MISC

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

DAVID D AUSTIN
Defendant

Case No: CR-16-602549-A

Judge: MICHAEL J RUSSO

INDICT: 2919.22 ENDANGERING CHILDREN
2919.22 ENDANGERING CHILDREN
2919.22 ENDANGERING CHILDREN
ADDITIONAL COUNTS...

JOURNAL ENTRY

04/03/2018: D1 DAVID D AUSTIN'S "MOTION FOR NEW TRIAL BASED ON NWELY DISCOVERED EVIDENCE ANDOR POST-CONVICTION RELIEF UNDER OHIO REV. CODE 2953.23," FILED 08/11/2017 BY ATTORNEY NATE N MALEK 0067380, IS DENIED. OSJ.

04/03/2018
CPMR2 04/03/2018 15:17:43

NO SIGNATURE REQUIRED

Judge Signature Date

FILED
2018 APR -3 P 3:36
CLERK OF COURTS
CUYAHOGA COUNTY

MISC
04/03/2018

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CR 16-602549-A

STATE OF OHIO	)	**JUDGE MICHAEL J. RUSSO**
Plaintiff-Respondent	)	
vs.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JOURNAL ENTRY**
DAVID D. AUSTIN	)	
Defendant-Petitioner	)	

MICHAEL J. RUSSO, J.:

Petitioner, David D. Austin, is seeking post-conviction relief pursuant to R.C. 2953.21. On September 2, 2016, Austin was found guilty of a single charge of endangering children, a felony of the third degree, as charged in count three of his indictment. Count five was dismissed pursuant to Crim.R. 29, and the jury was unable to reach a verdict on the remaining counts. On August 7, 2017, the state dismissed counts one, two, and four, and Austin was sentenced to 30 months of incarceration to be served consecutively to a sentence imposed in another criminal case. Austin filed a direct appeal on September 7, 2017; it remains pending.

On August 11, 2017, Austin timely filed this petition contemporaneously with a motion for new trial, which was denied on November 21, 2017. As discussed below, Austin alleges two claims for relief regarding evidentiary matters.

1. The State of Ohio impermissibly withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Austin argues that during a break in the trial, the lead prosecutor learned from a treating physician that the physician would be unable to pinpoint a date on which the victim received her injuries. This conversation reportedly was overheard by Austin's mother but was never disclosed to Austin's defense counsel—Austin alleges—in violation of *Brady*.

Austin does not specify which physician was overheard by Austin's mother outside the courtroom. The Court finds the following facts: Two physicians testified at trial—Dr. Tomei, the neurosurgeon who twice operated on and provides regular care to the victim, and Dr. Tarr, the nueroradiologist who interpreted the medical scans performed on the victim.

Tomei testified to the following:

> Q. Dr. Tomei, did you -- you had talked about different stages of blood, is that correct?
>
> A. Yes.
>
> Q. For an injury to be fresh, is there a medical term for a fresh bleed?
>
> A. We would call that an acute bleed or a hyperacute bleed if it's happening actively where we can see certain patterns on the skin.
>
> Q. If there is an -- if there is old blood, what would you call that?
>
> A. Old blood can fall into either a subacute category or a chronic category. **The chronic has the appearance of what we were seeing.**
>
> Q. There was acute blood as well?
>
> A. There was acute blood as well. Tr. 410-411 (emphasis added).

Tomei further testified about a trauma victim's physical reaction and ability to move around after experiencing a trauma. Tr. 413-414. On cross-examination, Tomei testified that a patient experiencing a less severe subdural hematoma could experience headaches, and that she was

not provided information that the victim experienced headaches and vomiting for two days prior to her admittance to the emergency room. Tr. 423. Tomei was not asked any questions on cross-examination regarding the timing of the injury, even though there was testimony on direct examination regarding an old injury.

Tarr reviewed the scans performed on the victim at trial, and explained the findings to the jury:

> A: Yeah, both of these are subdural hemorrhages and just by how white they are, you can say they're fairly acute. They're not months old. We can't grade them, you know, within hours, but certainly we know that they're not months old.
>
> The other thing I think you can see as you come down here, so remember that the blood is white but not quite as white as the bone, so here's a little bit more blood again in that subdural space but also here, there's also sort of dark density here or darker density, and that is also in the subdural space and so that's, you know, in kids, kids usually don't have that dark collection there and so that is, you know, sort of more chronic fluid in the subdural space.
>
> . . .
>
> Q. So was this an abnormality?
>
> A. Yeah, I guess what I was trying to point out is that this is what I would interpret as sort of a combination of more recent bleeding, the whiter density, and older bleeding, which the blood becomes dark over time and so that's what I was trying to point out. Tr. 457-458.

Tarr further testified that he could "not exactly" tell how recent the fracture to the victim's skull was, and could have been as old as three weeks prior to her admittance to the emergency room. Tr. 462. Defense counsel emphasized this on cross-examination:

> Q. Great. And then I believe that the time frame that you said from your medical expertise which you felt comfortable would be, it could have been two seconds to three or four weeks?
>
> A. The fracture?

Q. The fracture.

A. Yeah, that's correct. That's correct. Tr. 463.

From the brief in opposition of the state, the court gleans that Austin disputes the state's omission of the testimony of Dr. Ameya Nayate, a radiologist at University Hospitals who reviewed scans of the victim performed weeks after her admission to the emergency room. State's Brief, Ex. 2. The state determined—as part of its trial strategy—that Nayate's testimony would be duplicative of the testimony previously elicited from Tomei and Tarr. *Id.* Nayate's name was provided to defense counsel prior to trial. State's Brief, Ex. 3.

The information regarding the date of the victim's trauma was not withheld from defense counsel. The court finds that the prosecution elicited testimony as to the age of the trauma on direct examination of both testifying doctors, and it was discussed on cross-examination. Austin's counsel reiterated this testimony during closing, reminding the jury that "both doctors indicated they couldn't tell when the injury occurred." Tr. 661-662.

Evidence which is merely cumulative is insufficient to show a *Brady* violation. *State v. Mack*, 2015-Ohio-2149. The court concludes, as a matter of law, that the testimony of Nayate was duplicative of evidence already presented at trial, not exculpatory, and that the state declined to call him as a witness for those reasons. No violation of *Brady* occurred.

2. Newly discovered evidence exists which will exonerate Austin of his conviction.

Austin alleges that "new, exculpatory evidence exists which would exonerate" him. Motion, p. 5. Counsel for Austin provides the following examples:

a. The mother of the victim, Christina Rodgers, did not see Austin push the victim;
b. The minor victim in this matter stayed with a relative prior to the alleged acts contained within the indictment. Counsel has discovered that the child was suffering from episodes of

regular vomiting, an indicator of brain injury, prior to the date of the alleged activity by Austin;

c. Counsel has retained an expert on pediatric neurology who was prepared to testify at a second trial that the minor victim's injuries did not occur on or near September 23, 2015, the date which appears in all counts of the indictment as they relate to Austin.

None of the evidence cited by Austin, however, is new or exculpatory.

The expert retained by Austin's counsel does not provide new evidence about the timing of the victim's injuries, as discussed above. Christina Rodgers' testimony at trial covered all of the remaining "new evidence" alleged by Austin. Rodgers testified on cross-examination that she never saw anyone hit the victim. Tr. 353. She also testified as follows:

> Q. All right. Now, before then you indicated that she had indicated to you, and by she, I mean [the victim], that she was throwing up and her head was hurting?
>
> A. Yes.
>
> Q. All right. So let's talk about that. How long had she been throwing up?
>
> A. As soon as she came back from her aunt's house.
>
> Q. Let's get a time frame on the 23rd. When did she return back from her aunt's house?
>
> A. The night before.
>
> Q. So that would be the 22nd?
>
> A. Yes.
>
> Q. What time on the 22nd?
>
> A. It was around the time the sun was setting I remember.
>
> Q. And that is about 6:30, 7:00 in the summer, September, 6:30, 7:00?
>
> A. Yeah, probably so, yes.

Q. So how many -- she had spent a couple nights at her aunt's house --

A. Yes.

Q. -- prior to that?

A. It was time for her to come home.

Q. That's not my question. I want to make sure you understand my question. She had spent a couple of nights at her aunt's house up until the point of September 22nd?

A. Yes.

Q. And around 7:00, is that what your testimony is?

A. Yes.

Q. When she came home that evening at 7:00 p.m.ish, when did she start complaining about her head hurting and throwing up?

A. As soon as [the victim] got out of the car, she literally threw up everywhere, like it went everywhere. Tr. 350-352.

Trial counsel was clearly aware of this alternate theory as to the cause of the victim's injuries, but did not elect to contest this evidence through an expert witness.

"When a defendant prepares for trial, he and his attorney must research expert witnesses and make strategic decisions about which ones, if any, to have testify". *State v. Graff*, 8th Dist. Cuyahoga No. 102073, 2015-0hio-1650, ¶ 14. The court finds, as a matter of law, that Austin has not provided newly discovered evidence under R.C. 2953.21 which would entitle him to post-conviction relief. The jury had evidence that the injuries inflicted on the victim could have happened at a previous time and by a person other than the defendant; however, it was clearly unpersuaded by that argument. The court further finds as a matter of law that any challenge to the effectiveness of trial counsel should have been raised on direct appeal and, as such, is improper to raise in this petition. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994).

Conclusion

Upon a review of the petition, documents, and all of the files and records in the case, including the complete transcript of all proceedings, the court finds that there are no substantive grounds for relief and no hearing is required. R.C. 2953.21(D). Austin's petition is denied.

IT IS SO ORDERED.

JUDGE MICHAEL J. RUSSO

CERTIFICATE OF SERVICE

The foregoing Findings of Fact and Conclusions of Law and Journal Entry was sent by ordinary U.S. Mail this 3rd day of April, 2018 to: Nate N. Malek, 29025 Bolingbrook Road, Cleveland, Ohio 44124 and Dan Van, Assistant County Prosecutor, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113.

JUDGE MICHAEL J. RUSSO