

[Cite as *State v. Johnson*, 2016-Ohio-1213.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRIAN A. JOHNSON

Defendant-Appellant

: JUDGES:

:
: Hon. Sheila G. Farmer, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.

: Case No. 15 CAA 11 0092

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: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court
of Common Pleas, Case No. 14CR-I-01-
0019

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 21, 2016

APPEARANCES:

For Plaintiff-Appellee:

CAROL HAMILTON O'BRIEN
DELAWARE COUNTY PROSECUTOR

JAHAN KARAMALI
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant Brian A. Johnson appeals the October 22, 2015 judgment entry of the Delaware County Court of Common Pleas.

{¶2} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases. The rule provides in pertinent part the following:

(E) Determination and judgment on appeal

The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{¶3} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Association*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶4} This appeal shall be considered in accordance with the aforementioned rules.

FACTS AND PROCEDURAL HISTORY

{¶5} L.A. is a 56-year-old female who is developmentally disabled. L.A. has an I.Q. of 56 and a diagnosis of dependent personality disorder. At the time of these events, L.A. lived alone in a condo in the Abbeycross neighborhood of Westerville, Delaware County, Ohio. Although L.A. had some ability to live independently, she was closely

supervised by her cousin who lived nearby and her caseworker from the Delaware County Board of D.D. Both of her parents are deceased. L.A. does not drive and is dependent upon others to manage her money and to help her meet her own basic needs. She regularly attends a workshop called "All R Friends" and has worked some part-time jobs at care facilities and in her cousin's office.

{¶6} Johnson's cousin has been L.A.'s closest caretaker since both of their mothers were killed in an automobile accident in 2008. L.A. was the sole survivor of that accident. L.A.'s cousin testified she is mentally similar to a five- to ten-year-old child.

{¶7} Evidence at trial established that between September 7 and September 9, 2013, L.A. observed Johnson delivering newspapers in her neighborhood. L.A. testified Johnson asked to come inside her condo and she allowed him to come in. Once inside, they entered one of the condo's three bedrooms which L.A. referred to as her dad's bedroom.

{¶8} L.A. testified she understood Johnson wanted to have "sex" and she said no. She said he pushed her onto the bed and assaulted her. L.A. described digital penetration and intercourse with the aid of anatomically-correct drawings. L.A. said the sexual assault hurt and made a "mess" which she attempted to clean up. At trial she repeatedly said cleaning up the mess was a "mistake" because she later understood the police wanted the evidence.

{¶9} After the sexual assault, L.A. was scared to call police but called the security manager of the Columbus Dispatch to ask for help. The security manager told her to report the matter to the police and she did. Westerville detectives interviewed L.A. with the assistance of her case manager. L.A. became very upset when the detective asked

her to explain what happened by role-playing. Her caseworker testified she "freaked" and became distraught. L.A. identified Johnson as her attacker in a photo lineup and at trial.

{¶10} The Westerville police made contact with Johnson, who worked his mother's paper route throughout L.A.'s neighborhood. Johnson admitted entering L.A.'s condo and admitted digital penetration, although he denied intercourse. He told police L.A. "seemed somewhat normal" but was "a little strange."

{¶11} Johnson was charged by indictment¹ upon one count of rape pursuant to R.C. 2907.02(A)(1)(c) [Count I]; one count of rape pursuant to R.C. 2907.02(A)(2) [Count II]; one count of rape pursuant to R.C. 2907.02(A)(1)(c) [Count III]; one count of rape pursuant to R.C. 2907.02(A)(2) [Count IV]; one count of sexual battery pursuant to R.C. 2907.03(A)(2) [Count V]; one count of sexual battery pursuant to R.C. 2907.03(A)(1) [Count VI]; one count of sexual battery pursuant to R.C. 2907.03(A)(2) [Count VII]; and one count of sexual battery pursuant to R.C. 2907.03(A)(1) [Count VIII]. Johnson entered pleas of not guilty.

{¶12} Pursuant to the bill of particulars filed on February 5, 2014, the charges represented the following conduct:

Count I: vaginal penetration when victim's ability to consent was substantially impaired due to mental or physical condition.

Count II: vaginal penetration by force or threat of force.

Count III: digital penetration when victim's ability to consent was substantially impaired due to mental or physical condition.

¹ An earlier indictment upon four counts of rape under case number 13 CR I 04 0169 was dismissed on February 26, 2014. All pleadings and bond in the 2013 case transferred to the subsequent indictment under case number 14 CR I 01 0019.

Count IV: digital penetration by force or threat of force.

Count V: sexual battery by means of vaginal penetration when victim's ability to consent was substantially impaired due to mental or physical condition.

Count VI: sexual battery by means of vaginal penetration when offender coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

Count VII: sexual battery by means of digital penetration when offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

Count VIII: sexual battery by means of digital penetration when offender coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

{¶13} The case proceeded to trial by jury. Johnson moved for a judgment of acquittal at the close of appellee's evidence. In response, the trial court amended Counts III, IV, VII, and VIII to attempted offenses. Johnson was thereupon found guilty as charged.

{¶14} At sentencing, the trial court found Counts I, II, V, and VI merge, and Counts III, IV, VII, and VIII merge. The trial court sentenced Johnson upon Counts II and IV to an aggregate prison term of 14 years.

{¶15} Johnson appealed the conviction and sentence. We affirmed the conviction and sentence in *State v. Brian A. Johnson*, 5th Dist. No. 14CAA070039, 2015-Ohio-1676.

Johnson attempted to appeal our decision to the Ohio Supreme Court, but the Court declined jurisdiction.

{¶16} Johnson filed a petition for post-conviction relief on February 26, 2015. The trial court denied the petition without a hearing on March 12, 2015. The trial court denied Johnson's motion to reconsider. Johnson did not appeal the judgment.

{¶17} Johnson filed a second petition for post-conviction relief on October 21, 2015. The trial court denied the second petition for post-conviction relief on October 22, 2015. It is from this decision Johnson now appeals.

ASSIGNMENTS OF ERROR

{¶18} Johnson raises three Assignments of Error:

{¶19} "1. THE PETITIONER-APPELLANT'S FUNDAMENTAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT, UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION; WAS VIOLATED WHEN TRIAL COUNSELS PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS; WHEN COUNSEL FAILED TO COMPLY WITH PETITIONER-APPELLANT'S REQUESTS FOR HIS ENTIRE CASE FILE; WHICH IS THE BASIS FOR THE PETITIONER-APPELLANT'S R.C. 2953 CLAIMS; AND BY WHICH SUSTAIN THE PETITIONER-APPELLANT'S CONSTITUTIONAL CLAIMED ERRORS THAT COUNSELS' REPRESENTATION WAS DEFICIENT, WHEN COUNSEL FAILED TO INFORM HIM; RELATE MATTERS TRUTHFULLY; CONSULT AND EXPLAIN THE CIRCUMSTANCES RELATING TO PLEA NEGOTIATIONS, TO THE EXTENT

REASONABLY NECESSARY TO PERMIT THE PETITIONER-APPELLANT TO MAKE INFORMED, CONSENSUAL DECISIONS, AS WHETHER TO PROCEED TO TRIAL, OR TO ACCEPT THE ALFORD PLEA OFFERED BY THE STATE OF OHIO, AS RELAYED TO COUNSEL BY THE PROSECUTING ATTORNEY, UNBEKNOWING TO THE PETITIONER-APPELLANT; RESULTING IN A GREATER SENTENCING DISPARITY, AND A SUBSTANTIAL PREJUDICE SUFFERED BY THE PETITIONER-APPELLANT.

{¶20} “II. THE PETITIONER-APPELLANT’S FUNDAMENTAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT, UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION; WAS VIOLATED WHEN TRIAL COUNSELS PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS; WHEN COUNSEL FAILED TO INVESTIGATE; FAILED TO INFORM HIM; RELATE MATTERS TRUTHFULLY; CONSULT AND OR EXPLAIN THE STATUS OF MATTERS RELATING TO PETITIONER-APPELLANT’S REQUEST FOR SUBPOENAED RECORDS AND WITNESSES; IN RELATION TO THE PETITIONER-APPELLANT’S MOTHERS NAME, WHO WAS THE PRIVATE CONTRACTOR, ACCOUNT HOLDER OF THE NEWSPAPER DELIVERY ROUTES FROM THE PETITIONER-APPELLANT’S PLACE OF EMPLOYMENT; AS SUCH DOCUMENTS WERE NECESSARY TO ESTABLISH PROOF OF AN ALIBI WITNESS DEFENSE, BY WHICH THE PETITIONER-APPELLANT CONTENDS, IS THE BASIS AND SATISFACTION OF HIS R.C. 2953.23 CLAIMS; AND WHICH SUSTAIN THE PETITIONER-APPELLANT’S CLAIM THAT COUNSEL’S ERRORS PRECLUDED THE PETITIONER-APPELLANT’S ABILITY TO

MAKE INFORMED, CONSENSUAL DECISIONS, RELATING TO PLEA NEGOTIATIONS, AS WHETHER TO PROCEED TO TRIAL, OR TO ACCEPT THE ALFORD PLEA OFFERED BY THE STATE OF OHIO; RESULTING IN A GREATER SENTENCING DISPARITY, AND A SUBSTANTIAL PREJUDICE SUFFERED BY THE PETITIONER-APPELLANT.

{¶21} “III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR, WHEN THE TRIAL COURT FAILED TO COMPLY WITH THE LEGISLATIVE, STATUTORY PROVISIONS CONTAINED WITHIN OHIO REVISED CODE: 2953.23(A)(1)(A), (B); AS THE COURT UNREASONABLY CONCLUDED, THAT THE COURT OF COMMON PLEAS WAS DIVESTED OF SUBJECT MATTER JURISDICTION, OVER THE PETITIONER-APPELLANT’S POST-CONVICTION CLAIMS; THEREBY, DENYING THE PETITIONER-APPELLANT’S CLAIMS IN ERROR, AS THE PETITIONER-APPELLANT CONTENDS, THAT HE OVERCAME THE PRESUMPTIONS SET FORTH IN THE ABOVE MENTIONED STATUTE, THUS THE PETITIONER-APPELLANT’S RIGHTS, UNDER DUE PROCESS OF LAW, WAS VIOLATED, AS SUCH RIGHTS ARE GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE 4, SECTION 4; OHIO REVISED CODE: 3.23; JUDICIAL CONDUCT R. 1.1; 2.2.”

ANALYSIS

{¶22} This is Johnson’s second petition for post-conviction relief. The trial court determined it did not have jurisdiction to entertain Johnson’s second petition for post-conviction relief pursuant to R.C. 2953.23(A)(1). R.C. 2953.23 states:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶23} In Johnson's first and second petitions for post-conviction relief, the trial court noted Johnson raised a claim for ineffective assistance of counsel. The trial court determined Johnson did not raise any arguments based on new facts or on a new federal or state right as required by R.C. 2953.23(A)(1)(a). The trial court next determined that

Johnson failed to demonstrate by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted pursuant to R.C. 2953.23(A)(1)(b).

{¶24} A review of Johnson's arguments on appeal supports the trial court's determination that Johnson does not point the court to new facts or a new federal or state right upon which to allow Johnson to succeed on a successive petition for post-conviction relief. Further, Johnson has not directed this court to any evidence that but for constitutional error, no reasonable fact finder would have found Johnson guilty of rape. Upon our review of Johnson's arguments and the trial court's decision, we find the trial court did not abuse its discretion to deny Johnson's successive petition for post-conviction relief.

{¶25} Johnson's three Assignments of Error are overruled.

CONCLUSION

{¶26} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.,

Farmer, P.J. and

Wise, J., concur.