

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Plaintiff-Appellee, :  
-vs- :  
CHAD MEISENHELDER, :  
Defendant-Appellant. :

Case No. **12-1271**  
5th Dist. No. 11CA0092

MEMORANDUM IN SUPPORT OF JURISDICTION

**RECEIVED**  
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SUPREME COURT OF OHIO

FOR APPELLANT:

Chad Meisenhelder, #A412-944  
London Corr. Inst.  
P.O. Box 69  
London, Ohio 43140-0069

Appellant, in pro se

FOR APPELLEE:

Kenneth W. Oswalt (# )  
20 South Second St.  
Newark, Ohio 43055

Licking County Prosecutor

**FILED**  
JUL 26 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## JURISDICTIONAL STATEMENT

This case presents substantial Constitutional questions, including ineffective assistance of counsel at trial in failing to properly research, prepare and investigate for trial, and by failing to even submit a simple question to the sole inculpatory witness, an eyewitness, as to whether he wears glasses and had them on at the time, an example of negligence so egregious as to cry for relief, especially considering the plethora of recent cases and studies demonstrating the inherent unreliability of eyewitness testimony and the myriad wrongful convictions obtained thereby that are being uncovered due to DNA and other scientific advances. There can never be an excuse not to ask the sole inculpatory eyewitness whether he wears glasses and had them on at the critical time.

In addition, this case presents yet another instance of a trial court using a boilerplate denial of a post-conviction petition where the defendant was unavoidably prevented from obtaining critical exculpatory evidence within the statutory time period without any legitimate reason for such denial other than to help the state maintain a conviction, regardless of the falsity thereof.

This Court should accept jurisdiction and reverse the lower court.

STATEMENT OF THE CASE

Appellant was convicted following a jury trial of one count of Murder under R.C. §2903.02(B), and two counts of attempted felonious assault (also the underlying predicate felony for the murder charge) under R.C. § 2903.11(A) and 2023.02(A), both third degree felonies, on June 1, 2001 and on June 14, 2001, was sentenced to an indefinite term of fifteen years to life, consecutive to two additional consecutive four year terms.(Case No. 01 CR. 58, Licking County Common Pleas Court).

Direct Appeal was taken, and the lower court was affirmed on March 18, 2002 (2002-Ohio-1449).

On July 14, 2011, Appellant filed a Petition for Post-Conviction Relief which was summarily denied on August 18, 2011. Timely direct appeal was taken to the Fifth District Court of Appeals which affirmed the trial court on June 22, 2012. (11CA0092) attached. This timely appeal follows.

STATEMENT OF FACTS

On February 3, 2001, Appellant and two others got into a fight with three other men who were drunk. Appellant's co-defendant, Brial Eakin, landed the blows that eventually caused the death of Bobby Wilcox. State witness GFI;endell Newlon testified that he had seen Appellant land the blow that knocked Wilcox down, which is the blow that cracked his head and resulted in his death. His testimony included the fact that he was unable to distinguish clothing due to bad lighting. (Tr. 284)

Neither the prosecutor nor defense counsel asked this witness about any degree of certainty of his identification of Appellant,

or whether his eyesight is good or if he requires glasses, or whether he was wearing them.

In April, 2011, this witness contacted Appellant and advised him that he, in fact, has poor eyesight, that he required glasses and was not wearing them at the time of the incident. Moreover, the witness told Appellant that, had he been asked by either attorney, he would have told them that he was unsure of his identification of Appellant because he had not been wearing his glasses.

Appellant does not deny having been present, but vehemently has always denied striking any of the blows that resulted in the death, rendering him actually innocent of Murder.

#### PROPOSITION OF LAW NO. I:

WHERE A DEFENDANT IN A CRIMINAL CASE PRESENTS SUBSTANTIVE EVIDENCE OF INNOCENCE WHICH HE DEMONSTRATES COULD NOT HAVE BEEN OBTAINED PREVIOUSLY, IN A PETITION FOR POST-CONVICTION RELIEF, IT IS A VIOLATION OF DUE PROCESS OF LAW TO DENY THE PETITION WITHOUT A HEARING, AND TO DENY RELIEF.

#### LAW AND ARGUMENT

Where a Petition for Post-Conviction Relief presents sufficient cogent operative facts that, if true, would entitle the petitioner to relief, a hearing is required. State v Perry (1967) 10 Ohio St. 175, O.R.C. §2953.21.

In this case, Appellant presented evidence demonstrating that he was unavoidably prevented from obtaining the underlying evidence, namely the fact that the witness with the extant exculpatory testimony had refused to co-operate until 2011, and that Appellant could obviously not force the evidence from the witness. The evidence of unavailability was the witness himself.

The trial court refused to even consider the petition, even without any opposition by the prosecution, but instead erroneously argued that the evidence dehors the record could have somehow been argued on appeal, and that the petition was "unfounded".

This deprived Petitioner of due process of law and fundamental fairness and reversal is warranted.

The continual summary denial of any opportunity to present evidence establishing innocence by Ohio trial courts by implementing the harshest possible interpretation of the recently enacted limitations period needs to be addressed and arrested by this Court. There are far, far too many innocent people in prison due to hasty trials, ineffective or lazy lawyers, dishonest prosecutors, lying or mistaken witnesses, and refusal to permit meaningful access to the courts to present evidence to prove such innocence. This case is ripe for review and this Court should accept the case and reverse the lower courts.

PROPOSITION OF LAW NO. II:

WHERE TRIAL COUNSEL FAILS TO PROPERLY RESEARCH, PREPARE AND INVESTIGATE FOR TRIAL, AND THEREBY DEPRIVES THE DEFENDANT OF AN ADEQUATE DEFENSE, SUCH COUNSEL IS INEFFECTIVE WITHIN THE MEANING OF THE SIXTH AMENDMENT.

LAW AND ARGUMENT

It is well settled that a criminal defendant is constitutionally entitled to the effective assistance of counsel at all critical stages of the proceedings. Gideon v Wainwright (1963) 372 U.S. 353.

Where counsel fails to perform essential duties owed to his client, and the defense is prejudiced thereby, such counsel is

ineffective within the meaning of the Sixth Amendment. Strickland v. Washington (1984) 466 U.S. 668. Essential duties include adequate pre-trial investigation into witnesses and facts they will be testifying to, as well as evidence going to the witnesses' reliability. (id)

In this case, Appellant's conviction rests entirely upon the eyewitness testimony of one witness who was never asked any questions about the degree of certainty of his identification, and, incredibly, was never asked if he required glasses or had been wearing them at the time.

The recently revealed evidence that the sole inculpatory eyewitness in Appellant's case not only required glasses, but was not wearing them, and moreover, was prepared to testify to the fact that he was unsure of his identification in the first place, demonstrates the complete inadequacy of trial counsel's pretrial investigation.

How can a reasonably competent attorney fail to ask an eyewitness if he can see?

Appellant submits that under any interpretation of Strickland it cannot be reasonably argued that Counsel was not ineffective and that the defense was not prejudiced thereby.

The summary denial of the Post-Conviction Petition in this case should be reversed and a hearing conducted, and, ultimately, relief granted.

#### CONCLUSION

For any or all of the foregoing reasons, this Court should accept jurisdiction and reverse the lower courts, and Appellant so prays.

Respectfully submitted,

Chad Meisenhelder

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Appellant, in pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Licking County Prosecutor, 20 S. Second St., Newark, Ohio 43055, via regular U.S. Mail, on this 24 day of July, 2012.

Chad Meisenhelder

Chad Meisenhelder  
Appellant, in pro se

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED

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OF APPEALS  
LICKING COUNTY, OH  
GARY B. WALTERS

STATE OF OHIO :  
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 Plaintiff-Appellee :  
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JUDGES:  
W. Scott Gwin, P.J.  
John W. Wise, J.  
Julie A. Edwards, J.

-vs-

Case No. 11CA0092

CHAD MEISENHOLDER :  
 :  
 :  
 Defendant-Appellant

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from Licking County  
Court of Common Pleas Case No.  
01CR00058

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Edwards, J.*

{11} Defendant-appellant, Chad Meisenhelder, appeals from the August 18, 2011, Judgment Entry of the Licking County Court of Common Pleas denying his Petition for Post Conviction Relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{12} On the evening of February 3, 2001, Robert Wilcox, Cheryl Paxson and brothers Stephen Francis, Jr. and Derek Francis went out to celebrate Derek Francis's twenty-first birthday. Also out on the same evening were appellant, his brothers-in-law, Glendell Newlon and Stephen Riffle, and his co-defendant, Brian Eakin. In the early morning hours of February 4, 2001, the two groups encountered each other. A fight ensued between appellant, Mr. Eakin, Mr. Wilcox and the Francis brothers. As a result, Wilcox died and the Francis brothers sustained injuries.

{13} Consequently, on February 16, 2001, the Licking County Grand Jury indicted appellant on one count of murder in violation of R.C. 2903.02(B), an unclassified felony, and two counts of attempted felonious assault in violation of R.C. 2903.11(A)(1) and 2923.02(A), felonies of the third degree. At his arraignment on February 20, 2001, appellant entered a plea of not guilty to the charges.

{14} Subsequently, a jury trial commenced on May 29, 2001. The jury found appellant guilty as charged. Pursuant to a Judgment Entry filed on June 14, 2001, the trial court sentenced appellant to fifteen years on the murder count and to four years on each of the attempted felonious assault counts, to be served consecutively.

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{¶15} Appellant appealed his conviction and sentence. Pursuant to an Opinion filed on March 18, 2002 in *State v. Meisenhelder*, 5<sup>th</sup> Dist. No. 01CA00068, 2002-Ohio-1449, this Court affirmed the judgment of the trial court.

{¶16} On July 14, 2011, appellant filed an "Untimely Petition for Post Conviction." Pursuant to a Judgment Entry filed on August 18, 2011, the trial court denied appellant's petition.

{¶17} Appellant now raises the following assignment of error on appeal:

{¶18} "I. THE TRIAL COURT ERRED IN VIOLATION OF THE OHIO AND UNITED STATES CONSTITUTION'S AND AS A RESULT ALL OF APPELLANTS RIGHTS THEREUNDER WERE VIOLATED, WHEN IT DENIED HIS PETITION FOR POST CONVICTION RELIEF, BECAUSE THE FACTS AND ALLEGATIONS, CLAIMS, AND EVIDENCE ATTACHED WARRANTED A HEARING ON THE PETITION."

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{¶19} Appellant, in his sole assignment of error, argues that the trial court erred in denying his Petition for Post Conviction Relief without a hearing. We disagree.

{¶10} Appellant concedes that his Petition for Post Conviction Relief was untimely filed.<sup>1</sup> Pursuant to R.C. 2953.23(A), a court may not entertain an untimely petition unless defendant initially demonstrates either (1) he was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in defendant's situation. R.C. 2953.23(A)(1)(a). If defendant were able to satisfy

<sup>1</sup> Pursuant to R.C. 2953.21(A)(2), a petition for post conviction relief "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Supreme Court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

one of those two conditions, R.C. 2953.23(A) requires that he also must demonstrate that but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶11} At the trial in this matter, Glendell Newlon, appellant's brother-in-law, testified that he observed appellant land a "forceful" hit to Wilcox's face, causing Wilcox to fall with his head "wobbling" and to strike his head on the pavement. Trial Transcript at 244-245. Appellant, in his Petition for Post Conviction Releif, argued that there was newly discovered evidence that Newlon was not wearing his prescription glasses at the time of the fight. Attached to appellant's petition was Newlon's affidavit. Newlon, in his April 15, 2011, affidavit, stated, in relevant part, as follows:

{¶12} "I had previously given testimony in the criminal case of State of Ohio v. Chad Meisenhelder, Case Number 01CR-0058, but I was not asked for all of the facts that I knew and I was not given permission to speak freely, and had I been given permission to do so, I would have testified to the following:

{¶13} "At trial when I was testifying and during my testimony, Chad's defense lawyer and neither the Prosecutor for the State asked me if I was 100% sure whether it was Chad Meisenhelder or not assaulted Bobby Wilcox the night of February 04<sup>th</sup> 2001. I wear eye glasses for helping me see, and I that didn't have them on the night of February 04<sup>th</sup>, 2001. I wear eye glasses for helping me see, and I didn't have them on the night of the assaults against Bobby Wilcox. Had I been asked how sure I was that it was Chad that assaulted Bobby Wilcox, I would have said 'Not 100% sure that it was Chad was assaulted Bobby Wilcox.'

{¶14} "I was never questioned by either party at trial as to my eyesight and whether or not I had my eye glasses on or not. Had I been asked whether or not I wear eyeglasses, I would have said 'yes.' Had I been asked whether or not I was wearing my eyeglasses the night of 02-04-2001 at the time of the assault on Bobby Wilcox, I would have said 'No.'"

{¶15} According to appellant, "[t]his was enough to warrant a hearing on this issue, to determine whether counsel was ineffective for not developing and building this testimony about the lack of eye glasses, and that Newlon was not 100% sure that it was [appellant] that hit Wilcox in the face."

{¶16} Appellant, in support of his contention that such evidence was newly discovered, attached the affidavit of Rachel Newlon. Newlon, in her affidavit, stated that appellant had asked her to interview Glendell Newlon, that Newlon told her that he did not want to talk about the case, and that it was not until March of 2011 that Newlon finally agreed to answer some questions. We question whether such evidence was truly "newly discovered since" Glendell was appellant's brother-in-law and was with appellant just prior to the attack. Appellant clearly would have known if Newlon wore glasses and if he was wearing them on the night in question. }

{¶17} However, assuming, arguendo, that this was newly discovered evidence, we find that appellant has failed to demonstrate that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty. We note that Glendell Newlon testified at trial that "[t]he way the lighting was, I really couldn't tell colors because of the shadow... It was like silhouette, but I could see the three standing there." By so testifying, Newlon put his identification at issue of appellant as the one

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who hit Wilcox at issue before the jury. Moreover, as noted by appellee, appellant's liability was as a principal offender or as an accomplice with his co-defendant, Brian Eakin. The testimony established that Wilcox and the Francis brothers were out celebrating Derek Francis's twenty-first birthday. Trial Transcript at 141, 213. The three were walking down the street when appellant and Eakin came upon them. Trial Transcript at 149, 151, 240-242, 315. There is no dispute that Eakin bet appellant one dollar to beat up the three. Trial Transcript at 240-241, 315-317. Appellant admitted this to the police. Trial Transcript at 376. Appellant claimed he only watched as Eakin punched Wilcox and repeatedly kicked him in the head. Trial Transcript at 377. At the scene, Cheryl Paxson told the police that appellant did attack Wilcox. Trial Transcript at 110-111. Paxson testified that she heard Mr. Eakin and appellant say something to the effect "let's do this." Trial Transcript at 159. Moreover, at trial, Stephen Riffle, appellant's brother-in-law, testified that Eakin bet appellant a dollar if appellant would jump the three boys. Riffle testified that appellant asked Eakin "where's the dollar", that Eakin then pulled the dollar out and that appellant then took the dollar, took off running and jumped on the three guys. Trial Transcript at 317.

{¶18} Based on the foregoing, we concur with appellee that the jury could have convicted appellant "based upon his participation in the 'bet' that led to the fatal assault, even if the fatal blow was inflicted by his co-defendant, Brian Eakin."

{¶19} We find, therefore, that the trial court did not err in denying appellant's untimely petition without a hearing.

{¶20} Appellant's sole assignment of error is, therefore, overruled.

{¶21} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

*Julie G. Edwards*

*W. Scott Gwin*

*John H. Wise*

JUDGES

JAE/d0306

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