

FILED

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WIEDERHEIM
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO :
Plaintiff-Respondent : **CASE NO. 2012 CR 00839**
vs. : **Judge McBride**
ISOME EARL STURGILL, JR. : **DECISION/ENTRY**
Defendant-Petitioner :

Judith Brant, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Arenstein & Gallagher, Hal R. Arenstein, counsel for the defendant-petitioner Isome Earl Sturgill, Jr., The Citadel, 114 E. Eighth Street, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion to set aside the judgment of conviction and petition for post-conviction relief filed by the petitioner Isome Earl Sturgill, Jr.

The court issued a briefing order and notice of non-oral hearing to the parties. On November 4, 2013, the date of the non-oral hearing set by the court, the court took the issues raised by the petition under advisement.

Upon consideration of the motion/petition, the record of the proceeding, the evidence presented for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The petitioner Isome Sturgill, Jr. was convicted by a jury of the following charges: (1) one count of Failure to Comply with the Order or Signal of a Police Officer in violation of R.C. 2921.331(B), a felony of the third degree; (2) one count of Driving Under an OVI Suspension in violation of R.C. 4510.14(A), a misdemeanor of the first degree; (3) one count of Driving Under an FRA Suspension in violation of R.C. 4510.16(A), a misdemeanor of the first degree; and (4) one count of Operating a Vehicle While Under the Influence of Alcohol in violation of R.C. 4511.19(A)(1)(a). The jury further found that the petitioner was previously convicted of five or more OVI offenses, making this offense a felony of the third degree.¹ The petitioner was sentenced by this court to a stated prison term of thirteen years on these offenses.²

The petitioner appealed his convictions and sentence to the Twelfth District Court of Appeals and the transcripts were filed in said appeal on July 3, 2013. The appellate court recently issued a decision affirming the petitioner's convictions and sentence.³

While his appeal was pending, the petitioner filed the present motion to set aside his conviction and petition for post-conviction relief. The petitioner argues that he was denied his constitutional right to effective legal representation under the Sixth

¹ Judgment Entry Sentencing Defendant to Prison, filed Dec. 18, 2012.

² Id.

³ *State v. Sturgill* (Oct. 21, 2013), 12th Dist. Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648.

Amendment to the United States Constitution and, as such, that his convictions should be set aside and/or considered void.

LEGAL ANALYSIS

Due to the fact that the present pleading was filed subsequent to the petitioner's appeal, is based on an alleged violation of his constitutional rights, contains an assertion that his judgment is void, and requests that the sentence be vacated, the court will treat this pleading in its entirety as a petition for post-conviction relief.⁴

R.C. 2953.21 governs the present petition and states in pertinent part as follows:

"(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

* * *

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. * * * "

⁴ See, e.g., *State v. Sparks* (Aug. 20, 2013), 10th Dist. No. 12AP-1063, 2013-Ohio-3598, ¶ 6, citing *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160, 679 N.E.2d 1131.

The petitioner filed the present petition on September 5, 2013. This is within 180 days of July 3, 2013, the filing date of the transcripts at the court of appeals, and therefore, the petition is timely filed.

The petitioner argues that he was denied effective assistance of counsel due to his counsel's failure to impeach one of the state's witnesses, Samantha Fite, with a prior written statement.

"When determining whether a defendant's Sixth Amendment right to effective assistance of counsel has been violated, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' "⁵

" * * * [T]he Supreme Court established a two-part test which requires an appellant to establish that first, 'his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial.' "⁶ "Regarding the first prong, an appellant must show that his counsel's representation 'fell below an objective standard of reasonableness.' "⁷ "The second prong requires the appellant to show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "⁸ " 'A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other.' "⁹

⁵ *State v. Liso* (Oct. 28, 2013), 12th Dist. No. CA2012-08-017, 2013-Ohio-4759, ¶ 22, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158.

⁶ *Id.* at ¶ 23, quoting *State v. Myers* (March 5, 2007), 12th Dist. No. CA2005-12-035, 2007-Ohio-915, ¶ 33, citing *Strickland*, *supra*.

⁷ *Id.*, quoting *Strickland*, 466 U.S. at 688.

⁸ *Id.*, quoting *Strickland* at 694.

As set forth by the Twelfth District Court of Appeals:

"Samantha Fite, a bartender at Hangovers * * * testified at trial that they served alcohol to appellant on the evening of June 21, 2011. Fite testified that appellant and Neal arrived at Hangovers around 6:00 p .m., and they stayed for one and one-half to two hours. During this time, appellant was personally served four or five alcoholic drinks. When appellant and Neal returned to Hangovers sometime later, around 10:00 p.m., Fite served appellant another drink. Appellant and Neal played a game of pool and then left for the evening. Fite stated that at the time appellant and Neal left, neither were stumbling around. However, Fite opined that neither appellant or Neal should have been driving given that they each had consumed numerous drinks. Fite further testified that she had not been drinking or smoking marijuana on the night she served appellant alcohol."¹⁰

In the prior statement given by Fite, she wrote as follows:

"I was working at Hangovers on 6-21-2011. A man and woman came into the bar[.] [S]he had a Jack + Diet he had a Jack + Coke[.] [T]hey asked if food could get delivered they order a pizza had a couple more drinks (*sic*). They left said they was (*sic*) going to Zapps. About 10-10:30 they walked back in the bar said they had got (*sic*) into a fight at Zapps[.] [T]hey had one more drank (*sic*) they shot a game of pool then I said last call and they left.

Q. Do you think he should have been driving?

A. No neither one of them should of (*sic*) been driving."¹¹

In his petition, Sturgill argues as follows: " * * * the trial testimony of Samantha Fite inflated the number of drinks Petitioner had compared to her written statement provided to law enforcement. * * * A reading of her written statement suggests that Petitioner ordered as many as three drinks. * * * "¹²

⁹ *Sturgill*, supra, 2013-Ohio-4648 at ¶ 16, quoting *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52.

¹⁰ *Sturgill*, supra, 2013-Ohio-4648 at ¶ 8.

¹¹ Motion to Set Aside the Judgment of Conviction and Petition for Post-Conviction Relief, Exhibit.

¹² *Id.* at pg. 7.

However, nowhere in her written statement does Samantha Fite say that the petitioner only had three drinks on the evening in question. Fite wrote in her statement that the petitioner had a “Jack + Coke[,]” then had “a couple more” drinks, and had one more drink when he came back to the bar. There is no indication by Fite in her written statement as to how many drinks constitute “a couple more.” At trial, Fite testified that she served the petitioner four or five drinks initially and then one more drink when he returned to the bar at a later time. These statements are not inherently contradictory.

It should also be noted that the written statement and the trial testimony of Samantha Fite was consistent that she felt that the petitioner should not have been driving on the evening in question because of how many drinks he consumed.

Furthermore, as discussed by the appellate court, there was sufficient evidence that the petitioner operated a vehicle while impaired on the evening in question. In addition to the testimony by Fite and the bartender at Zappz that the petitioner was served six or seven drinks that evening (one by the bartender at Zappz and five or six by Fite)¹³, the appellant admitted to the police officers that he had been drinking on the night in question.¹⁴ Additionally, there was testimony given by Sergeant Robinson that he observed the petitioner driving and it appeared as though he was impaired, as indicated by speeding, driving into oncoming traffic, driving in the improper lane, moving within lanes, going left of center, running stop signs, passing cars on curves, and driving through yards in residential areas.¹⁵

Given this evidence, the petitioner has failed to demonstrate that there is a reasonable probability that, had defense counsel questioned Samantha Fite about her

¹³ *Sturgill* at ¶¶ 8-9.

¹⁴ *Id.* at ¶ 28.

¹⁵ *Id.*

written statement to show a possible difference, if any, between her trial testimony and written statement of at most one or two drinks served on the evening in question (depending on Fite's answer as to what she meant by "a couple more" drinks), the result of the proceeding would have been different. There was sufficient evidence presented at trial that the petitioner operated a vehicle while under the influence of alcohol on the evening in question. As such, there is not a reasonable probability that the result of the trial would have been different if Samantha Fite had been questioned by defense counsel about her written statement.

CONCLUSION

The petitioner's motion to set aside the judgment of conviction and petition for post-conviction relief is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 11-27-2013



Judge Jerry R. McBride