

[Cite as *State v. Rector*, 2003-Ohio-3283.]

STATE OF OHIO, CARROLL COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 02 AP 772
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
THOMAS RECTOR,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 00 CR 4182.

JUDGMENT: Reversed and Remanded.

APPEARANCES:
For Plaintiff-Appellee: Attorney Donald R. Burns, Jr.
Carroll County Prosecutor
Attorney Edward S. Asper
Carroll County Asst. Prosecutor
49 Public Square
Carrollton, OH 44615

For Defendant-Appellant: Attorney David H. Bodiker
Ohio Public Defender
Attorney James R. Foley
Asst. Ohio Public Defender
8 E. Long Street, 11th Floor
Columbus, OH 43215

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Dated: June 19, 2003

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Petitioner-Appellant, Thomas Rector, appeals the decision of the Carroll County Court of Common Pleas dismissing Rector's post-conviction petition without an evidentiary hearing. A trial court is allowed to dismiss a post-conviction petition without an evidentiary hearing if the petitioner fails to set forth sufficient operative facts to demonstrate that trial counsel was ineffective. Here, Rector's affidavits demonstrate that certain witnesses may have been able to establish an alibi for him on some counts or discount the State's witnesses by demonstrating a motive to fabricate the allegations against him, but were not called to testify in his defense. We conclude these affidavits set forth sufficient operative facts to demonstrate that counsel was ineffective for not calling those witnesses to testify on Rector's behalf. Accordingly, the trial court's judgment is reversed and this matter is remanded for an evidentiary hearing.

{¶2} Rector was indicted on five counts for raping his minor step-daughter. During his trial, the prosecution nolle the first count of the indictment. The jury returned a verdict of guilty on the remaining four counts. The trial court subsequently held a sentencing and sexual predator hearing wherein it sentenced Rector to the maximum sentence on each count, ordered those sentences be served consecutively, and determined Rector was a sexual predator. We affirmed those decisions in part, but reversed Rector's sexual predator determination since he was not given adequate notice of the sexual predator hearing. *State v. Rector*, 7th Dist No. 01 AP 758, 2002-Ohio-7442.

{¶3} Rector timely filed a petition for post-conviction relief in the trial court which alleged his trial counsel was ineffective for failing to call several witnesses whose testimony could have resulted in his acquittal. Rector attached the affidavits of people he alleged should have been called as witnesses to his petition. The State moved to quash Rector's petition, arguing Rector had failed to produce a sufficient evidentiary or legal foundation to support a claim on the merits. The trial court granted the State's motion without holding an evidentiary hearing. Rector timely appeals the trial court's decision.

{¶4} Rector's sole assignment of error argues as follows:

{¶5} "The trial court erred in dismissing Mr. Rector's postconviction petition without an evidentiary hearing because Mr. Rector was denied the effective assistance of counsel."

{¶6} Rector argues the trial court erred when it dismissed his petition without an evidentiary hearing because he presented sufficient operative facts demonstrating that counsel was ineffective for failing to call certain witnesses in his defense. Our review of the trial court's disposition of a petition for post-conviction relief without an evidentiary hearing is a hybrid presenting mixed questions of law and fact. *State v. Cornwell*, 7th Dist. No. 00-CA-217, 2002-Ohio-5177, ¶28. The trial court's factual findings will not be reversed unless they are against the manifest weight of the evidence. *Id.* A judgment is not against the manifest weight of the evidence when it is supported by competent, credible evidence. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226, 638 N.E.2d 533; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. Upon accepting such findings of fact, we will independently determine the propriety of the trial court's conclusions of law. *Cornwell* at ¶28.

{¶7} Under Ohio's post-conviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for post-conviction relief is not automatically entitled to an evidentiary hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 2 OBR 661, 443 N.E.2d 169.

{¶8} "Before granting an evidentiary hearing on the petition, the trial court shall determine *whether there are substantive grounds for relief* (R.C. 2953.21[C]), i.e., whether there are grounds to believe that 'there was such a denial or infringement of the

person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.” (Emphasis sic.) *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282-283, 714 N.E.2d 905, quoting R.C. 2953.21(A)(1).

{¶9} Therefore, in order to obtain an evidentiary hearing, the petition, the supporting affidavits, the documentary evidence, the files, and the records must demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief. *Id.* at paragraph two of the syllabus; *State v. Jackson* (1980), 64 Ohio St.2d 107, 112, 18 O.O.3d 348, 413 N.E.2d 819. Ineffective assistance of counsel is a substantive ground for relief in post-conviction proceedings. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 714 N.E.2d 905.

{¶10} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate counsel's performance was deficient and that deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ineffectiveness is demonstrated by showing counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156, 524 N.E.2d 476. To establish prejudice, a defendant must show there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. *Strickland* at 694. A reasonable probability must be a probability sufficient to undermine confidence in the outcome of the case. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The defendant bears the burden of proof in demonstrating ineffective assistance of counsel. *Smith* at 100. Generally, the decision whether or not to call a witness is a trial tactic which will not sustain a claim of ineffective

assistance of counsel. *State v. Payton* (1997), 124 Ohio App.3d 552, 558, 706 N.E.2d 842.

{¶11} In order to demonstrate his counsel's ineffectiveness, Rector attached several affidavits to his petition for post-conviction relief. Rector argues the witnesses his counsel failed to call in his defense provided him with an alibi for some of the charges and would have adversely impacted the child's credibility. He argues these affidavits indicate that there is a reasonable probability that the outcome of his trial may have been different if his counsel had called these witnesses during trial and, therefore, he is entitled to an evidentiary hearing to establish his claim. The trial court quashed the motion because it found the statements in the affidavits lacked relevance and/or credibility.

{¶12} When a petitioner submits affidavits to support his petition for post-conviction relief, "a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun* at paragraph one of the syllabus. "[I]f we would allow any open-ended allegation or conclusory statement concerning competency of counsel without a further showing of prejudice to the defendant to automatically mandate a hearing, division (D) of R.C. 2953.21 would be effectively negated and useless." *Jackson* at 112.

{¶13} In assessing the credibility of affidavit testimony when determining whether to grant an evidentiary hearing, a trial court should consider all relevant factors, including the following: (1) whether the judge reviewing the post-conviction 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; (5) whether the affidavits contradict evidence proffered by the defense at trial; and, (6) whether the information in the affidavit contradicts the evidence in the record by the same witness or is internally inconsistent. *Calhoun* at 285, citing *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319. Depending upon the circumstances, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. *Id.*

{¶14} Many of *Calhoun's* factors are present in Rector's affidavits. The affiants are all Rector's relatives. The judge presiding over Rector's post-conviction proceedings is the same judge which presided over Rector's trial. The affidavits all appear to have been drafted by the same person as they have similar fonts and language, were all signed the same day, and were all notarized by the same person. But in this case, these facts alone do not demonstrate that the trial court should have found them completely incredible. For instance, the handwritten changes to many of the affidavits demonstrate that the affiants were given the opportunity to review those affidavits to ensure that the affidavit stated what the affiant wanted to say.

{¶15} The Second District was faced with a similar situation in *State v. Padgett* (Dec. 10, 1999), 2nd Dist. No. 17658. In that case, the judge presiding over the defendant's post-conviction proceedings was a different judge than presided at trial. The defendant's post-conviction affidavits all were made either by the defendant or his relatives. It did not appear each affidavit was written by the same person since, aside

from the similarities of their format and font, each affidavit reflected each affiant's particular perspective. Finally, the affidavits did not contradict the evidence in the record and was partly corroborated by the record. The appellate court concluded that under these facts, the trial court improperly concluded the affidavits were not credible.

{¶16} We conclude the trial court abused its discretion when it found the affidavits lacked credibility. Although the affiants were Rector's relatives, they were also relatives of the victim. Accordingly, witnesses such as Rector's in-laws had no particular interest in fabricating facts on behalf of Rector, as their grandchild and niece was the victim. Furthermore, each affidavit demonstrated the individual perspectives of the particular affiants. But sometimes, even when the truthfulness of an affidavit assumed, if the information it contains "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.

{¶17} According to Rector, his counsel was ineffective because the ten affidavits may have resulted in an acquittal for two reasons. First, Rector argues they would have established an alibi on at least two of the counts in the indictment. Second, Rector argues they would have demonstrated the child's father may have influenced the child to lie, thereby impugning the credibility of the child's testimony.

{¶18} Each count of the indictment alleged a different rape on or about different times, October 1999, November 20 to November 27, 1999, December 24, 1999, and July 1 to August 30, 2000. Rector argues his witnesses may have offered an alibi for the counts alleged to have happened in November and December. In the affidavits, the witnesses attest that during Thanksgiving, the child was at Rector's parents with family

and Rector was not alone with her at that time. Similarly, the affidavits say the child was not with the Rectors on Christmas Eve and that on Christmas Day the child was at Rector's parents and Rector was not alone with her at that time. Rector argues this testimony provided an alibi which should have been placed before the jury. Counsel could not have been ineffective for failing to present an alibi for the November incident given the statements in the affidavits. That count of the indictment alleged the rape took place on or about November 20-27, 1999. The statements in the affidavits which relate to November 1999 all deal with Rector's whereabouts on Thanksgiving Day. So while it is true that these affidavits provide Rector an alibi for Thanksgiving Day, they are silent as to whether he had an alibi for the remainder of the week. Thus, in regards to the November incident, the affidavits do not set forth sufficient operative facts to demonstrate a reasonable possibility that, but for counsel's failure to present this defense, the outcome of the trial would have been different.

{¶19} The same does not hold true for the December 24, 1999, incident. At trial, the victim testified she was raped "sometime before Christmas * * * on a break [she] had from school." Her father testified that the victim spent some time on December 24, 1999, at her mother's home. But the affidavits uniformly state that the victim was not at her mother's home that day. Thus, these affidavits provide an alibi for the exact date alleged in the indictment. Furthermore, they throw doubt on the veracity of the victim and her father. Of course, the indictment does allege the offense in December 1999 happened "on or about" December 24, 1999, rather than on that date in particular. Accordingly, the affidavits may not provide a complete alibi to the charges. But these affidavits provide an alibi for that date and cast doubt upon the credibility of the State's case against Rector.

{¶20} Rector's final argument clearly attempts to show that trial counsel should have attacked the credibility of both the victim and her father. At Rector's trial, it appeared counsel thought about arguing the child's father had influenced her to lie about Rector. However, counsel never followed through on that argument. Rector now argues these witnesses demonstrate counsel was ineffective for not doing so.

{¶21} Many of the affidavits contain unsupported beliefs that the victim's father made up these stories and that the victim was making the allegations to please him. But others contain more concrete statements. For instance, Rector's brother-in-law stated that the victim's father told him he "wished there was something he could do" to keep the child from her mother. Other affiants described how the victim had made wrongful allegations of sexual abuse against other members of the family in the past.

{¶22} Given the lack of corroborative evidence in this case, these kinds of statements are important. The victim was the only witness at trial who saw these events and there was no physical proof of rape. Thus, the other witnesses were intended to either bolster or attack her version of events. Clearly, some proof that her father influenced her to make up these allegations or that she had made up similar allegations in the past would impugn the victim's credibility. This kind of attack is enhanced when the affiants are able to provide Rector an alibi for at least one of the events.

{¶23} Of course, we are not saying at this point that the affidavits Rector provided to the court entitle him to a new trial. Indeed, there is a strong presumption that counsel's decision not to call these witnesses was a matter of trial strategy and, therefore, he was not ineffective. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674-675, 693 N.E.2d 267. But we do believe that Rector has set forth sufficient operative facts which could demonstrate

the ineffective assistance of counsel. Thus, he is entitled to an evidentiary hearing so the trial court can hear exactly what the prospective witnesses would testify to and determine whether there is a reasonable probability that this testimony would have changed the outcome of the trial. Accordingly, Rector's sole assignment of error is meritorious.

{¶24} Accordingly, the trial court's judgment quashing Rector's petition for post-conviction relief without an evidentiary hearing is reversed and this case is remanded for an evidentiary hearing on Rector's post-conviction proceedings.

Donofrio and Vukovich, JJ., concur.