LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date June 11, 2020 Case No. 12CR086257

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS.

ROY R. YOUNG
Defendant

Rhys Brendan Cartwright-Jones
Defendant's Attorney

This matter is before the Court on Defendant's Motion To Vacate And Set Aside Conviction and Sentence – Post Conviction Petition, filed May 5, 2020; the State's response in opposition on June 2, 2020.

The Motion is not well-taken and is hereby DENIED. See Judgment Entry.

IT IS SO ORDERED. No Record.

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JUDGE D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Cartwright-Jones, Esq.

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I. INTRODUCTION

This matter is before the Court on Defendant's Motion To Vacate And Set Aside Conviction and Sentence – Post Conviction Petition, filed May 5, 2020; the State responded in opposition on June 2, 2020.

II. PROCEDURAL HISTORY

On November 29, 2012, the Defendant was indicted on multiple sex offenses for sexual conduct he engaged in with his minor stepdaughter, including rape.

The Defendant went to trial and was convicted on all charges. He was sentenced on June 19, 2015, to life in prison with the possibility of parole after 13 years and classified as a Tier III sexual offender/child victim offender.

Since his conviction, the Defendant has filed numerous pleadings challenging his conviction and sentence – none of which have been successful.

The Defendant filed a direct appeal as of right on June 30, 2015. His convictions and sentence were affirmed on April 19, 2017. (See: Case No. 15CA010803).

In that appeal, the Defendant challenged the sufficiency of the indictment, alleged errors in the jury instructions, alleged the trial court engaged in an improper *ex parte* communication with the State, challenged the weight of the evidence, and asserted ineffective assistance of counsel.

On March 16, 2016, the Defendant filed a Petition to Vacate or Set Aside Judgment and Sentence and a Motion For Specific Discovery Related to Biological Testing. These motions were thereafter overruled by the Court and were ultimately designated by the Ninth District Court of Appeals as petitions for post-conviction relief. (See: Case No. 16CA011045).

On June 24, 2016, the Defendant filed a Motion For Summary Judgment which was overruled by the Court on October 18, 2016.

On November 14, 2016, the Defendant filed his second appeal relative to the Court's denial of his petitions for post-conviction relief (Case No. 16CA011045) which the Ninth District Affirmed on July 16, 2018.

In his March 16, 2016 petitions for post-conviction relief, he again argued that his trial counsel was ineffective. Specifically, he argued that counsel failed to investigate DNA evidence of condoms found in the family's septic tank, DNA evidence on a condom wrapper, and criminal charges pending against a State's rebuttal witness. All of these arguments failed.

On March 7, 2019, the Defendant filed a Motion For Discovery In Aid of Delayed Post-Conviction Petition; the State responded in opposition on March 13, 2019. The Court denied the Motion on March 20, 2019.

As noted, the Defendant's currently pending motion seeks to set aside his conviction and sentence *via* post-conviction relief based upon newly discovered evidence posited by the Affidavit of his brother.

III. LAW AND AGRUMENT

STANDARD OF REVIEW

IS THE PETITION TIMELY

In the matter of *State v. Higgins,* 9th Dist. Summit No. 28215, 2017-Ohio-909, the Ninth District stated,

> Pursuant to RC 2953.21(A)(2), a petition for post conviction relief must be filed no later than 365 days after the trial transcript is filed in the direct appeal from judgment of conviction and sentence, or, if no direct appeal is taken, 365 days after the expiration of the time to file an appeal; the petitioner must also show by clear and convincing evidence that, but for constitutional error at trial, no

reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted. *Id.* at ¶ 5.

In this matter, the transcript was filed in Defendant's direct appeal on September 8, 2015. As such, the time to file a petition for post-conviction relief expired on September 8, 2016.

Accordingly, the Petition is untimely.

The question then becomes "was the petitioner 'unavoidably' prevented from discovering the facts on which the petition is predicated?" R.C. 2953.23(A)(1).

In the case at hand, the answer is no relative to Robert's statements about the condom as obviously that information was in existence at the time of Petitioner's trial. As for Sherry's alleged statement to Robert, the answer is *ostensibly* yes.[1]

Regardless, the Court will address the merits as to both.

THERE IS NO RIGHT TO A HEARING EVEN IF PETITIONER IS GRANTED LEAVE TO FILE A PETITION FOR POST-CONVICTION RELIEF OUT OF RULE

The Ninth District has addressed this issue as well in *State v. West,* 9th Dist. Summit No. 28668, 2017-Ohio-8474, at ¶ 13,

> . . .citing Section 2953.21(C) [and] [i]nterpreting that section, the Ohio Supreme Court has explained that "[a]n evidentiary hearing is not automatically guaranteed each time a defendant files a petition for postconviction relief." *State v. Broom*, 146 Ohio St.3d 60, 2016- Ohio-1028, ¶ 29. "A trial court has the discretion to deny a postconviction petition without discovery or an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate 'sufficient operative facts to establish substantive grounds for relief.'" *State v. Calhoun,* 86 Ohio St.3d 279 (1999), paragraph two of the syllabus. To warrant an evidentiary hearing in a postconviction proceeding, a petitioner must submit evidence outside the record that sufficiently establishes that the petitioner is entitled to relief on one or more asserted constitutional grounds. *Id.* ¶14; *West* at ¶13.

[1] Keep in mind that Robert's Affidavit has no date as to when Sherry's alleged statement was made though he does aver that he kept in touch with her for "6 to 7 years."

DOES PETITIONER'S "NEWLY DISCOVERED" EVIDENCE ESTABLISH A CONSTITUTIONAL DEFECT IN THE TRIAL PROCEEDINGS

THE CONDOM

In the first prong in his argument for a new trial, the Petitioner, yet again, puts the presence of a condom allegedly found in the victim's bedroom at issue.

Despite the fact that the presence of the condom came up at trial and was argued previously in Petitioner's last petition for post-conviction relief, Petitioner now urges the Court that the specific facts and circumstances surrounding the discovery of the condom in the victim's bedroom may have been planted and part of a scheme of shenanigans orchestrated by the victim and her mother.

As proof of this allegation, Petitioner submits the Affidavit of his brother, Robert Young ("Robert").

Robert avers that when he helped "Sherry," the victim's mother, and the victim move out of the home where the assaults occurred, he did not initially observe a condom in her bedroom. Later, upon reentering the victim's room, he alleges that he saw the condom (for the first time) and discarded it. Robert *speculates* that Sherry planted the condom in order to support the victim's [false] allegations.

First, one could easily infer that Robert simply *did not see* the condom during the initial move. Second, if the condom was there but contained no DNA from the Petitioner, that fact alone is not necessarily exculpatory, after all, the State conceded at trial that there was no DNA evidence connecting Petitioner to the crimes yet he was still convicted, as is often the case in sexual assault cases. And, as the Ninth District noted, his trial counsel made a valid tactical decision not to have other condoms or wrappers tested for DNA for fear that they would incriminate the Petitioner. Third, if the condom was actually in the victim's room and contained the Petitioner's DNA that would be catastrophic for his defense.

Accordingly, consider this scenario - if Robert is correct that Sherry fabricated the condom evidence, who is to say that she did not plant a condom that was used during sexual relations between herself and the Petitioner? Trial testimony established that Sherry and Petitioner used condoms during certain sexual activities – if Sherry really created evidence to bolster a lie, she could have placed a used condom containing Petitioner's semen in the victim's room that would have been incredibly inculpatory. And, most importantly, she would not have let Robert discard it when he allegedly found it.

Further testimony, hearsay testimony no less from a witness with potential bias (the Petitioner's brother) that the presence, or lack thereof, of a condom in the victim's room is nowhere near sufficient evidence that convinces this Court of a "strong probability that it would change the result if a new trial was granted."

SHERRY'S STATEMENT

The second argument advanced by Petitioner, and admittedly, slightly more compelling, is that Sherry's alleged statement "I'm glad we made all that shit up now" merits a new trial.

This Court disagrees.

As argued by the State, there are multiple problems, explanations, and issues surrounding this statement. Like the condom issue, the Court is not convinced that there is a "strong probability" that if Sherry's alleged statement was introduced in a new trial, it would change the result of Petitioner's convictions.

First, Robert's allegation about Sherry's statement is lacking in basic detail about when, where, and in what context it was made. All we know from Robert's Affidavit that she allegedly made the statement "at a gas station" after discussing being evicted from her residence – a residence owned by Robert's parents. How do we know that she was even referring to Petitioner's convictions for sexual assault? She could have been referring to a myriad of statements she made about Petitioner. And significantly, when was the statement allegedly made?

Second, the statement is hearsay. While there may, or there may not be an exception, the statement is suspect on its face as it is unsworn and not subject to cross examination. If the statement is inadmissible at trial, then obviously it will not change the result if a new trial is granted. *State v. Jalowiec,* 9th Dist. Lorain No 14CA010548, 2015-Ohio-5042, at ¶ 30.

Third, Sherry's alleged statement is really not "new evidence" at all. As noted by the State in its brief, Sherry testified at trial that she and the victim lied about what happened and that it was all "made up." As such, the jury already heard Sherry *herself* testify under oath that the allegations were untrue and made up. How could a second jury, hearing Robert testify about what Sherry allegedly said, make a difference? Clearly, hearing from Robert about what Sherry allegedly said by way of hearsay is substantially less probative than hearing it directly from Sherry in open court, under oath, subject to cross examination.

Finally, as noted *supra,* Robert's Affidavit is suspect given his relationship to the Petitioner. If Sherry actually said what Robert alleges (not that it would change anything anyway), why is there no Affidavit from Sherry? Or, more tellingly, why no Affidavit from the victim?

IV. CONCLUSION

As noted *supra,* this Court believes that the issue of the condom, or lack thereof, has been fully litigated. Moreover, both inculpatory and exculpatory inferences may be drawn as to its significance such that the Court cannot say that Robert's testimony about how it was discovered and disposed of in any way suggests a strong probability that if introduced at a new trial, it would change the result of Petitioner's convictions.

Further, Robert's information about what he observed in the victim's room is not new evidence. Clearly, his knowledge about the condom was in existence at the time of the trial and Robert could have been called as a witness. Petitioner choose not to call Robert as a witness – probably a sound trial decision. Post-conviction relief does not afford a petitioner a new opportunity to call a witness at a second trial that the petitioner chose not to call at the first when the information the witness possesses was available at the time of the first trial.

As for Sherry's alleged statement, it is not really new evidence, but consistent with her sworn trial testimony. Clearly, the jury believed the victim in this case, not Sherry. Robert's testimony about what Sherry allegedly said to him would add nothing that was not brought up in the trial and is far less compelling than Sherry's actual trial testimony was. Further, her alleged statement, proffered by Robert, is probably inadmissible anyway.

The Motion To Vacate And Set Aside Conviction and Sentence - Post-Conviction Relief is DENIED.

IT IS SO ORDERED. No Record.

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JUDGE D. CHRIS COOK