No. 23-3599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 8, 2024
KELLY L. STEPHENS, Clerk

PAUL HENRY GIBSON,

Petitioner-Appellant,

v.

TIM SHOOP, WARDEN,

Respondent-Appellee.

ORDER

Before: McKEAGUE, MURPHY, and BLOOMEKATZ, Circuit Judges.

Paul Henry Gibson petitions for rehearing en banc of this court's order entered on January 19, 2024, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Kelly L. Stephens
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 08, 2024

Mr. Paul Henry Gibson
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601

Re: Case No. 23-3599, *Paul Gibson v. Tim Shoop*
Originating Case No.: 1:22-cv-00697

Dear Mr. Gibson,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Lisa Browning

Enclosure

Gibson v. Shoop, 2024 U.S. App. LEXIS 5693

Copy Citation

United States Court of Appeals for the Sixth Circuit

March 8, 2024, Filed

No. 23-3599

Reporter

2024 U.S. App. LEXIS 5693 *

PAUL HENRY GIBSON, Petitioner-Appellant, v. TIM SHOOP, WARDEN, Respondent-Appellee.

Prior History: Gibson v. Shoop, 2024 U.S. App. LEXIS 1357 (6th Cir., Jan. 19, 2024)

Core Terms

en banc, petition for rehearing

Counsel: [*1] PAUL HENRY GIBSON, Petitioner - Appellant, Pro se, Chillicothe, OH.

For TIM SHOOP, Warden, Respondent - Appellee: Lisa Browning, Office of the Attorney General, Columbus, OH.

Judges: Before: McKEAGUE, MURPHY, and BLOOMEKATZ, Circuit Judges.

Opinion

ORDER

Paul Henry Gibson petitions for rehearing en banc of this court's order entered on January 19, 2024, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

No. 23-3599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL HENRY GIBSON,

Petitioner-Appellant,

v.

TIM SHOOP, WARDEN,

Respondent-Appellee.

ORDER

Before: McKEAGUE, MURPHY, and BLOOMEKATZ, Circuit Judges.

Paul Henry Gibson, an Ohio prisoner, petitions the court to rehear en banc its order denying his application for a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

No. 23-3599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL HENRY GIBSON,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, Circuit Judge.

Paul Henry Gibson, an Ohio prisoner proceeding pro se, appeals the district court's dismissal of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, as untimely. Currently pending are Gibson's application for a certificate of appealability ("COA") and motion to proceed in forma pauperis.

In 2016, Gibson was convicted by a jury of rape and sentenced to 10 years to life imprisonment. On March 13, 2017, the Ohio Court of Appeals affirmed. *State v. Gibson*, No. CA2016-06-107, 2017 WL 957746, at *8 (Ohio Ct. App. Mar. 13, 2017). Gibson did not seek leave to appeal in the Ohio Supreme Court. On December 12, 2018, he moved for reconsideration and to reopen his appeal, pursuant to Ohio Rule of Appellate Procedure 26(A)(1) and (B). The Ohio Court of Appeals denied both motions as untimely.

On March 13, 2019, Gibson filed a petition for post-conviction relief, seeking a new trial based on newly discovered evidence of judicial bias. In support of his claims, Gibson cited a January 25, 2019, news article concerning statements the trial judge made when he recused himself from presiding over another sex offense case two years after Gibson's trial. The judge recused himself from presiding over the resentencing in that case and from any future cases involving male defendants charged with forcible rape of females in their teens and early 20s due to potential bias

from having a family member who was a victim of a similar crime 10 years earlier. Gibson also raised claims of ineffective assistance of counsel, asserting that his attorney failed to present expert testimony and documentary evidence to support his defense and to rebut the State's medical evidence. Gibson later filed a supplemental petition and a motion for a new trial, pursuant to Ohio Rules of Criminal Procedure 33 and 35(A), seeking a new trial and an evidentiary hearing. The trial court denied the State's motion to dismiss on timeliness grounds, finding that Gibson's petition was timely because it was filed less than 120 days after he learned of the judge's conflict of interest. In a separate order, the trial court denied the post-conviction petition and the motion for a new trial. On June 28, 2021, the Ohio Court of Appeals affirmed the trial court's ruling, and on October 26, 2021, the Ohio Supreme Court denied leave to appeal. *State v. Gibson*, No. CA2020-11-114, 2021 WL 2646075, at *3 (Ohio Ct. App. June 28), *perm. app. denied*, 175 N.E.3d 572 (Ohio 2021).

On September 13, 2021, Gibson filed another Rule 33 motion for a new trial, raising several claims of ineffective assistance of counsel. The trial court denied the motion on January 13, 2022, finding that it was "nearly identical" to his first post-conviction petition and that it was untimely and barred by res judicata and the law-of-the-case doctrine. Gibson sought review in the Ohio Court of Appeals. In June 2022, Gibson moved for leave to file a successive post-conviction petition in the trial court. His appeal to the Ohio Court of Appeals and his motion for leave to file a successive petition remained pending at the time he filed his § 2254 petition.

Gibson filed a § 2254 petition in the district court by placing it in the prison mailing system on November 16, 2022. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). Gibson alleged four instances of judicial misconduct or bias: (1) the appointment of a defense attorney who had been requested by the prosecution; (2) the removal of an exculpatory investigative report from the record; (3) the exclusion of defense expert testimony; and (4) the failure to dismiss for cause a juror who had a personal and working relationship with the lead detective. Gibson later amended his petition to raise eleven additional claims: (5) counsel failed to adequately cross examine the State's witnesses; (6) counsel failed to call a medical expert witness; (7) counsel failed to make

certain objections; (8) counsel's questioning of a certain witness amounted to a "deliberate assassination of [Gibson's] character"; (9) counsel performed inadequately during voir dire; (9) counsel failed to seek recusal of the trial judge; (10) counsel failed to investigate; (11) counsel failed to object to false expert testimony; (12) the State presented false expert testimony; (13) the State submitted fraudulent documents; (14) the prosecutor engaged in improper bolstering of a witness; and (15) counsel failed to call a key defense witness.

Gibson also moved to stay the proceedings, asserting that the "[c]laims to be filed are detrimental to the just outcome of this case" and that the "court needs a complete picture of the evidence and [constitutional] errors plagu[]ing this case resulting in a miscarriage of justice." The magistrate judge denied the motion, explaining that Gibson did not indicate that he had any pending state court proceedings or offer any other reason for a stay.

The State moved to dismiss Gibson's § 2254 petition as untimely, and the magistrate judge recommended that the motion be granted. With respect to claims 5 through 15, the magistrate judge determined that the one-year statute of limitations began to run on April 28, 2017, the last day on which Gibson could have sought direct review of his judgment of conviction and sentence in the Ohio Supreme Court, making the petition untimely as to those claims. With respect to claims 1 through 4, the magistrate judge accepted the state court's finding that Gibson could not have discovered the facts underlying his claims of judicial bias until January 2019 and used that as the starting date for the statute of limitations as to those claims. The magistrate judge determined that the limitations period for those claims was tolled during the pendency of Gibson's first post-conviction petition and motion for a new trial—March 2019 through October 26, 2021—but still expired before he filed his petition in November 2022. Finding that Gibson failed to present any evidence of actual innocence to overcome the time bar, the magistrate judge concluded that his petition was untimely.

Gibson renewed his request to stay the proceedings to allow him to exhaust his pending Rule 33 motion for a new trial, which included claims 5 through 15 in his habeas petition. The

magistrate judge denied the motion, explaining that the pending state court proceedings would not toll the statute of limitations.

In his objections to the magistrate judge's recommendation to dismiss the petition, Gibson stated that he had "chosen to move forward" on only his first four claims because his remaining claims were "pending in State Court of Appeals Twelfth District." He asked the court to consider his objections and allow his petition to proceed as timely filed in the event his request for a stay was denied. Gibson devoted the remainder of his objections to arguing the timeliness of claims 1 through 4. He argued that the statute of limitations as to those claims should be equitably tolled from October 2021 until approximately December 6, 2021, when he was released from a six-week hospital stay. Gibson also asserted that he could overcome any time bar with a showing of actual innocence, citing exhibits attached to his September 13, 2021, successive post-conviction petition. He did not submit these documents, but they appear to include an affidavit from his girlfriend at the time who would have offered to rebut the victim's testimony, reports and credentials of proposed defense expert witnesses, exhibits and testimony submitted at trial, and trial rulings. The district court referred the objections to the magistrate judge, who prepared a supplemental report and recommendation adhering to his original recommendation.

Again, Gibson objected, asking the court to expand the record to include the exhibits attached to his successive post-conviction petition and to subpoena his hospital records. The district court referred those objections to the magistrate judge, who again recommended that the petition be dismissed as untimely and that Gibson be denied a COA. Over Gibson's objections, the district court adopted the magistrate judge's recommendations and dismissed the petition as untimely.

Gibson now appeals and seeks a COA from this court. He argues that the statute of limitations for claims 5 through 15 has not yet begun due to the pending state post-conviction proceedings and that the statute of limitations for claims 1 through 4 did not expire until December 6, 2022, because it was tolled by his 2021 hospital stay. He also argues the merits of his claims.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court denies relief on procedural grounds, the petitioner must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). The statute provides, in relevant part, that the one-year period runs from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(A), (D). The limitations period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). And under certain circumstances, the limitations period may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). A credible showing of actual innocence may also allow a habeas petitioner to overcome AEDPA's limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

The Ohio Court of Appeals affirmed Gibson's conviction on March 13, 2017, and he did not appeal. His conviction therefore became final for purposes of § 2244(d)(1)(A) when his time for perfecting an appeal to the Ohio Supreme Court expired on April 27, 2017. *See Keeling v.*

Warden, Lebanon Corr. Inst., 673 F.3d 452, 460 (6th Cir. 2012); Ohio S. Ct. Prac. R. 7.01(A)(1)(a)(i). The statute of limitations began running the following day and expired on April 28, 2018. Gibson filed his petition over four-and-a-half years later, on November 16, 2022.

The district court found that, under § 2244(d)(1)(D), the statute of limitations for Gibson's first four claims did not begin to run until January 25, 2019, when Gibson discovered through a news article that the trial judge harbored a potential bias against defendants in certain sex offense cases. That limitations period was tolled on March 13, 2019, when Gibson filed a post-conviction petition based on this new evidence. The limitations period resumed on October 27, 2021, the day after the Ohio Supreme Court declined to exercise jurisdiction. At that point, 318 days remained, giving Gibson until October 9, 2022, to file those four claims. Gibson's November 16, 2022, petition was therefore untimely as to these claims.

Reasonable jurists would not disagree with the district court's determination that Gibson was not entitled to equitable tolling for the time that he claimed to have been hospitalized in late 2021. Gibson submitted no corroborating documentation. Nor did he show that he was diligently pursuing his rights or that the hospitalization somehow prevented him from filing a timely petition in October 2022.

With respect to claims 5 through 15, the magistrate judge rejected Gibson's assertion that he did not learn the factual basis for these claims until August 2021, when certain documents were furnished to him by his post-conviction attorney. The magistrate judge deferred to the state court's ruling, in connection with Gibson's motion for a new trial, that Gibson had not shown that he could not have discovered the facts underlying his ineffective-assistance-of-counsel claims in time to file a timely post-conviction petition. Based on that finding, the magistrate judge concluded that Gibson was not entitled to a later start of the statute of limitations under § 2244(d)(1)(D) and that his petition was therefore untimely as to those claims under § 2244(d)(1)(A).

Despite being warned of the consequences of failing to make specific objections, Gibson did not address that ruling in his objections and indicated that he wished to pursue only claims 1 through 4 in the event the court denied his request for a stay. By failing to object to the magistrate

judge's recommendation to dismiss claims 5 through 15 as untimely, Gibson forfeited review of that ruling on appeal. *See Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019).

To the extent Gibson wishes to challenge the district court's denial of his request for a stay regarding claims 5 through 15, a COA is not warranted on this issue. Although a district court has discretion to stay a § 2254 petition and hold it in abeyance pending exhaustion of state remedies, it should only exercise that discretion if there is good cause for the petitioner's failure to exhaust, if the unexhausted claims are "potentially meritorious," and if "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005). A stay would have been inappropriate here because the claims in Gibson's § 2254 petition were exhausted at the time of filing. Claims 5 through 15 in the § 2254 petition were essentially the same as those made in Gibson's first post-conviction petition. And the Ohio Supreme Court denied leave for appeal on that first petition. Thus, the claims in the § 2254 petition were exhausted upon filing. And to the extent any claim was raised for the first time in his second motion for a new trial, Gibson's assertion that he "was only granted access to trial court records[] and . . . transcripts to accurately pursue the claims of ineffective assistance on or about [A]ugust 1, 2021," failed to establish good cause for his failure to exhaust. Gibson did not explain why he was able to raise some ineffective-assistance claims in his first post-conviction petition but not others. And the claims all appear to be based on facts that would have been known to Gibson during trial. Reasonable jurists would not debate the district court's denial of Gibson's request for a stay.

For these reasons, Gibson's application for a COA is **DENIED** and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 19, 2024
KELLY L. STEPHENS, Clerk

No. 23-3599

PAUL HENRY GIBSON,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

Before: KETHLEDGE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Paul Henry Gibson for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - CINCINNATI

PAUL HENRY GIBSON,	:	Case No. 1:22-cv-697
Plaintiff,	:	Judge Matthew W. McFarland
v.	:	
TIM SHOOP, Warden,	:	
Defendant.	:	

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:
(1) Respondent's Motion to Dismiss (Doc. 21) is GRANTED;
(2) Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 5) is DISMISSED WITH PREJUDICE;
(3) The Court CERTIFIES pursuant to 28 U.S.C. § 1915(a)(3) that, for the reasons discussed above, an appeal of any Order adopting these Reports would not be taken in good faith, and therefore, deny Plaintiff leave to appeal in forma pauperis. *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997);
(4) This case is TERMINATED from the Court's docket.

Dated: June 26, 2023.

Richard W. Nagel, Clerk of Court
By: */s/ Kellie A. Fields*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION – CINCINNATI

PAUL HENRY GIBSON,	:	
	:	Case No. 1:22-cv-697
Petitioner,	:	
	:	Judge Matthew W. McFarland
v.	:	Magistrate Judge Michael R. Merz
	:	
TIM SHOOP, Warden,	:	
	:	
Respondent.	:	

ENTRY AND ORDER

This matter is before the Court upon the Report and Recommendations (Doc. 24), Supplemental Report and Recommendations (Doc. 35), and Second Supplemental Report and Recommendations (Doc. 38) (collectively, the "Reports") of United States Magistrate Judge Michael R. Merz, to whom this case is referred pursuant to 28 U.S.C. § 636(b). The Reports recommend that Respondent's Motion to Dismiss (Doc. 21) be granted. (*See* Doc. 24.) Petitioner filed Objections to all three Reports. (Docs. 33, 36, & 39.) Thus, the matter is ripe for the Court's review.

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has completed a *de novo* review of the record in this case. Upon review, the Court agrees with the thorough analysis contained in the Reports. The Court finds that Petitioner's Objections have been fully addressed and adjudicated in the Reports. Nonetheless, the Court will address Petitioner's Objections to ensure a clear statement of the basis for the Court's findings.

Petitioner's first objection to the Magistrate Judge's Reports focuses on Grounds Five through Fifteen of his habeas petition. (*See* Objections, Doc. 39.) Petitioner maintains that he can preserve his objections to the dismissal of Grounds Five through Fifteen for a later date. (*Id.* at Pg. ID 845.) In support of this argument, Petitioner cites to his request for a stay pending the outcome of the related state court cases. (*See id.*) However, this Court denied that request on April 25, 2023. (*See* Decision and Order Denying Renewed Motion to Stay, Doc. 32.) In that Order, the Court emphasized that Petitioner must make his objections on those ground no later than May 1, 2023. (*Id.*) As Petitioner has made no timely objections to the dismissal of Grounds Five through Fifteen, he waived the opportunity to do so. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985) (a petitioner who fails to make timely and specific objections to a magistrate judge's report forfeits his right to appeal the aspects of the report to which he did not object).

In Petitioner's second objection, he maintains that he is entitled to the equitable tolling of the statute of limitations for Grounds One through Four because he was hospitalized for an extended period. (Objections, Doc. 39, Pg. ID 845-46.) As noted by the Magistrate Judge, Petitioner has failed to provide the Court with the medical records related to that hospital stay. (*See* Supplemental Report and Recommendations, Doc. 35, Pg. ID 824.) Though, even if Petitioner had provided the necessary medical records and the Court had tolled the statute of limitations, Petitioner's petition would still be untimely. (*See* Second Supplemental Report and Recommendations, Doc. 38, Pg. ID 841.)

Conclusion

Accordingly, the Court **ADOPTS** the Report and Recommendations (Doc. 24), Supplemental Report and Recommendations (Doc. 35), and Second Supplemental Report and Recommendations (Doc. 38) in their entirety. The Court **ORDERS** the following:

(1) Respondent's Motion to Dismiss (Doc. 21) is **GRANTED**;

(2) Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 5) is **DISMISSED WITH PREJUDICE**;

(3) The Court **CERTIFIES** pursuant to 28 U.S.C. § 1915(a)(3) that, for the reasons discussed above, an appeal of any Order adopting these Reports would not be taken in good faith, and therefore, deny Plaintiff leave to appeal in forma pauperis. *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997);

(4) This case is **TERMINATED** from the Court's docket.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: _____
JUDGE MATTHEW W. McFARLAND

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT CINCINNATI

PAUL HENRY GIBSON,

Petitioner, : Case No. 1:22-cv-697

- vs - District Judge Matthew W. McFarland
Magistrate Judge Michael R. Merz

TIMOTHY SHOOP, Warden,

:

Respondent.

SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus action is before the Court on Petitioner's Objections (ECF No. 36) to the Magistrate Judge's Supplemental Report and Recommendations ("Supp Report," ECF No. 35) which recommended dismissing the Petition as time-barred. The original Report and Recommendations reached the same result ("Report," ECF No. 24). District Judge McFarland has recommitted the case for reconsideration of the case in light of the Objections (ECF No. 37).

The Petition was filed November 16, 2022 (ECF No. 24, PageID 775). The Report calculated the AEDPA one-year statute of limitations ran as to Grounds Five to Eleven as of April 28, 2018. *Id.* at PageID 781. As to Grounds One through Four, the statute expired October 26, 2021. *Id.* The Supp Report noted that Gibson had not objected to the conclusion in the Report that the statute of limitations had run as to Grounds Five through Fifteen on April 21, 2018.

Gibson did object as to Grounds One through Four, claiming that he was entitled to equitable tolling from October 26, 2021, until he was discharged from the hospital about December

6, 2021. He asserted the medical records would establish he was "incapacitated" for that period of time. The Supp Report rejected that claim because no medical records were furnished and the Court had only Gibson's opinion as a layman about what the records would establish. Gibson notes that he sought a subpoena duces tecum directed to the Warden to produce the medical records, but his source for believing the records would be found there is Ohio Revised Code § 5120.21. However, the records required to be kept by that statute do not include records of hospitalizations outside the institution. Gibson has not shown he has made any request for those records to the place of his hospitalization, the Lexner Medical Center at the Ohio State University.

Instead of furnishing his own medical records, Gibson turns to the opinion in *Harper v. Ercole,* 2009 WL 4893196 (E.D. N.Y. Dec. 16, 2009). That opinion by District Judge Vitaliano adopted a report and recommendations of Magistrate Judge Lois Bloom to deny equitable tolling. Judge Bloom "**assumed** that Harper was entitled to equitable tolling for the period of time that he was hospitalized (February 27, 2008 to June 3, 2008)." *Id.* at *2 (emphasis added). She nevertheless denied equitable tolling because Harper had not been diligent after being released. Judge Vitaliano adopted that recommendation, but the Second Circuit reversed, holding the petition was timely because it was filed within seventy-eight days, the remaining untolled time after his discharge. *Harper v. Ercole*, 648 F.3d 132 (2nd Cir. 2011).

Harper has neither been adopted nor rejected by the Sixth Circuit, so it remains only persuasive rather than binding precedent. But even treating the case in that way, it does not support Gibson's position. First of all, the Second Circuit held a person seeking tolling on the basis of hospitalization would normally be expected to provide corroboration of the condition and its severity. Gibson has done neither.

Second, even if we assume[1] tolling begins the day the hospitalization began, extraordinary circumstances only equitably toll the statute of limitations; they do not restart it. Gibson claims he learned of the facts supporting Grounds One through Four on January 25, 2019. Assuming the truth of that claim, the one-year statute would begin running on that date and expire one year later on January 25, 2020. 28 U.S.C. § 2244(d)(1)(D).

Finally, Gibson seeks tolling by virtue of claimed actual innocence. As the Report and Supplemental Report point out, the evidence of actual innocence proffered by Gibson is not of the character or quality required by precedent. In his instant Objections, Gibson does not address that finding, but instead claims the evidence in question was all excluded by Judge Pater who was biased. Thus the evidence in question is not "new" evidence, but evidence whose exclusion could have been attacked on direct appeal.

Conclusion

The undersigned remains persuaded that the Petition herein is barred by the statute of limitations and should therefore be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

May 30, 2023

[1] Harper does not require District Courts to make this assumption. Rather, Judges Bloom and Vitaliano made the assumption and the Second Circuit did not question it. This Court should not make that assumption, but insist on some corroboration of the condition and severity, as *Harper* says is appropriate.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ *Michael R. Merz*
United States Magistrate Judge

25, 2023, in a Decision which emphasized that his objections to the pending Report were due not later than May 1 (ECF No. 32, PageID 810). To the extent his phrase "not moving forward" means he believes he can preserve any objections to dismissal of Grounds Five through Fifteen until later, he is mistaken. Because he has made no timely objection to dismissal of those claims as recommended, he as waived the opportunity to do so. A petitioner who fails to make timely and specific objections to a magistrate judge's report forfeits his right to appeal the aspects of the report to which he did not object. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).

As to Grounds One through Four, Gibson acknowledges that the tolling of the statute by virtue of the pendency of properly filed collateral attacks (28 U.S.C. § 2244(d)(2)) expired October 26, 2021, when the Supreme Court of Ohio declined jurisdiction for review (Objections, ECF No. 33, PageID 814). He then claims he is entitled to equitable tolling from that date until approximately December 6, 2021, when he was released from the hospital:

> The medical records in question establish six weeks of Gibson being incapacitated being in the Intensive care unit at Ohio State university Wexner medical center for three weeks and another three weeks in Franklin Medical center for rehab as Gibsons traumatic injuries cause Him to be unable to walk. Therefore, Gibsons Tolling of one year should begin the day Gibson was released from the hospital. This was on approximate date of December 6, of 2021.

Id. However, the Court cannot determine what those records "establish" because they have not been filed with the Court. Even if they were filed, the Court might require analysis by medical personnel to evaluate their impact. At this point the Court has only Gibson's self-serving unsworn account of the period of hospitalization.

Gibson directs the Court's attention to Magistrate Judge Peter Silvain's Order of November 29, 2022, which embodies the results of Judge Silvain's initial review of the case under Rule 4 of

the Rules Governing § 2254 Cases (ECF No. 7). As part of the Order, Judge Silvain denied an initial request for discovery, holding

> This case has just begun, and the state court record has not yet been filed. At this point, it is not apparent that the materials sought by Petitioner are material or otherwise necessary to resolve the case. Should the Court later determine that these materials are necessary, the Court may order the record expanded with such materials. See Rule 7, 2254 Rules. Petitioner's motion for discovery (Doc. 6) is DENIED at this time, subject to reconsideration.

Id. at PageID 50. Petitioner has never renewed that request for discovery. Nor has he explained why he requires a subpoena duces tecum from this Court to obtain his own medical records from a treating facility. In fact, in opposing Respondent's Motion to Dismiss, he did not make a claim of equitable tolling[1] and his objection to the Report for not considering it is therefore untimely.

Gibson relies on *Harper v. Ercole*, 648 F.3d 137-38 (2d Cir. 2011), for the proposition that medical conditions can constitute the extraordinary circumstances needed to justify equitable tolling. The Magistrate Judge agrees. However, there must be some proof of the severity of the condition; in *Harper* that severity was unchallenged. Here the reliance on medical condition was not raised until the Objections and is uncorroborated by the medical records which Gibson says exist, but which he has not produced. Gibson has not shown his entitlement to equitable tolling.

Gibson thus turns to a claim of actual innocence to excuse his late filing. As evidence of hCourtis actual innocence, he cites exhibits attached to his Petition for Post-Conviction Relief filed September 13, 2021[2] (Objections, ECF No. 33, PageID 820). The Common Pleas Court docket reflects a successive motion for new trial filed that day with exhibits (ECF No. 20, PageID 710), but the State

[1] Petitioner admits in his Objections that he did not raise equitable tolling in his Reply because he had counted on the ninety-day limit for applying to the Supreme Court for certiorari as tolling the statute and did not realize until it was pointed out in the Report that that time only applies on direct review, not collateral review. He turned back to attempting equitable tolling because "90 days extracted for the allowance of time to file for certiorari in the supreme court is a game changer therefore Gibsons request for equitable tolling and or request leave to file a delayed petition." (ECF No. 33, PageID 819).

[2] Petitioner refers to this filing as a petition for post-conviction relief, but it was labeled a motion for new trial when filed.

Court Record filed by Respondent does not include these documents. Gibson now moves to expand the record to include these documents, but he does not tender copies.

Even if these documents were submitted and could be examined by the Court, Gibson's descriptions of them make it clear they would not satisfy the criteria for proof of actual innocence. As Gibson recognizes, the controlling precedent on the actual innocence gateway is now the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

> [A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U. S., at 329, 115 S. Ct. 851, 130 L. Ed. 2d 808; see *House*, 547 U. S., at 538, 126 S. Ct. 2064, 165 L. Ed. 2d. 1 (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup*, 513 U. S., at 332, 115 S. Ct. 851, 130 L. Ed. 2d. 808.

McQuiggin v. Perkins, 569 U.S. 383, 386-87 (2013).

In *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit anticipated *McQuiggin* and held Congress enacted the statute of limitations in 28 U.S.C. § 2244(d)(1) "consistent with the *Schlup* [*v. Delo*] actual innocence exception." The *Souter* court also held:

> [I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo,* 513 U.S. 298, 316 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more

> likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005).

Against this standard, we examine Gibson's descriptions of the exhibits to his successive motion for new trial.

> At this time let it be known that Theresa Tuners affidavit is just one of five different Exhibit's filed in Gibsons defense as evidence. Ex. A I Direct review testimony of Amelia Turner EX. A Cross examination of Amelia Turner EX. A 3 Prosecutions version to mislead the court filed 12/13/2016 and A 4 twelfth district court of appeals decision reflecting the false information contained in states fraudulent document. EX. B 1 Consultation report of proposed defense expert Dr. David Burkons B 2 Dr. Burkons Credentials EX. C 1 Consultation report of Dr. David Lowenstein. EX. C 2 Dr. Lowenstein's credentials EX. C 3 case law examples of Dr. David Lowenstein's testimony as a qualified expert. C 4 Prosecutions fraudulent document and version of C 1 and Dr. Lowenstein' s qualifications. EX. C 5 Court's decision reflecting misinformation given by Prosecutions false document. EX. D 1 Affidavit of Theresa Turner 011s Case studies and letters related to the healing in hymenal injuries and problematic injuries and the duration of visible signs of trauma and or transections associated with vaginal intercourse.

(Objections, ECF No. 33, PageID 820). None of these documents fit the required description from *Schlup* and *Souter*. None of them are new physical evidence. Some of them purport to be comments on the scientific evidence offered at trial, but are not themselves new scientific evidence. Dr. Burkons and Dr. Lowenstein were known to defense at the time of trial. Te referenced court

decisions are obviously not new physical or scientific evidence. Theresa Turner is described as Gibson's girlfriend who lived with the victim and would have been able to contradict or rebut some of the prosecution's witnesses; her probable bias is inherent in the description of her as Gibson's girlfriend. These examples of new evidence just do not fit the legal standard. Gibson has not demonstrated his actual innocence so as to escape the bar of the statute of limitations.

Conclusion

Having reconsidered the case in light of the Objections, the Magistrate Judge adheres to his prior recommendation: the Petition should be dismissed with prejudice as barred by the statute of limitations. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

May 2, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

PAUL HENRY GIBSON,

Petitioner, : Case No. 1:22-cv-697

- vs - District Judge Matthew W. McFarland
Magistrate Judge Michael R. Merz

TIMOTHY SHOOP, Warden,

Respondent. :

RECOMMITTAL ORDER

This case is before the Court on Petitioner's Objections (ECF No. 33) to the Magistrate Judge's Report and Recommendations (ECF No. 24).

The District Judge has preliminarily considered the Objections and believes they will be more appropriately resolved after further analysis by the Magistrate Judge. Accordingly, pursuant to Fed. R. Civ. P. 72(b)(3), this matter is hereby returned to the Magistrate Judge with instructions to file a supplemental report analyzing the Objections and making recommendations based on that analysis.

May 1, 2023.

Matthew W. McFarland
United States District Judge

State v. Gibson, 2021 Ohio LEXIS 2140

Supreme Court of Ohio

October 26, 2021, Decided

2021-0974.

Reporter 2021 Ohio LEXIS 2140 * | 165 Ohio St. 3d 1424 | 2021-Ohio-3730 | 175 N.E.3d 572 | 2021 WL 4956447

State v. Gibson

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] Butler App. No. CA2020-11-114.

State v. Gibson, 2021-Ohio-2150, 2021 Ohio App. LEXIS 2114, 2021 WL 2646075 (Ohio Ct. App., Butler County, June 28, 2021)

Opinion

APPEAL NOT ACCEPTED FOR REVIEW

State v. Gibson, 2021-Ohio-2150

Copy Citation

Court of Appeals of Ohio, Twelfth Appellate District, Butler County

June 28, 2021, Decided

CASE NO. CA2020-11-114

Reporter

2021-Ohio-2150 * | 2021 Ohio App. LEXIS 2114 ** | 2021 WL 2646075

STATE OF OHIO, Appellee, - vs - PAUL H. GIBSON, Appellant.

Subsequent History: Discretionary appeal not allowed by State v. Gibson, 165 Ohio St. 3d 1424, 2021-Ohio-3730, 2021 Ohio LEXIS 2140, 175 N.E.3d 572, 2021 WL 4956447 (Oct. 26, 2021)

Habeas corpus proceeding at, Stay denied by Gibson v. Shoop, 2023 U.S. Dist. LEXIS 72453 (S.D. Ohio, Apr. 25, 2023)

Appeal dismissed by State v. Gibson, 2024-Ohio-120, 2024 Ohio App. LEXIS 151 (Ohio Ct. App., Butler County, Jan. 16, 2024)

Prior History: [**1] CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS. Case No. CR 2015 10 1601.

State v. Gibson, 2017-Ohio-877, 2017 Ohio App. LEXIS 865 (Ohio Ct. App., Butler County, Mar. 13, 2017)

Disposition: Judgment affirmed.

Core Terms

assigned error, trial court, post-conviction relief, motion for a new trial, trial court's decision, joint petition, bias, misconduct, juror

Counsel: Michael T. Gmoser, Butler County Prosecuting Attorney, Willa Concannon, Hamilton, Ohio, for appellee.

Paul H. Gibson, #A725912, Pro se, Chillicothe Correctional Institution, Chillicothe, Ohio.

Judges: S. POWELL, J. M. POWELL, P.J., and BYRNE, J., concur.

Opinion by: S. POWELL

[*P1] Appellant, Paul H. Gibson, appeals the decision of the Butler County Court of Common Pleas denying his joint petition for post-conviction relief and motion for a new trial. For the reasons outlined below, we affirm the trial court's decision.

[*P2] On April 22, 2016, a jury found Gibson guilty of raping a nine-year-old girl in violation of R.C. 2907.02(A)(1)(b), a first-degree felony. Approximately one month later, on May 24, 2016, the trial court held a sentencing hearing and sentenced Gibson to serve a mandatory term of ten-years-to-life in prison. The trial court also ordered Gibson to pay a $5,000 fine and classified Gibson as a Tier III sex offender.

[*P3] On March 13, 2017, this court affirmed Gibson's conviction. See State v. Gibson, 12th Dist. Butler No. CA2016-06-107, 2017-Ohio-877. In so holding, this court found Gibson's conviction was not against the manifest weight of the evidence. Id. at ¶ 32-41. In reaching this decision, [**2] this court found it clear that "[t]he jury found [the victim's] testimony believable and we defer to the factfinder with respect to credibility determinations." Id. at ¶ 39. This court also found that "[a]ny asserted inconsistencies" in the victim's testimony were "readily explained" by the testimony elicited from the state's expert witness, "an expert in pediatric abuse who has seen over a thousand patients for child sexual abuse in her career * * *." Id. This was in addition to this court's finding that "to the extent any inconsistencies existed, the jury was able to rationally resolve them based on the testimony presented at trial during their deliberations." Id. at ¶ 40.

[*P4] On December 12, 2018, Gibson filed with this court an application for reconsideration and an application to reopen his appeal. This court denied Gibson's application for reconsideration on January 8, 2019. See State v. Gibson, 12th Dist. Butler CA2016-06-107 (Jan. 8, 2019) (Entry Denying Application for Reconsideration). The following month, on February 5, 2019, this court also denied Gibson's application to reopen his appeal. See State v. Gibson, 12th Dist. Butler No. CA2016-06-017 (Feb. 5, 2019) (Entry Denying Application for Reopening).

[*P5] On March 13, 2019, Gibson filed the joint petition for [**3] post-conviction relief and motion for new trial subject to this appeal. In support of this filing, Gibson argued the trial court judge who presided over his trial, Judge Charles Pater, was biased and prejudiced against him, thereby entitling him to a new trial.

[*P6] On September 4, 2019, Gibson filed a supplemental petition for post-conviction relief. In his supplemental petition, Gibson again argued that he was entitled to a new trial because Judge Pater "made decisions to [his] detriment which were influenced by" Judge Pater's bias and prejudice against him. These decisions included, but were not limited to, the trial court's decision not to dismiss a potential juror for cause, the trial court's decision to permit the victim's mother to testify at

trial about Gibson's "excessive" drinking, and the trial court's decision to reject Gibson's request to question a witness about whether Gibson had voluntarily submitted to a polygraph examination.

[*P7] On October 26, 2020, a visiting judge issued a decision denying Gibson's joint petition for postconviction relief and motion for a new trial. In so holding, the court noted that it had reviewed the entirety of the record and found "no evidence" that [**4] Judge Pater "made trial rulings or other decisions that evidenced judicial bias." Given this finding, the court also found Gibson had failed to demonstrate that he was entitled to a new trial.

[*P8] Gibson now appeals the decision denying his joint petition for postconviction relief and motion for new trial, raising the following five assignments of error for review.

[*P9] Assignment of Error No. 1: [*P10] TRIAL COURT ERRED BY APPOINTING COUNSEL REQUESTED BY PROSECUTION, VIOLATING LOCAL RULE 6.04.

[*P11] Assignment of Error No. 2: [*P12] TRIAL COURT MADE ERROR BY DENYING DEFENDANT THE RIGHT TO PRESENT A COMPLETE DEFENSE.

[*P13] Assignment of Error No. 3: [*P14] PROSECUTORIAL MISCONDUCT/FRAUD.

[*P15] Assignment of Error No. 4: [*P16] PROSECUTORIAL MISCONDUCT. FILING FRAUDULENT DOCUMENTS WITH THE COURT WITH THE INTENT TO MISLEAD.

[*P17] Assignment of Error No. 5: [*P18] REFUSAL TO DISMISS FOR CAUSE, CREATING A BIAS AND PREJUDICIAL JURY.

[*P19] In his five assignments of error, Gibson makes a variety of claims challenging the jury's verdict finding him guilty of first-degree felony rape. This includes arguments wherein Gibson claims that he received ineffective assistance of trial counsel, that he was the victim of prosecutorial misconduct, and that the trial

court denied him the [**5] right to present a complete defense. However, even assuming the facts alleged by Gibson were true, the vast majority of Gibson's arguments could have been raised as part of his direct appeal, thereby rendering those claims barred by the doctrine of res judicata. See, e.g., State v. Harrop, 12th Dist. Fayette No. CA2018-12-028, 2019-Ohio-3230, ¶ 8 (res judicata barred appellant's arguments raised in his petition for postconviction relief and motion for new trial where appellant "directly appealed his convictions and sentence on multiple occasions, and either asserted or could have asserted in his direct appeals the same arguments he raised in his motion for a new trial and petition for post-conviction relief").

[*P20] That is to say nothing of the fact that several of Gibson's other claims do not arise out of the judgment entry that Gibson appealed, i.e., the trial court's decision denying his joint petition for postconviction relief and motion for new trial. Gibson's claims instead arise out of the trial court's original judgment entry sentencing him to serve a mandatory term of ten-years-to-life in prison after the jury found him guilty of first-degree felony rape. Pursuant to App.R. 12(A)(1)(a), this court may only " review and affirm, modify, or reverse the judgment or final [**6] order appealed * * *." (Emphasis added.) Therefore, assuming Gibson's claims were not already barred by the doctrine of res judicata, any of Gibson's claims arising out of something other than the trial court's decision denying his joint petition and motion need not be addressed by this court. See, e.g., State v. Wright, 8th Dist. Cuyahoga No. 95634, 2011-Ohio-3583, ¶ 7 ("because this assignment of error addresses issues outside the scope of the present appeal, it will not be addressed").

[*P21] Regardless, even when reviewing the actual substance of Gibson's claims, we find no merit to any of the arguments raised within Gibson's five assignments of error. For instance, as it relates to Gibson's first assignment of error alleging the trial court violated its Loc.R. 6.04 by appointing him with trial counsel requested by the state, that rule sets forth the trial court's procedure as it relates to discovery, submitting interrogatories, and requests for admission. The trial court's Loc.R. 6.04,

therefore, has no application to the case at bar, let alone to the trial court's decision denying Gibson's joint petition for post-conviction relief and motion for new trial. Gibson's claim otherwise lacks merit.

[*P22] Moreover, as it relates to Gibson's fourth assignment of error alleging the [**7] state acted fraudulently when it filed a false and/or misleading memorandum regarding the proposed testimony of his expert witness, Dr. Lowenstein, Gibson has not provided any evidence to prove the state actually engaged in such misconduct. Gibson has also failed to provide any evidence to show how the state's alleged misconduct contributed to the trial court's purported bias against him, as well as any prejudice resulting from the state's alleged misconduct. This is because, as the record indicates, Gibson was free to argue against the state's position before the trial court, just as he does to this court on appeal. The same rationale would apply to Gibson's arguments advanced under his second and third assignments of error, one of which involves a substantially similar argument wherein Gibson alleges the state submitted "false, fraudulent documents with the intent to mislead the court, with complete success."

[*P23] Gibson's claims advanced under his fifth assignment of error also lack merit. In his fifth assignment of error, Gibson argues the "willingness" of the trial court "to leave a potentially bias[ed] juror for defense to use as an unnecessary preemptory challenge on shows bias." [**8] The record, however, does not support Gibson's claim that his trial counsel sought to have that juror excused for cause. And, even if the record did support such a claim, the record indicates that juror specifically stated that he could be a fair and impartial. There is also nothing in the record to indicate any decision the trial court may have made regarding this juror was the result of the trial court's bias against Gibson, nor is there anything in the record to indicate how the jury's composition prejudiced Gibson. This is particularly true here when considering the jury acquitted Gibson on three of the four charges. [*P24] In light of the foregoing, and despite Gibson's claims otherwise, the record is devoid of any evidence to suggest the trial court was biased against Gibson or that

Gibson did not receive a fair trial. In so holding, we note the well-established principle that "a defendant is entitled to a fair, but not perfect, trial." State v. Morton, 8th Dist. Cuyahoga No. 109200, 2021-Ohio-581, ¶ 49, citing United States v. Hasting, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L. Ed. 2d 96 (1983); and State v. Lott, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990). "The purpose of appellate review," therefore, "is to ensure that litigants receive fair trials, not perfect ones." State v. Lopez, 2d Dist. Montgomery No. 18646, 2001- Ohio 6997, 2001 Ohio App. LEXIS 5620, *16 (Dec. 14, 2001) (Fain, J., concurring). Accordingly, finding no merit to any of the arguments advanced herein, Gibson's five assignments [**9] of error lack merit and are overruled.

[*P25] Judgment affirmed.

M. POWELL, P.J., and BYRNE, J., concur.

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

PAUL H. GIBSON,

Defendant.

Case No.: CR 2015 10 1601

Judge James A. Brogan
By Assignment

ENTRY AND ORDER DENYING DEFENDANT'S POST-CONVICTION MOTIONS FOR NEW TRIAL

****

This matter is before the court on Defendant, Paul H. Gibson's, (Gibson/Defendant/Petitioner), and his attorney's, motions for post-conviction relief and a new trial.

Upon consideration of the motions, the exhibits, the pleadings, the arguments of counsel, the other matters of record herein, and for the reasons that follow, the defendant's motions are denied.

PROCEDURAL POSTURE

On April 23, 2016, Gibson was convicted of one count of rape of a child under the age of 13 in violation of R.C. §2907.02(A)(1)(b). The trial court sentenced Gibson to a term of ten years-to-life in prison.

On March 13, 2017, the Ohio Twelfth District Court of Appeals affirmed the trial court's judgment. *State v. Gibson*, 2017-Ohio-877. It is worth noting that Gibson's appellate counsel never ordered the transcript of the *voir dire*, nor raised any issues of

judicial bias in the direct appeal, as these would become points of contention in the current flings.

In November 2018, the court of appeals denied Gibson's *pro se* motion to reconsider his appeal and motion to reopen his appeal. (12/12/18 Applications for Reconsideration and Reopening; 1/8/19, Entries Denying Application for Reconsideration and Reopening, attached as State's Ex. 3). Gibson did not raise any claims of judicial bias at that time, alleging only that his appellate counsel should have argued that his trial counsel was ineffective for failing to present a defense; for failing to subpoena witnesses; and for failing to present expert testimony despite the trial court's favorable ruling approving funds for an expert. (*See* Application for Reopening, p.3)

Gibson, in 2019, filed another *pro se* motion for post-conviction relief seeking a new trial on an allegation of judicial bias.

The state moved to dismiss that *pro se* filing without a hearing because: 1) it was untimely filed; 2) because Gibson had failed to meet his burden under R.C. §2953.23 to demonstrate he was "unavoidably prevented" from discovering the facts upon which he now must rely to support the claim; and 3) on the merits, as the judicial bias claim failed to assert sufficient operative facts to demonstrate grounds for relief.

On February 3, 2020, this court overruled the state's motion to dismiss the petition because any information about Judge Pater's recusal in *State v. Lawrence*, (*Butler County Case No. CR2016-10-1598*), came to light only recently and could not have been discovered in the exercise of Gibson's due diligence.

This court found at that time, that Gibson was "unavoidably prevented" from discovery of the facts upon which he must rely to present his claim for relief. This court

Gibson then, without leave of the court, simultaneously and improvidently filed a *pro se* motion for a new trial pursuant to Crim. R. 35(A). The appropriate rule would be 33. The defendant's motion, seeks to incorporate counsel's amended petition, and adds claims of judicial bias.

The state has now moved to dismiss all the claims as untimely and barred by *The Doctrine of Res Judicata*. Additionally, the state urges this court to reject Gibson's new claim because the Ohio Twelfth District Court of Appeals found no evidence of judicial bias in *Lawrence* by Judge Pater. Also see *State v. Sharp*, CA-2019-10-181, 2020-Ohio-3497. "Recusal by Judge Pater in *Lawrence* is no indication that Sharp's sentence was the product of prejudice or bias against Sharp and Sharp's claim at this state 'appears to be nothing more than speculation in an effort to take advantage of events in an unrelated case.'"

DECISION

The defendant's present filings represent a shotgun approach that the court shall address in a reasonable sense of order.

First, Scott Blauvelt, Attorney-At-Law, in an amended petition for post-conviction relief, raises the specter of inappropriately seated jurors, and a claim from trial counsel that the court forced him to use a peremptory challenge on a juror who demonstrated clear bias.

Next, Gibson claims ineffective assistance of counsel, arguing his attorney failed to properly challenge the state's expert's testimony.

Finally, the defendant argues Judge Pater demonstrated bias in his rulings that: 1) a witness could testify about Gibson's excessive consumption of alcoholic beverages;

2) a defense polygraph was inadmissible at trial; 3) that prohibited a defense "expert" from testifying at trial; and 4) that denied the defendant access to a police report.

The court turns first to counsel's juror claims.

In the present amended petition, attorney Scott Blauvelt alleges that two jurors should have been excused for cause by Judge Pater because they had family members who had been the victim of sexual abuse. That allegation is now moot, however, as counsel withdrew it upon learning those two jurors were in fact excused for cause by Judge Pater.

Next, counsel argues that trial counsel, Kyle Rapier, contends that he challenged Prospective Juror 977 for cause because the juror stated he was an acquaintance of Detective Mark Sons who investigated the crime for which Gibson was charged.

Rapier claims that Judge Pater overruled that challenge.

Rapier claims that Juror 977 gave equivocal answers and counsel was therefore required to use a peremptory challenge to remove Juror 977. Rapier states that he has heard the recording of the *voir dire* of Juror 977 and while the recording was poor, he could hear his challenge to the juror. Gibson concedes this claim would normally be subject to the *Doctrine of Res Judicata*, but for Judge Pater's revelation in recusing himself in *Lawrence's* sentencing.

Under the *Doctrine of Res Judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment."

State v. Szefcyk, 77 Ohio St.3d 93, 96, *1996-Ohio-337,* quoting *State v. Perry* (1967), 10 Ohio St.2d 175, ¶9 of the syllabus.

The state addresses Gibson's claim regarding prospective Juror 977 and the trial record as follows:

> It is undisputed that Prospective Juror 977 was a Captain at the Butler County Sheriff's Office, and in that capacity, knew one of the investigating law enforcement officers, Detective Sons of the Fairfield Police Department. (VD 14-15, 52-53, 71-72). It should be noted that Detective Sons was never called by the State, he testified only as a defense witness. (See T.p. Vol. II 119-123).[1]
>
> At the outset, the court asked Juror 977 if the "association with [Detective Sons] would that predispose you in his favor or against any testimony he would offer?"; Juror 977 answered unequivocally, "No." (VD 15). This court again asked whether the work relationship would affect Juror 977 and the juror stated, "I would probably tend to believe him and what he said (VD 16). The court then asked, "Do you think it would be really, difficult, then to be objective" in evaluating Detective Sons' testimony? Juror 977 responded, "No, I don't think it would be really difficult, no" and stated, "I think I could" render a fair verdict. (VD 17).
>
> Later, Juror 977 assured the prosecutor that as a law enforcement officer, he "absolutely recognized the defendant's right to a "jury that's fair and impartial." (VD 53).
>
> Finally, in response to Mr. Rapier's question whether he could remain unbiased as to Detective Sons' testimony, the juror equivocated that "It would be difficult[.]" (VD 73).

According to Petitioner, defense counsel later exercised a for-cause challenge against Juror 977 during a sidebar (at page 86 of the transcript) which the court denied. (Pet. Mem. Contra p.5).

Mr. Rapier avers in his third affidavit that he made a for-cause challenge "after" the sidebar and it was denied. (Third Rapier Aff., ¶ 5). (Mr. Rapier does not aver that the court *wrongly* denied the allegation, much less that it was the product of bias.)

However, the record does not reflect that a for-cause challenge was made or denied during, or after the sidebar.

This court has reviewed the transcript of the *voir dire* and it finds that it comports with counsels' representations. Even if this court were to accept Gibson's trial counsel's statement that he challenged Juror 977 for cause, Judge Pater's decision to overrule that challenge was well within his discretion to do so. *See State v. Wilson* (1972) 29 Ohio St. 203, 211. The later revelation in *Lawrence* by Judge Pater does not change this court's mind about his ruling at Gibson's trial.

The court will now consider Petitioner's *pro se* claims.

In his petition, Gibson argues that he was denied the effective assistance of counsel when his lawyer failed to challenge Dr. Simonton, an expert for the prosecution, who testified about conducting her genital exam of the victim. She testified that the genital exam was normal, which was consistent with the abuse described by the victim, and that the abuse occurred years before the examination.

Here the Defendant raises issue with the performance of trial counsel, claiming his attorney failed to conduct an independent investigation of the testimony, and to effectively challenge the expert based on Gibson's post-trial research, and therefore the defendant was unjustly convicted.

Gibson, to establish a claim of ineffective assistance of counsel with evidence beyond the record, must first show that his attorney's actions were outside the wide range of professionally competent assistance. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Second, the petitioner must demonstrate that he was prejudiced as a result of his attorney's actions. *Id* at 689, 104 S.Ct. at 2065, and to demonstrate prejudice, the petitioner must prove, but for the attorney's actions, there is a reasonable probability the result of the proceeding would have been different. See *Id*

at 2068.

"Courts making determinations of whether the petitioner was deprived the effective assistance of counsel, must be guided by a strong presumption licensed attorneys are competent and the challenged action is the product of a sound trial strategy and falls within the wide range of reasonable professional assistance." See *State v. Bradley* (1989), 42 Ohio St.3d 136, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. "Judicial scrutiny of counsel's performance is to be highly deferential, and * * * courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Even if the wisdom of trial counsel's tactics is debatable, "debatable trial tactics do not constitute ineffective assistance of counsel." *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

Gibson stated in his petition that he had conducted extensive research while incarcerated into treatises that suggested one would expect to find hymenal laceration one hundred percent of the time in a child of the victim's age and that the transection would persist indefinitely. He fails, however, to demonstrate how this information would have resulted in a different outcome at trial or how his attorney was deficient. Regardless, as the state argues, the claim is barred from consideration.

The state argues that this claim is barred by the time restrictions of R.C. §2953.21(A)(2), that reads in the relevant part that the petition must be filed no later than one year after the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.

Here, the trial transcript was filed on August 23, 2016. Gibson was required to file his post-conviction petition by August 22, 2017. Gibson filed his *pro se* petition on

March 7, 2019, nearly two years late, and he has not shown good cause for his late filing regarding this claim.

Having disposed of Gibson's ineffective assistance of counsel claim, the court now considers his request for a new trial.

Gibson has also filed a motion for a new trial for many of the same reasons raised in his post-conviction relief petition.

Crim. R. 33(B) provides as follows:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial[.] (*emphasis added*).

The state argues that Gibson must first obtain leave from this court to file this motion by providing clear and convincing proof that he was unavoidably prevented from filing his motion within the fourteen days allotted by Crim. R. 33(B). The state concedes that a court making a preliminary determination whether to grant leave to file an untimely new trial motion should not consider the merits of the underlying claim. *State v. Young*, 12th Dist. Butler No. CA2018-03-047, 2019-Ohio-912, at 32.

Here, even if the court granted leave to file the motion, Gibson's arguments would still fail.

Gibson claims that Judge Pater exhibited judicial bias in permitting a witness to testify about his excessive drinking; in the ruling prohibiting his counsel from eliciting the fact that he took a polygraph; and in a ruling prohibiting a defense "expert" from testifying at trial, and in the court's denial of his Rule 29 motion at trial.

Regardless, as the defendant did not assert this claim at trial, or during his myriad appeals and post-conviction motions, the matter is *res* judicata.

CONCLUSION

The court notes that previously, in an overabundance of caution, it overruled the state's motion to dismiss Gibson's petition for post-conviction relief because of the *Lawrence* revelation.

A subsequent examination of the sentencing document, trial record, appellate opinion, and now transcribed *voir dire*, however, provides no evidence that Judge Pater made trial rulings or other decisions that evidenced judicial bias. Indeed, it is worth noting that the jury acquitted Gibson of three of the four counts in the indictment.

This court has also examined Gibson's *pro se* petition, his represented petition, the supporting affidavits, all the documentary evidence, all the files and records, and the court reporter's transcript. This court dismisses Gibson's petition based on the findings of fact and conclusions of law stated above.

Further, the court finds Gibson has failed to demonstrate that he is entitled to a new trial for any of the reasons stated in Crim. R. 33.

IT IS THEREFORE ORDERED, AJUDGED AND DECREED, that Gibson's *pro* se and represented motions for post-conviction relief are denied.

IT IS FURTHER ORDERED, AJUDGED AND DECREED Gibson's *pro se* motion for a new trial pursuant to Crim. R. 33 is also denied.

IT IS SO ORDERED,

James A. Brogan, Judge
by Assignment

cc: *Filed electronically*

AFFIDAVIT

This sworn affidavit is from Paul Henry Gibson. On this Seventh Day of June 2023.

This affidavit should be taken as fact and otherwise any falsity's should be considered as perjures.

I Paul H. Gibson do swear that on or about October twenty first of the year twenty twenty-one, 10/21/2021 that I was in fact Hospitalized from a life threatening Aortic dissection. I was placed on life support and heavily medicated. During this time, I also contracted a life threatening case of staff/ or mrsa pneumonia this also required life support in the way of a feeding tube and a breathing tube. I stayed in Ohio State University Wexner medical center "Ross Heart "Intensive care unit from approximately October 21st, 2021 until approximately November 14th at which time I was transferred to Franklin Medical Center where I was admitted until approximately December, 6th of 2021. The injuries sustained during this time left me completely incapacitated, in fact my children were called to say goodbye as the Doctors gave little chance of my survival.

Submitted.

Paul Henry Gibson

AFFIANT FURTHER SAITH NAUGHT

Affiant Paul H. Gibson

Sworn to and subscribed in my presence this 19th day of March 2024

Notary Public Rita Roman

My commission expires _____

NOTARY PUBLIC STATE OF OHIO

RITA ROMAN
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 03-26-2028

Gibson 136b

Ref# CCI0523000632	Housing:DD4136B	Date Created:05/05/2023
ID#: A725912	Name:GIBSON,PAUL	
Form:Kite	Subject:Health Care	Description:Health Care
Urgent:No	Time left:n/a	Status:Closed

Original Form

5/5/2023 6:49:24 PM : (a725912) wrote

This kite is intended for Mr. Deganzaga medical administrtator. I am currently involved with the U.S. District Court in a Habeas Corpus proceeding, at this time thuogh I have sent a subpoena Dueses Techem requesting the court to subpoena the records for my hospital stay at U.S.U and F.M.C from October of 2021 to December of 2021 they have continued to ignore the request to subpoena these documents and have ruled to dismiss my petition as time barred. My requesy for you is would you draw up a letter stating the date of my hospital stay. Please consider this request as it will be of extreme value to my claim.

Thank you.

Inmate: Gibson, # 725912, Unit D,4 / 136b

(freepaulgibson.weebly.com)

Communications / Case Actions

5/5/2023 6:49:24 PM : (a725912) wrote

Form has been submitted

5/12/2023 10:28:59 AM : (Kevin Degonzague) wrote

Sir,

I have reviewed your request. Once a request or subpoena for medical records has been delivered to us, we will gladly provide the documentation requested. Unfortunately, it is not ODRC policy for us to draft letters for court documentation. I apologize and will await the required documentation.

5/12/2023 10:29:04 AM : (Kevin Degonzague) wrote

Closed incarcerated individual form

Ohio Butler Cty. Gen. Div. LR 6.04

Copy Citation

Rules current through rule amendments received through May 24, 2021

- OH - Ohio Local, State & Federal Court Rules
- Butler County Court of Common Pleas
- General Division
- Chapter 6. Criminal.

Rule 6.04. Appointed counsel for indigent defendants

(A) The Butler County Public Defender will provide attorneys to the Court of Common Pleas and the Butler County Area Courts and Municipal Courts to provide representation for indigent defendants charged with felonies. Should a conflict arise in representation by the Public Defender, the following procedure shall be instituted by the Common Pleas Court.

(B)Conflict.

Court administration shall maintain, and make appointments from, a rotary list of those attorneys who have been approved by the General Division Judges to qualify as conflict or appellate attorneys. The list may pair the seriousness and complexity of a case with the qualifications and experience of the person to be appointed. The General Division Judges may add attorneys to the approved list due to caseload concerns, replace attorneys being removed from the list, or develop less-experienced attorneys, by allowing them to represent only clients charged with fifth, fourth, and/or third degree felonies.

(C) All counsel appointed to represent indigent defendants shall meet the minimum education and training requirements contained in the Ohio Administrative Code for each type of case that any such attorney undertakes. The General Division Judges may add attorneys to the approved list, remove attorneys from the list, replace attorneys removed from the list, or restrict the types of cases to which any particular attorney can be assigned.

(D) It is the intention of the Court to distribute equitably appointments for conflict attorneys who have been approved by the Court in an objectively rational, fair, neutral, and nondiscriminatory manner, although the court retains the discretion to deviate from the list when taking into account the factors contained in (B).

(E) In making an appointment for a conflict attorney, the Court will consider the factors contained in the Ohio Rules of Superintendence.

(F) No attorney shall be required to join or pay a fee to any organization as a condition for inclusion in the appointment system.

(G) The Court shall maintain a record of all appointments of counsel, a record of attorneys' refusals to accept appointments, and the reasons for each such refusal.

(H) No attorney on the conflict list is assured of any number of appointments or of a substantially equal number of appointments. No attorney is granted a legal right or claim by virtue of consideration for being on the conflict list, acceptance onto the list, or exclusion from the list.

(I) In accordance with the Rules of Superintendence, at least once every 5 years, the Court shall review the compensation paid to court appointed counsel in order to determine the compensation's adequacy and effect upon the availability of court appointments. The Court shall provide the report to all funding authorities of the Court. In conducting that review, the Court may survey the compensation of appointed attorneys in other courts of similar size around the state; may take into account the attorney comments elicited pursuant to (J); may consider how the amount of compensation affects the availability of qualified attorneys to take appointments; and may take any other steps reasonably calculated to provide a sufficient overview of the adequacy of the Court's funding.

(J) By January 15th of each year, the Court Administrator will prepare a summary of the number of criminal cases originating during the previous year which required appointed counsel. The summary will indicate how many cases were assigned to each of the attorneys on the Court's list of attorneys approved for appointment for indigent defendants in criminal cases. A copy of this summary shall be immediately sent to all attorneys on the appointment list and to the judges of the Court. By letter accompanying the summary, the Court Administrator will invite the attorneys to express to him any concerns they might have regarding the equitable distribution of appointments. At the second judges' meeting in February, the judges will discuss the concerns raised by the attorneys. The judges will then decide whether any action is warranted in order to ensure that the Court is distributing criminal appointments equitably.

(K)Application Procedure for the Approved Counsel List of Conflict Attorneys.

Attorneys who wish to be appointed to represent indigent defendants when a conflict has been determined by the Butler County Public Defender shall first complete an Application for Approval as Indigent Defense Counsel (Appendix G). Completed applications, along with any other documentation required by court policy, shall be submitted to the court administration office and shall be reviewed by the General Division Judges. A decision will be made by a majority of the General Division Judges to approve or disapprove applications. Attorneys shall not approach individual judges for reconsideration. Attorneys approved for appointment will be approved for one calendar year and, thereafter, performance will be reviewed a minimum of once per year. Approved attorneys shall follow policies and procedures provided and approved by the Court.

(L)Procedure for Appointment of Counsel.

(1) A defendant's case will be assigned by the Butler County Public Defender to one of the public defenders assigned to the Court in which the indigent defendant is appearing.

(2) After consultation with the trial judge all counsel for capital murder cases shall be appointed by the Common Pleas Court Administrative Judge from the Supreme Court list of certified attorneys.

(3) Requests for appointed counsel from the conflict list for indigent defendants shall be directed to the Court's bailiff. All appointments of conflict attorneys shall be made by entry prepared by the Court's bailiff and signed by the judge assigned to hear the case.

(M)Procedure for Submission of Fee Applications.

Appointed counsel shall submit a Motion, Entry and Certification for Appointed Counsel Fees, as prescribed by the Ohio Public Defender's Office, within 30 days from the date of the final hearing. Fee applications submitted outside the 30-day guideline shall be subject to a reduction of the amount requested at the discretion of the judge assigned to hear the case. Motions for judicial release and other post-conviction motions shall be submitted on a separate fee application, which shall be submitted within 30 days of the date of the entry of the judge's decision.

In accordance with Ohio Public Defender Standards and Guidelines for Appointed Counsel Reimbursement, counsel is required to prepare and maintain time records for each appointed case, showing the date of service, nature of services rendered, and hours worked. Time records shall be provided to the Court upon request.

History

Added 2-7-20.

PreviousNext

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1 Appellate Practice and Procedure in Ohio Rule 8

Copy Citation

- **Anderson's Appellate Practice and Procedure in Ohio**
- **PART FOUR: SELECTED RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO**
- **SELECTED RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO AFFECTING APPELLATE PRACTICE**
- **Rules Of Superintendence For The Courts Of Ohio**

Rule 8. Court appointments

- **(A) Definitions**
  - As used in this rule:
    - (1) "Appointment" means the selection by a court or judicial officer of any person or entity designated pursuant to constitutional or statutory authority, rule of court, or the inherent authority of the court to represent, act on behalf or in the interests of another, or perform any services in a court proceeding. The term "appointment" does not include the selection by a court or judicial officer of the following:

- (a) An acting judge pursuant to R.C. 1901.121(A)(2)(a), (B)(1), or (C)(1) or R.C. 1907.141(A)(2)(a), (B)(1), or (C)(1);
- (b) A receiver pursuant to R.C. 2735.01;
- (c) An arbitrator, mediator, investigator, psychologist, interpreter, or other expert in a case following independent formal or informal recommendations to the court or judicial officer by litigants;
- (d) Any individual who is appointed by any court pursuant to the Revised Code or the inherent authority of the court to serve in a non-judicial public office for a full or unexpired term or to perform any function of an elected or appointed public official for a specific matter as set forth in the entry of appointment;
- (e) A guardian ad litem pursuant to Sup.R. 48;
- (f) A guardian pursuant to Sup.R. 66.

- (2) "Appointee" means any person, other than a court employee, receiving an appointment by a court or judicial officer. "Appointee" does not include a person or entity who is selected by someone other than the court.
- (3) "Equitable distribution" means a system through which appointments are made in an objectively rational, fair, neutral, and nondiscriminatory manner and are widely distributed among substantially all persons from the list maintained by the court or division of persons pre-qualified for appointment.
- (4) "Judicial officer" means a judge or magistrate.

- **(B) Local rule**
  - (1) Each court or division of a court shall adopt a local rule governing appointments made in the court or division.
  - (2) The local rule required by division (B)(1) of this rule shall include all of the following:
    - (a) For appointments frequently made in the court or division, a procedure for selecting appointees from a list maintained by the court or division of persons pre-qualified to serve in the capacity designated by the court or division. The procedure shall ensure an equitable distribution of appointments. To ensure an equitable distribution of appointments, the court or division may utilize a rotary system from a graduated list that pairs the seriousness and complexity of the case with the qualifications and experience of the person to be appointed. The court or division may maintain separate lists for different types of appointments.
    - (b) A procedure by which all appointments made in the court or division are reviewed periodically to ensure the equitable distribution of appointments;
    - (c) If not addressed by the Revised Code or Supreme Court rule, the compensation appointees will receive for services provided and expenses incurred as a result of the appointment, including, if applicable, a fee schedule.
  - (3) The local rule required by division (B)(1) of this rule may include the following:
    - (a) Qualifications established by the court or division for inclusion on the appointment list;
    - (b) The process by which persons are added to or removed from the appointment list;
    - (c) Other provisions considered appropriate by the court or division.
- **(C) Compensation review and report**
  - At least once every five years, each court or division of a court shall review the compensation paid court appointees to determine the compensation's adequacy and effect upon the availability of court appointments. The court or division shall provide the report to all funding authorities of the court or division.
- **(D) Factors in making appointments**
  - In making appointments, a court or judicial officer shall take into account all of the following:
    - (1) The anticipated complexity of the case in which appointment will be made;
    - (2) Any educational, mental health, language, or other challenges facing the party for whom the appointment is made;
    - (3) The relevant experience of those persons available to accept the appointment, including proficiency in a foreign language, familiarity with mental health issues, and scientific or other evidence issues;
    - (4) The avoidance of conflicts of interest or other situations that may potentially delay timely completion of the case;
    - (5) Intangible factors, including the court or judicial officer's view of a potential appointee's commitment to providing timely, cost-effective, quality representation to each prospective client.

(EXIBIT,B,1)

DAVID M. BURKONS, M.D., FACOG
David M. Burkons, M.D., Inc.

1611 South Green Road, Suite 004
South Euclid, Ohio 44121
216-297-2061 • Fax: 216-297-2034
E-mail: dmburkons@aol.com

March 14, 2016

Kyle M. Rapier, Esq.
Brandabur & Bowling, Co., LPA
315 So. Monument Ave.
Hamilton, OH 45011

Re: State of Ohio
v Paul Gibson
Butler County Common Pleas
Case: CR 2015 101601
B&B File No: 2015-13229

Dear Mr. Rapier:

I have reviewed the records sent me in the above captioned case. These included:

#1 The Mayerson interview with alleged victim
#2 Children's Hospital Medical Records of alleged victim
#3 S.A.N.E. photos

I also have had several phone discussions with you in regard to this matter.

This review of records was undertaken so as to determine if in my professional opinion, the evidence included in these records, support the accusation that Mr. Gibson sexually penetrated A. T., when she was a 9 and 10 year old child.

In way of background, I am a practicing Board Certified Obstetrician/Gynecologist, who particularly during my training at the University of Michigan in the mid to late 1970's, had extensive exposure to cases of sexual molestation of young, pre-pubescent and teenage girls.

After thorough review of the records, I have come to the following conclusions:

#1 While the recorded interview with the alleged victim took place several years after the supposed events, I find that very incongruous that she reports no physical trauma from being penetrated by an adult male when she was 9 years old.

#2 Re-examination, which took place at Cincinnati Children's Hospital, seemed to be very superficial in that there is no evidence that anything more than an external examination was done.

There is no mention of whether or not there was a hymen present, or was there a traumatized hymeneal ring.

The S.A.N.E. photos are all of the external genitalia, and show no evidence of previous scarring or trauma.

Therefore, after careful review of the records provided to me, I must conclude that the evidence therein, does not support the accusation that Paul Gibson sexually penetrated A. — — T. —.

I base my conclusions to a reasonable degree of medical certainly and reserve the right to modify them should additional information is brought to my attention.

Sincerely Yours,

David M. Burkons, M.D., FACOG

DMB/mcg

PLEASE NOTE THAT ALTHOUGH Dr.Burkons was not given the information related to an internal examination that there was in fact a internal examination using a colposcope for a internal examination,as well as internal images showing that there was No evidence of injury past or present to the hymen and or the hymenal ring. Dr,Burkons opinion would have only been solidified Dr.Burkons opinion was probamatic to the prosecutions case so therefor this expert was not called as was expected By the defendant. (Failure to call by appointed counsel attorney Kyle Rapier.)

(EXHIBIT C, 1)

Lowenstein & Associates

David M. Lowenstein, Ph. D.
691 South Fifth Street • Columbus, Ohio 43206 • (614) 444-0432 • fax: (614) 444-1482

(PSYCHOLOGIST DENIED BY JUDGE CHARLES L. PATER)

CONSULTATION REPORT

State of Ohio v. Paul Gibson
Case #: 2015 19 1601
Butler County Common Pleas

Background Information:

This examiner was first contacted by Kyle Rapier, Attorney, concerning his request to review a videotape and medical information on a case that he was representing the defendant, Paul Gibson, who has been alleged to have sexually abuse a female under the age of 13 years old several years ago and who had recently has been charged with this offense. The alleged victim (that will now be designated as Jane Doe) is presently 13 years old and lives with her mother, father and younger sister.

Jane Doe reported that she had been sexually abused on a regular basis for approximately one (1) year by her aunt's "drunk" boyfriend, Paul Gibson, who resided in the family home when Jane Doe's father was incarcerated and not living in the family home. Jane Doe's mother reportedly was employed on the second shift and as a result was not at home to care for her children which is the reason why the aunt was residing in the home with her boyfriend. Jane Doe had indicated that she was frightened of Paul Gibson and on many occasions she would sleep in her mother's bedroom so that she could feel safe until her mother would come home at 11:00 p.m. She also shared that the alleged perpetrator would also come into this bedroom and attempt to kiss her and touch her. There were no occasions when any of these actions and/or behaviors were witnessed by anyone else whether the aunt was home or not or whether the younger sister was in the home or not.

Jane Doe stated that these activities occurred when she was approximately 9 years old and continued for the entire year on a daily basis while her father was out of the home and her mother was at work and the aunt was busy. Jane Doe stated that Paul Gibson would come into her room following her showering and "force" her to disrobe at first and then he later "molested" her and put his penis in her vagina. Jane Doe stated that he would force her to do these activities and that she was frightened to inform either her aunt or mother for fear that it would be her fault and she would get in trouble.

CONSULTATION REPORT

State of Ohio v. Paul Gibson

Case #: 2015 19 1601
Butler County Common Pleas

Jane Doe has had at least three (3) recent psychiatric hospitalizations this past year and all were suicide related. Jane Doe had indicated that she had told her friends that she did not care if she lived or died and had stated to her mother that she wanted to jump out her window. Jane Doe had also reported that she had pinched herself several times causing black and blue marks on her inside thighs and that she had used a razor blade to cut herself because she wanted to stop her thinking and mental anguish. Her last hospitalization occurred in June 2015 in what seemed to be following her disclosure to her mother that Paul Gibson had sexually abused her. At first she informed her mother that when she was 9 years old Paul Gibson had touched her and saw her with no clothes on. As time progressed Jane Doe then informed her mother that Paul Gibson had molested her which Jane Doe now states is the reason why she was depressed and suicidal and required hospitalization.

Jane Doe has a caseworker (Missy) from Butler County Children Services as well as she has been seeing a counselor (Kasey Cook) in outpatient treatment. This examiner was provided the treatment notes from Jane Doe's last psychiatric hospitalization and the videotape interview by the Mayerson Clinic that was completed on June 24, 2015 for this review. There are other significant information sources that would be helpful to review which will be discussed later in this report.

Review of Videotape:

1. There is no information about the training and experience of the interviewer and her training with sexual abuse victims, etc. Can information be obtained about this professional?

2. Jane Doe comes into the interview room with her phone and is asked to turn it off or put it away. She states that she has some notes on this phone, but she is never asked what the notes are, why she needed notes and who may have helped her write these notes (coaching??).

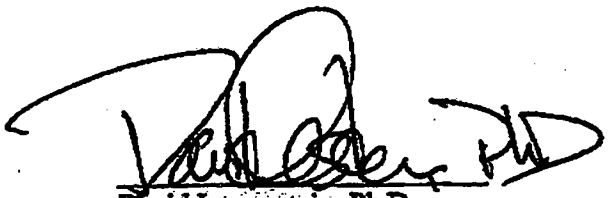
3. Jane Doe also states when she talks about her family that she indicates that she has a lot of anxiety just like her younger sister. The interviewer never asks about this anxiety and what brings it on or why it is evident and what she has done to relieve her anxiety – is this because she only wants to know about the abuse and nothing else?

4. When talking about her family, Jane Doe states that "we were talking about it last night." What was discussed last night? Was it a rehearsal for the interview that she was having today? Who talked with her last night and what was talked about – these questions were never asked by the interviewer (coaching?).

CONSULTATION REPORT

State of Ohio v. Paul Gibson

Case #: 2015 19 1601
Butler County Common Pleas



David Lowenstein, Ph.D.
Psychologist (Ohio License # 3937)

This report was submitted by U.S. Mail and electronic email to Kyle Rapier, Attorney at Law, on Monday February 9, 2016.

that it might have influenced his sentencing of a defendant for a similar crime has resulted in a flurry of letters to attorneys concerning the perceived bias.

Butler County Prosecutor Michael Gmoser said his office is searching through sex crime cases assigned to Judge Charles Pater in the past 10 years and informing both attorneys and defendants of Pater's recusal for bias from a re-sentencing of a sex case defendant after an October discussion in chambers.

The recusal from that re-sentencing has also led Pater to say he will recuse himself from certain types of sex cases in the future.

Dustin Lawrence was convicted following a jury trial of gross sexual imposition, rape, kidnapping and domestic violence in 2017 and was sentenced to 33 years in prison by Pater. During a motion to have his sentence reconsidered by the judge based on mistakes made in the pre-sentence investigation report regarding Lawrence's criminal history, Pater said he was going to agree to the re-sentencing.

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He said that he might have been too harsh in his sentence because of the personal situation in his family, according to prosecutors. Pater agreed to recuse himself from re-sentencing based on his statements.

"The state believes it has a legal and ethical duty to inform you of this recusal," Gmoser wrote in a letter to defense attorneys.

He said he has a obligation for disclosure because of rules governing exculpatory evidence that must be turned over to the defense.

"The family occurrence occurred 10 years ago, so we have a 10-year period of time when potentially the judge, by his admission, has harbored a bias with respect to these types of cases therefore under those circumstances ... I am required to go back through those cases and sent letters to the attorneys and defendants," Gmoser said in an interview with the Journal-News.

The entry of recusal signed by Pater does not use the word "bias."

"Upon further reflection of ... statements in chambers to counsel on Oct 24, 2018, specifically, that a family member had been a victim of a similar crime, which may have impacted the court's original sentencing determination, hereby recuses himself from further hearing ...," the entry from Pater states.

The re-sentencing of Lawrence was reassigned by administrative Judge Jennifer McElfresh to Judge Greg Howard, who set a hearing for March. But the reason for the re-sentencing is not due to the recusal, but the pre-sentence report errors, according to court records from Howard.

Pater said in an interview with the Journal-News that when the case came back to him for post conviction relief he told the prosecutor's office appellate division and the appellate attorney in chambers he had rethought the sentence.

"I indicated that there was something else mulling around in my brain and that was I had had thoughts since the sentencing that the sentence was perhaps too high, too stiff, too many years," Pater said "That wasn't the driving factor (for the re-sentencing) but the fact that there were legal problems did give me a opportunity to reassess that length of time that I gave him."

Pater said he has never tried to hide his own personal family background from attorneys, "but I don't talk unnecessarily about it ."

He added that with the exception of this case which gave him a "nagging feeling" upon reflection, he as never knowingly done anything unethical in a case.

"Don't have a sense that I have ever done anything ethically wrong, this is the one time that I have had that kind of a sense and it so happened that this case came back and it so happened there was also problems in PSI that I relied on." Pater said

Gmoser said the recusal may not just effect sentences.

"That bias may not just go to sentencing," he said. "That bias may go to anything with respect to the trial in that case when it comes to objections,

admissibility of evidence. But it is up to attorneys and defendants to file motions for remedy in individual cases.

In a letter sent by email Tuesday, Pater said he will recuse himself in the future from similar sex cases.

"I decided that it would be best if I were to recuse from presiding over cases in which male defendants are charged with forcible rape of females in their teens and early 20s. These cases are a small percentage of the sex offense cases typically indicted and tried in the court of common pleas. I see no reason, generally speaking, to recuse from any other type of sex offense." Pater said.

flurry of letters

Crime | Jan 25, 2019

By Lauren Pack, Staff Writer

BUTLER COUNTY — An incident 10 years ago involving a family member and the admission of a Butler County County Common Pleas Court judge that it might have influenced his sentencing of a defendant for a similar crime has resulted in a flurry of letters to attorneys concerning the perceived bias.

Butler County Prosecutor Michael Gmoser said his office is searching through sex crime cases assigned to Judge Charles Pater in the past 10 years and informing both attorneys and defendants of Pater's recusal for bias from a re-sentencing of a sex case defendant after an October discussion in chambers.

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"The family occurrence occurred 10 years ago, so we have a 10-year period of time when potentially the judge, by his admission, has harbored a bias with respect to these types of cases therefore under those circumstances ... I am required to go back through those cases and sent letters to the attorneys and defendants," Gmoser said in an interview with the Journal-News.

The entry of recusal signed by Pater does not use the word "bias."

"Upon further reflection of ... statements in chambers to counsel on Oct 24, 2018, specifically, that a family member had been a victim of a similar crime, which may have impacted the court's original sentencing determination, hereby recuses himself from further hearing ...," the entry from Pater states.

The re-sentencing of Lawrence was reassigned by administrative Judge Jennifer McElfresh to Judge Greg Howard, who set a hearing for March. But the reason for the

re-sentencing is not due to the recusal, but the pre-sentence report errors, according to court records from Howard.

Pater said in an interview with the Journal-News that when the case came back to him for post conviction relief he told the prosecutor's office appellate division and the appellate attorney in chambers he had rethought the sentence.

"I indicated that there was something else mulling around in my brain and that was I had had thoughts since the sentencing that the sentence was perhaps too high, too stiff, too many years," Pater said "That wasn't the driving factor (for the re-sentencing) but the fact that there were legal problems did give me a opportunity to reassess that length of time that I gave him."

Pater said he has never tried to hide his own personal family background from attorneys, "but I don't talk unnecessarily about it ."

He added that with the exception of this case which gave him a "nagging feeling" upon reflection, he as never knowingly done anything unethical in a case.

"Don't have a sense that I have ever done anything ethically wrong, this is the one time that I have had that kind of a sense and it so happened that this case came back and it so happened there was also problems in PSI that I relied on." Pater said

Gmoser said the recusal may not just effect sentences.

"That bias may not just go to sentencing," he said. "That bias may go to anything with respect to the trial in that case when it comes to objections, admissibility of evidence. But it is up to attorneys and defendants to file motions for remedy in individual cases.

In a letter sent by email Tuesday, Pater said he will recuse himself in the future from similar sex cases.

"I decided that it would be best if I were to recuse from presiding over cases in which male defendants are charged with forcible rape of females in their teens and early 20s. These cases are a small percentage of the sex offense cases typically indicted and tried in the court of common pleas. I see no reason, generally speaking, to recuse from any other type of sex offense." Pater said.

+ Show Caption

HAMILTON, Ohio — A Butler County judge's admission that he may have been influenced by personal bias when he sentenced a convicted rapist to 33 years in prison touched off a quiet legal earthquake that could reverberate through a decade of local sex-crime cases.

Judge Charles Pater stated in a letter of recusal that his sentencing of Dustin Lawrence, convicted in 2016 of raping a then-girlfriend's 16-year-old daughter, had been affected by an incident in his own life: A member of Pater's family had once been a victim of a similar crime.

Lawrence's appeals attorney, Eric Eckes, learned this by accident.

He had initially discovered errors in Lawrence's presentence investigation when he revisited it in 2018. One such error incorrectly stated that Lawrence was convicted of violating a restraining order when the conviction was actually for a moving traffic violation.

As Eckes sought a resentencing, Pater conceded during one conversation he hadn't been fair to Lawrence in the first one.

In the letter of recusal, he wrote, "Upon further reflection of its statements in chambers to counsel on October 24, 2018, specifically, that a family member of the Court had been the victim of a similar crime which may have impacted the Court's original sentencing determination, hereby recuses himself from further hearing the above captioned matter."

Pater declined a request for further comment.

The admission sent ripples through the Butler County Court of Common Pleas. Pater has since recused himself from hearing any other cases involving sex crimes, and Butler County Prosecutor Mike Gmoser has begun sifting through 10 years of cases to contact defendants who were accused of sex crimes in Pater's courtroom.

In the letters he sends to them, Gmoser writes: "The State believes it has a legal and ethical duty to inform you of this recusal."

However, the letters also emphasize Gmoser isn't taking a position on those cases. Each and every defendant must decide individually how to proceed with the information that their treatment was influenced by a judge's personal experiences.

As for Lawrence, his appeal will be put on hold and the case remanded back to the Butler County Court of Common Pleas.

Judge Greg Howard will preside when he is resentenced in March.

AFFIDAVIT OF INDIGENCE

The undersigned, Paul H.Gibson, after being first duly cautioned and sworn, does affirm that the following are true to the very best of my knowledge:

1. I am a prisoner at Chillicothe Correctional Institution, County of Ross, State of Ohio, and that I am without the necessary funds with which to pay the costs of this action;

2. I am without possession of real or personal property and assets of sufficient value with which to offer security for such costs;

3. I am truly indigent earning only $ 20.00 per month which covers my hygiene, medical copay, and over the counter medications leaving me unable to afford the cost of this action, nor the cost that I owe in this matter.

4. Other: _____

AFFIANT FURTHER SAITH NAUGHT

Paul H. Gibson
Affiant

STATE OF OHIO }
COUNTY OF ROSS }

SWORN TO & SUBSCRIBED IN MY PRESENCE THIS 31st DAY OF January, 2024

Rita Roman
Notary Public

My Commission Expires

SEAL

NOTARY PUBLIC STATE OF OHIO

RITA ROMAN
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 03-26-2028

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL HENRY GIBSON — PETITIONER
(Your Name)

VS.

TIMOTHY SHOOP (warden) — RESPONDENT(S)

PROOF OF SERVICE

I, Paul H. Gibson, do swear or declare that on this date, MAY 10TH, 2024 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Attorney Gerneral Office, Lisa Kathryn Browning, 30 East Broad st. 23rd Floor, Columbus, Ohio, 43215-6001.

Supreme Court of The United States, 1 First Street, N. E., Washington, DC, 20543.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on,
MAY 10TH, 2024

Paul H. Gibson
(Signature)

APPENDIX (R)