

IN

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

2009 JAN -7 PM 1:34

STATE OF OHIO, :
Respondent-Plaintiff, :

Case No. 03-CRI-112

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

v. :

ROSE KATE ROSEBOROUGH, :
Petitioner-Defendant. :

JUDGE JAMES D. SWEENEY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Rose Kate Roseborough filed her Petition to Vacate or Set Aside Judgment Pursuant to R.C. 2953.21 on August 29, 2005, raising five grounds for relief, each of which was supported by evidence outside the record of the case. This Court ordered an evidentiary hearing, which ultimately consisted of the deposition of Gerald Hurst, Ph.D. on April 23, 2008, and the courtroom testimony of five witnesses on August 27, 2008.

This Court, after considering all the files and records pertaining to this case, and the testimony, documents, and other evidence adduced at the hearing, makes the following Findings of Fact and Conclusions of Law:

Procedural background:

1. In November 2003, Ms. Roseborough was arrested and charged with two counts of aggravated murder with death specifications, one count of attempted aggravated murder, two counts of involuntary manslaughter, one count of aggravated arson, and two counts of child endangering in connection with the April 7, 2003 house fire that killed her 11-month-old twin daughters, Lucie and Julia Bursley.

2. Ms. Roseborough retained counsel.

3. The State presented evidence and testimony at trial that the fire began in the bedroom of Ms. Roseborough's daughter, Caitlin Miller, without the use of accelerants.

4. The State called EMT Kevin Rosser as a witness, who testified that he observed soot on Ms. Roseborough's face of a "large-particle" type that could only have been acquired at the beginning of the fire.

5. The defense called Rick Pletcher as an expert witness, who agreed that "large-particle" soot is formed in the early stages of a fire.

6. No physical evidence other than Mr. Rosser's testimony connected Ms. Roseborough to the charged offenses. The State relied on that testimony as conclusive proof that Ms. Roseborough started the fire that killed her daughters.

7. Ms. Roseborough was convicted of two counts of aggravated murder, one count of attempted aggravated murder, and one count of aggravated arson, and was sentenced pursuant to an entry dated November 15, 2004.

8. Ms. Roseborough is serving a sentence of life in prison without the possibility of parole.

9. Ms. Roseborough filed a Petition to Vacate or Set Aside Sentence Pursuant to R.C. 2953.21, contending that a) she was denied the effective assistance of trial counsel when counsel failed to obtain an appropriate expert to rebut the State's soot-related testimony, b) she was denied due process of law when the trial court refused to conduct a *Daubert* hearing or otherwise assess the validity and reliability of Kevin Rosser's testimony, c) she was denied the right to an impartial jury when the jurors improperly ignored that the cause of death had been stipulated by the parties to be smoke inhalation, d) prosecutorial misconduct deprived her of the rights to due process and fundamental fairness, and e) she was denied the right to an impartial jury due to pre-trial publicity.

Findings of Fact:

10. On August 10, 2004, the day that Kevin Rosser testified at trial for the State, defense counsel first learned that the State's theory was that the particular type of soot on Ms. Roseborough's face proved that she set the fire. Hearing Tr. 68-69.

11. When Mr. Rosser began to testify regarding this theory, defense counsel objected and requested a *Daubert* hearing to assess the scientific validity of the State's expert testimony, noting that Mr. Rosser was basing his opinion on matters involving fire chemistry. Tr. 1758. That request was denied by the trial court, which cited the "*Tomlinch*" case as the basis for its ruling. Tr. 1758-59.

12. Subsequent to the testimony of Mr. Rosser, and the State's arson investigator, Captain Tom Smith, trial counsel retained arson investigator Rick Pletcher as the lone defense witness on fire-and soot-related issues. Hearing Tr. 73.

13. Mr. Pletcher's background did not include any education or training regarding fire chemistry. Hearing Tr. 74.

14. On cross-examination, Mr. Pletcher's testimony agreed with that of Mr. Rosser, in that "large-particle" soot was supposedly formed only in the early stages of a fire. Trial Tr. 3651; Hearing Tr. 77.

15. At the postconviction hearing held August 27, 2008, defense counsel testified that there was no strategic reason for the employment of a defense expert who agreed with the State's theory regarding soot particle formation and size. Hearing Tr. 91, 104.

16. Gerald Hurst, Ph.D., an expert in fire chemistry and fire dynamics, testified at an April 23, 2008, trial deposition that the State's theory regarding soot formation was false, and that during the course of a room fire, oxygen depletion and soot agglomeration result in larger particles being produced at the end stages of a fire, rather than the beginning stages. Hurst Tr. 17-31.

17. The State offered no expert opinion to dispute Dr. Hurst's testimony.

18. Dr. Hurst testified that the knowledge he possessed regarding soot formation is also possessed by numerous other individuals, who could have testified as a defense expert witness, and that an individual possessing a Master's degree in chemistry would have been able to disprove the State's soot theory. Hurst Tr. 38-39.

19. Had Dr. Hurst or another suitable expert testified at trial, his expert testimony would have conclusively disproved the State's theory regarding soot formation and interpretation.

20. Trial counsel was aware that Mr. Rosser's testimony concerned matters of fire chemistry and were aware of the crucial importance of that testimony to the States aggravated murder case, but through a lack of diligence failed to consult with or obtain an expert witness with the appropriate education or training necessary to explain why that testimony was invalid.

Conclusions of Law:

21. With respect to Ms. Roseborough's First Ground for Relief, the test to determine if a defendant was deprived of the effective assistance of counsel is set forth in *Strickland v. Washington* (1984), 466 U.S. 668.

22. To prevail on a claim of ineffective assistance of trial counsel, Ms. Roseborough must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced him. To establish prejudice, Ms. Roseborough must demonstrate that trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 694.

23. Trial counsel's obligations include a duty to "adequately research and screen an expert witness." *Richey v. Mitchell* (6th Cir. 2005), 395 F.3d 660, 683.

24. The evidence adduced at the hearing, and the files and the record of the case, demonstrate a deficiency in defense counsel's performance at trial that undermined the proper function of the adversarial process so that it cannot be said that the trial produced a just result.

25. Trial counsel for Ms. Roseborough, in failing to obtain or even consult with an appropriate expert regarding the State's soot theory, did not act as competent counsel would. Trial counsel knew that Mr. Rosser's testimony was grounded in matters of fire chemistry, and that his testimony could be used as "proof" that Ms. Roseborough started the fire that killed her daughters. Because the defense theory was that Ms. Roseborough did not start the fire, failure to call a witness who was qualified to effectively rebut Mr. Rosser's testimony cannot be dismissed as trial strategy.

26. Ms. Roseborough was denied the effective assistance of counsel when trial counsel's performance fell below an objective standard of reasonableness, and she was severely prejudiced by that ineffectiveness, as the State was subsequently free to argue that the soot on Ms. Roseborough's face proved that she murdered her children.

27. With respect to Ms. Roseborough's Second Ground for Relief, state and federal constitutional provisions regarding due process of law require trial courts to assess the scientific validity of expert testimony. *Ege v. Yukins* (6th Cir. 2007), 485 F.3d 364, 375.

28. The soot-related testimony offered by Kevin Rosser resembles no testimony that has been previously found admissible in an Ohio court of law.

29. Despite defense counsel's request for a *Daubert* hearing regarding the bases for that testimony, the trial court ruled that the testimony was admissible, citing an Ohio case, identified as *Tomlinch*, for the proposition that it "was easy to tell he chopped off his thumb; he had chopped off his thumb because it was gone."

30. This ruling by the trial court constituted an abuse of discretion, in that it was arbitrary, unreasonable, and unconscionable.

31. In light of the critical nature of the testimony regarding the purported significance of the "type" of soot on Ms. Roseborough's face, and the lack of any physical evidence suggesting that she started the fire, the trial court's admissibility ruling deprived Ms. Roseborough of a fair trial.

32. With respect to Ms. Roseborough's Third, Fourth, and Fifth Grounds for Relief, Ohio's *aliunde* rule bars this Court from considering the substance of those claims.

Upon due consideration, this Court finds Ms. Roseborough's Petition to Vacate and Set Aside Sentence well taken. It is therefore ORDERED, ADJUDGED AND DECREED that the jury verdict and sentence rendered on November 15, 2004, are vacated. Therefore, Ms.

Roseborough's judgment of conviction is SET ASIDE AND VACATED, and a NEW TRIAL IS GRANTED.

1/6/09
DATE

James D. Sweeney
JUDGE JAMES D. SWEENEY