bernice up on Madison because she just got in a car with someone who is giving her a ride because of her legs, so she doesn’t have to walk all the way down here. But he is getting ready to walk in his house about right now.” Postconviction Exhibit 12(A).

{¶27} Appellant claims this video indicates he was not the seller; he appears to agree his street name is “E,” but contends “E” was not the seller. This is an incorrect assessment of the information in the video. The statements made by S.P. in the video indicate the officers saw “E” leave the residence, walk to the controlled buy area, and return to the house several minutes later. The man seen doing that was not the man wearing blue cameo pants.

{¶28} It is also important to note this video is of the second controlled buy. During trial Detective Hanlin testified the man seen as “E” during the first controlled buy was wearing blue jeans and a red t-shirt. Tr. 55. He then explained:

Yes. The – [S.P.] and the driver that day pulled into an alleyway where myself and Detective Vinci didn’t feel we could park in the same area without being viewed. We stayed – I stayed on a cellular telephone with her. She was passing along her observations to me.

I was then passing them on to Detective Vinci who’s within the same car as me who is also on a cell phone with Detective Ellis. So, as she’s

describing what she's observing to me Detective Vinci is describing it to Detective Ellis who is sitting in front of the house.

With those – that coordination we were able to see him leave the house, walk toward the suspect's vehicle, at the conclusion of the controlled purchase walk directly back towards his residence and back into the front door of the residence.

Trial Tr. 55.

{¶29} There are no inconsistencies between the trial testimony and the suppression hearing testimony concerning the procedure used in the first controlled buy. Suppression Tr. 12.

{¶30} Furthermore, it is noted that at trial, Detective Hanlin also testified the clothing Appellant was observed to be wearing during the controlled buys was the same clothing he was wearing when the search warrant was executed, which was blue jeans and a red T-shirt. Trial Tr. 55.

{¶31} Consequently, despite Appellant's insistence to the contrary the video does not indicate Appellant was not the seller. Instead, it evinces he was the seller and supports Officer Hanlin's testimony at the suppression hearing and the information in Detective Ellis' affidavit supporting the search warrant. As the trial court aptly reasoned in its judgment entry:

Defendant's problem is that the controlled buys were witnessed by Police at the time they occurred. While the Police relied upon local drug abusers to set up the deal it was their own observations of the controlled buys themselves that lead to the search warrant. It is not clear if the Officers saw the actual hand to hand but they definitely saw Defendant who was not elsewhere.

6/14/17 J.E.

{¶32} We agree with the trial court's finding and hold the video and the suppression transcript do not establish substantive grounds for relief; the video does not indicate the search warrant should have been suppressed. Amber West's

affidavit at most creates a credibility issue. However, as stated above, the trial court did not abuse its discretion in determining her affidavit lacked credibility because of her close relationship with Appellant.

{¶33} Municipal court judgments were also attached to the petition for postconviction relief. These filings also fail to evince substantive grounds for relief. The municipal court filings regarding Angela Gilliam's criminal record are used to support Appellant's argument that Angela Gilliam had an agreement with the prosecution to testify against Appellant and that agreement was not disclosed to the jury or to Appellant. This argument was presented in the direct appeal in the fourth assignment of error; Appellant claimed he did not get a fair trial because of cumulative error and prosecutorial misconduct. *Henry*, 2017-Ohio-7505 at ¶ 32-33, 56-59. In the direct appeal, Appellant argued Gilliam was indicted for the same crimes he was and since her indictment was dismissed prior to Appellant's sentencing, there must have been an agreement with the state for her to testify against him in exchange for the dismissal of her indictment.

{¶34} Appellant now expands upon that argument. He attached judgment entries indicating Gilliam was on probation for a misdemeanor theft offense at the time she was indicted. He contends her probation was not violated upon her indictment and the probation was completely erased from her record. He asserts this is further evidence she had an agreement with the state to testify against him.

{¶35} The judgments he attached indicate Gilliam was sentenced to one year of probation for theft on March 3, 2015. Appellant's trial occurred exactly one year later. Thus, the probation would have been completed. Nothing in the attached judgments indicates her probation was erased. His attachments do not indicate she received a probation violation for being indicted. However, it is not unusual for the probation violation to be stayed until the case from which the indictment arose is resolved. Furthermore, filing a probation violation is a discretionary matter. Therefore, the information provided by Appellant in the postconviction petition does not indicate there was an agreement between the state and Gilliam. The argument

presented in the direct appeal was the strongest position for asserting there was an agreement. The argument, however, was determined to lack merit. *Id.* at ¶ 59.

{¶36} The other municipal court filing is the charging complaint. In closing argument, trial counsel brought to the jury's attention the time stamp discrepancy on the charging document. *Id.*, 2017-Ohio-7505 at ¶ 49. The charging document was signed and dated July 30, 2015. However, the time stamped date on it is July 20, 2015. *Id.* at ¶ 48. The discrepancy was brought to the jury's attention, was raised in the direct appeal, and was found to be meritless. *Id.* at ¶ 51.

{¶37} Appellant now contends he recently discovered an additional July 20, 2015 time stamped document in trial counsel's files. He contends counsel failed to present this additional evidence at the trial. He asserts this new document has a different time of day stamped on it then the one counsel presented at trial. He attached this document as exhibit 11 and asks this court to compare it with trial defense exhibits B and C. Exhibit 11 and trial defense exhibit B are the same document and the time and date stamped on them are the same. Both have the time stamped date of "2015 JUL 20 A 8:02." The only difference between the two documents is exhibit B is a certified copy and exhibit 11 is a copy with no certification.

{¶38} Exhibit C is also a charging document. It is time stamped "2015 JUL 20 A 9:18." It is also signed by the clerk and states it was signed by her on July 30, 2015. Exhibit C was admitted at trial. No attachment to the postconviction petition indicates there is a different time stamped copy of this document.

{¶39} Accordingly, there is no new evidence presented or any evidence outside the record indicating trial counsel was ineffective in presenting the discrepancy in the charging document at trial.

{¶40} The last item attached to the postconviction petition is the private detective's report. This report reiterates much of the information in the affidavits and arguments presented in the postconviction petition. It does not establish trial counsel's alleged ineffectiveness is substantive grounds for relief.

{¶41} Appellant's arguments fail; there is no evidence outside the record indicating trial counsel was ineffective. As the trial court noted:

Defendant's Counsel was an out of town retained Attorney that Defendant could have discharged any time after the Motion to Suppress. Defendant said and did nothing. Often times Defendant's [sic] write to the Court complaining about an ongoing Case and claim that their Attorney is not doing his job. That did not happen in this Case.

Just in case Defendant or anyone else has any lingering possible or imaginary doubt, it should be noted that Defendant was in possession of the prerecorded controlled buy money at the time of his arrest.

6/14/17 J.E.

{¶42} For the above stated reasons, the trial court's decision is affirmed.

Donofrio, J., concur.

Waite, J., concur.