[Cite as *State v. Shuster,* 2014-Ohio-4144.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL SHANE SHUSTER

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 14 AP 0003

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 12 CR 0008
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 11, 2014

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1}. Appellant Michael Shane Shuster appeals from the decision of the Court of Common Pleas, Morgan County, which denied his petition for post-conviction relief pertaining to his conviction and sentence for multiple counts of rape, gross sexual imposition, and sexual battery occurring over a period of more than five years. The relevant facts leading to this appeal are as follows.

{¶2}. In March 2012, a school guidance counselor became aware of sexual abuse concerns involving the teenage female victim in this matter. The guidance counselor thereupon obtained more details from the victim and contacted Children's Services and the Morgan County Sheriff's Department.

{¶3}. The victim (appellant's stepdaughter) was subsequently interviewed by law enforcement officers and a medical forensic interviewer at Nationwide Children's Hospital. The victim stated the sexual abuse began in 2006 when the family moved into a new home, when she was approximately ten years old. The abuse occurred regularly in her bedroom, and included digital penetration and sexual intercourse. The sexual assaults continued until shortly before the victim disclosed the allegations to her guidance counselor. The victim's mother was apparently unaware of the abuse.

{¶4}. On April 13, 2012, a grand jury indicted appellant on thirty counts including gross sexual imposition, sexual battery (stepdaughter victim), and forcible rape covering ten different time periods - one count of each offense for each period.

{¶5}. The case proceeded to a jury trial. The victim, age sixteen at the time of trial, took the stand and recounted the incidents of sexual abuse and approximate dates with the help of a scrapbook of her hunting achievements, dated by year and age. She

recalled that appellant conditioned certain things she wanted, such as a new hunting gun, a hunting trip, and a dog, on acts of abuse. Eventually the victim was old enough to try to get away from appellant, but would use his strength to hold her down.

{¶6}. Appellant testified in his defense and, despite various admissions he had made to law enforcement officers, he denied all sexual contact with the victim. He stated, inter alia, that he was only trying to cooperate during his interviews with law enforcement and, in trying to protect his family, he allowed the investigating deputies to put words in his mouth. A number of charges were dismissed pursuant to appellant's Crim.R. 29(A) motion during the trial because the victim was unable to recall certain time periods in the indictment. The charges submitted to the jury, the jury's findings, and the trial court's sentences are as follows:

COUNT NO.	DATES OF OFFENSE	OFFENSE	R.C. SECTION	DEGREE	VERDICT	SENTENCE	CONSECUTIVE OR CONCURRENT
1	10/1/06–12/25/06	G.S.I. (victim <13)	2907.05(A)(4)	F3	Guilty	36 mos.	Concurrent
4	6/1/07–8/31/07	G.S.I. (victim <13)	2907.05(A)(4)	F3	Guilty	Merged	N/A
5	6/1/07–8/31/07	Sex. Batt. stepparent (victim <13)	2907.03(A)(5)	F2	Guilty	Merged	N/A
6	6/1/07–8/31/07	Rape (victim <13)	2907.02(A)(1)(sic)	F1 w/mandatory 25–to–life sentence	Guilty	25 years to life	Consecutive
7	10/1/07–12/31/07	G.S.I. (victim <13)	2907.05(A)(4)	F3	Guilty	Merged	N/A
8	10/1/07–12/31/07	Sex. Batt. stepparent (victim <13)	2907.03(A)(5)	F2	Guilty	Merged	N/A
9	10/1/07–12/31/07	Rape (victim <13)	2907.02(A)(1)(sic)	F1 w/ mandatory 25–to–life sentence	Guilty	25 years to life	Consecutive

13	9/1/08–11/30/08	G.S.I. (victim <13)	2907.05(A)(4)	F3	Guilty	Merged	N/A
14	9/1/08–11/30/08	Sex. Batt. stepparent (victim <13)	2907.03(A)(5)	F2	Guilty	Merged	N/A
15	9/1/08–11/30/08	Rape (victim <13)	2907.02(A)(1)(sic)	F1 w/ mandatory 25–to–life	Guilty	25 years to life	Consecutive
16	9/1/09–11/30/09	G.S.I. (force)	2907.05(A)(1)	F4	Guilty	Merged	N/A
17	9/1/09–11/30/09	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
18	9/1/09–11/30/09	Rape (force)	2907.02(A)(2)	F1	Guilty	10 years	consecutive
19	10/1/10–11/30/10	G.S.I. (force)	2907.05(A)(1)	F4	Guilty	Merged	N/A
20	10/1/10–11/30/10	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
21	10/1/10–11/30/10	Rape (force)	2907.02(A)(2)	F1	Guilty	10 years	consecutive
25	5/1/11–6/30/11	G.S.I. (force)	2907.05(A)(1)	F4	Guilty	Merged	N/A
26	5/1/11–6/30/11	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
27	5/1/11–6/30/11	Rape (force)	2907.02(A)(2)	F1	Guilty	10 years	consecutive
28	12/26/11–1/23/12	G.S.I. (force)	2907.05(A)(1)	F4	Guilty	Merged	N/A
29	12/26/11–1/23/12	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	48 months	concurrent
30	12/26/11–1/23/12	Rape (force)	2907.02(A)(2)	F1	Not Guilty	N/A	N/A

{¶7}. The trial court determined that in each grouping of offenses, the offenses of G.S.I. and sexual battery would be merged into the rape offense, therefore in each group appellant was sentenced only upon the rape conviction (with the exception of Count 1, in which group the counts of sexual battery and rape were dismissed). Counts 1 through 15 charged offenses against a child under the age of 13; Counts 16 through 30 were premised upon force and/or the fact the offender was the stepparent of the victim. The sentences for Counts 1 and 29 were ordered to be served concurrently with

Counts 6, 9, 15, 18, 21, and 27, which were ordered to be served consecutively. Appellant was also found to be a Tier III sex offender.

{¶8}. Appellant then filed a direct appeal to this Court and a motion for new trial in the trial court. On August 6, 2014, we overruled and/or dismissed appellant's assigned errors and affirmed his convictions and sentences. *See State v. Shuster*, 5th Dist. Morgan Nos. 13AP0001, 13AP0002, 2014-Ohio-3486. The issue of the motion for new trial, which had been denied by the trial court, was consolidated into said appeal; however, we found the trial court's ruling on the motion for new trial was void for lack of jurisdiction. *Id*. at ¶ 58.

{¶9}. In the meantime, on February 20, 2014, appellant filed a post-conviction ("PCR") petition in the trial court, pursuant to R.C. 2953.21. His claims essentially challenged the effectiveness of trial counsel regarding the use of a defense psychological expert and failure to obtain a medical expert and a more experienced defense investigator. Appellant supported these claims with affidavits from Attorney Lorin Zaner and Dr. Margaret Kay. In addition, affidavits in support of the claims were provided by appellant himself, appellant's father, appellant's grandmother, and investigator Daniel Zumbro. The State filed a response on February 25, 2014.

{¶10}. On March 14, 2014, the trial court dismissed appellant's PCR petition, without a hearing.

{¶11}. Appellant filed a notice of appeal on April 9, 2014. He herein raises the following sole Assignment of Error:

{¶12}. “I. THE TRIAL COURT'S SUMMARY DISMISSAL OF MICHAEL SHANE SHUSTER'S PETITION FOR POST-CONVICTION RELIEF WITHOUT A HRARING

(SIC) VIOLATED HIS RIGHT TO DUE PROCESS BECAUSE THE COURT DID SO WITHOUT MEANINGFULLY ADDRESSING THE EVIDENCE UPON WHICH THE PETITION WAS BASED OR ANALYZING ITS IMPACT ON MR. SHUSTER'S CASE OVERALL."

I.

{¶13}. In his sole Assignment of Error, appellant contends the trial court violated his due process rights by denying him post-conviction relief without a hearing. We disagree.

Standards of Review

{¶14}. It is well-settled that a petition for post-conviction relief brought pursuant to R.C. 2953.21 will be granted only where the denial or infringement of constitutional rights is so substantial as to render the judgment void or voidable. *State v. Jackson,* Delaware App.Nos. 04CA-A-11-078, 04CA-A-11-079, 2005-Ohio-5173, ¶ 13, citing *State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859. A defendant is entitled to post-conviction relief only upon a showing of a violation of constitutional dimension that occurred at the time that the defendant was tried and convicted. *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13, 16. In reviewing a trial court's denial of appellant's petition for post-conviction relief, absent a showing of abuse of discretion, we will not overrule the trial court's finding if it is supported by competent and credible evidence. *State v. Delgado* (May 14, 1998), Cuyahoga App. No. 72288, citing *State v. Mitchell* (1988), 53 Ohio App.3d 117, 559 N.E.2d 1370. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is

unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219..

{¶15}. Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶16}. A petition for post-conviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Wilhelm,* Knox App.No. 05-CA-31, 2006-Ohio-2450, ¶ 10, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819. However, " ' * * * when the trial court record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation. * * * ' " *State v. Radel,* Stark App.No. 2009-CA-00021, 2009-Ohio-3543, ¶ 17, quoting *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (citation omitted).

{¶17}. The Ohio Supreme Court has recognized: “In post-conviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing.” *State v. Gondor,* 112 Ohio St.3d 377, 388, 860 N.E.2d 77, 2006-Ohio-6679, ¶ 51. As an appellate court reviewing a trial court's decision in regard to the “gatekeeping” function in this context, we apply an abuse-of-discretion standard. *See id.* at ¶ 52, citing *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905. Accord *State v. Scott,* Stark App.No. 2006CA00090, 2006-Ohio-4694, ¶ 34. To make the determination as to holding a hearing, the court must consider the petition, supporting affidavits, and files and records, including, but not limited to, the indictment, journal entries, clerk's records, and transcript of the proceedings. *See* R.C. 2953.21(C).

Appellant's Claims of Ineffective Assistance of Trial Counsel

{¶18}. Appellant herein focuses on three areas of alleged ineffective assistance. He first maintains that trial counsel failed to present expert medical testimony to challenge one of the State's witnesses, a nurse practitioner, who testified as to the "normal" results obtained via the physical examination of the victim. Appellant urges that expert testimony could have been utilized to clarify or challenge the nurse's testimony as to how often “normal” findings are obtained in cases of sexual abuse. *See* Tr. at 293; Zaner Affidavit at ¶ 23. However, appellant does not articulate what such an expert would have actually concluded, such as the statistical likelihood that normal findings would exist even where genital penetration of a minor female had repeatedly occurred. The impact of expert testimony in this regard is thus largely speculative in this instance. We have recognized that “ *** complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and

because allegations of what a witness would have testified are largely speculative." *State v. Phillips,* Stark App.No.2010CA00338, 2011–Ohio–6569, ¶ 26, quoting *Buckelew v. United States* (5th Cir.1978), 575 F.2d 515, 521 (internal quotations marks omitted).

{¶19}. Appellant next contends trial counsel failed to investigate and utilize a psychological expert, Dr. Margaret Kay, who had been contacted before trial by appellant's family, in order to allow consideration of appellant's cognitive abilities that might impact the processing of questions during interrogation, as well as issues of false allegations, delayed reporting and memory capabilities on the part of the victim. Appellant argues that Dr. Kay, had she been engaged by trial counsel, " *** *would have* administered numerous tests to Mr. Shuster, including but not limited to, clinical personality tests, intelligence tests, neuropsychological assessments, behavior assessments and a mental status examination." Appellant's Brief at 11, citing Kay Affidavit at ¶ 20, emphasis added. Again, however, we are left to speculate as to what scientific results would have been obtained from such tests, and what exculpatory value they would have had to the defense. It has been aptly stated that "[p]etitions for post-conviction relief are available to defendants to rectify errors in prior proceedings and to effectuate justice. They are not available to be used as fishing expeditions." *State v. Yarbrough,* Shelby App.No. 17-2000-10, 2001-Ohio-2351, citing *State v. Durr* (Aug. 25, 1994), Cuyahoga App. No. 65958.

{¶20}. Appellant thirdly maintains that trial counsel failed to either properly supervise and direct Daniel Zumbro, the volunteer defense investigator at trial, or to obtain the services of a more experienced criminal investigator to investigate the claims

and credibility of the victim. The trial transcript indicates that Zumbro's main focus was on the layout of the house and the likelihood of sound carrying between the bedrooms. *See* Tr. at 559-577. Appellant essentially argues that since much of the State's case hinged on the victim's recollections of appellant's acts, much more effort should have been made to impeach the victim by investigating her alleged motives for accusation. However, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. We find in this instance that trial counsel may have, based on a reasonable trial strategy, sought to avoid overemphasizing credibility issues before the jury with a repeatedly abused child victim taking the stand.

{¶21}. Notwithstanding our concerns with the speculative nature of appellant's above arguments, we must further balance such claims with the evidence in the trial record. *See* R.C. 2953.21(C), *supra*. As we summarized in appellant's direct appeal, in addition to the victim's testimony before the jury, evidence was adduced that appellant was first interviewed by the Morgan County Sheriff's Office on March 5, 2012 and waived his Miranda rights. In the first interview, appellant admitted he intentionally touched the victim's breasts and genitals, but denied having sex. He stated he was trying to get "closer" with the victim as his stepchild because he is not her biological father, and he claimed there were only two incidents during which the contact occurred. In his second interview on March 6, 2012, he admitted placing his penis in the victim's vagina and that sexual contact occurred on multiple occasions, maybe "a dozen times." He also admitted he had held the victim down and prevented her from getting away. While acknowledging penetration occurred, appellant insisted it was not "sex" because

he did not ejaculate. Moreover, after his arrest, appellant wrote a number of incriminating letters from jail to his wife, the victim's mother. The letters stated, for example, that appellant and the victim were “caught up in evil,” but no “extreme lines” were crossed. He also wrote that he did not realize what the victim was “put[ting] into place” until it was too late. He also therein stated that he“[knew] what took place was wrong, but it was not intentional,” and that he didn't know the law.

Conclusion

{¶22}. In addressing PCR claims, we remain mindful that “[a] defendant is entitled to a fair trial but not a perfect one.” *See State v. Bleigh,* Delaware App.No. 09-CAA-03-0031, 2010-Ohio-1182, ¶ 133, quoting *Bruton v. United States* (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (internal quotations omitted). In the case sub judice, that after reviewing the documentary evidence presented by appellant in his petition, the trial court concluded that "[c]onsidering the totality of the circumstances, which includes the three stated alleged deficiencies, there would be no different result." Judgment Entry at 6. We are unable to conclude the trial court's conclusions in this regard were unreasonable, arbitrary, or unconscionable. Upon review of the record and judgment entry in the case sub judice, we hold the trial court did not abuse its discretion in denying appellant’s petition for post-conviction relief, and we are unpersuaded that the trial court abused its discretion in declining to allow a post-conviction evidentiary hearing in this matter.

{¶23}. Appellant's sole Assignment of Error is therefore overruled.

{¶24}. For the foregoing reasons, the judgment of the Court of Common Pleas of Morgan County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JWW/d 0821