

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-073

Appellee

Trial Court No. 2006CR0496

v.

Richard Solether

DECISION AND JUDGMENT

Appellant

Decided: January 22, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Heather M. Baker, Assistant Prosecuting Attorney, for appellee.

Michelle L. Berry and Professor Mark A. Godsey, for appellant.

* * * * *

HANDWORK, J.,

{¶ 1} This is the second time that the case before us is on appeal from a judgment of the Wood County Court of Common Pleas. See *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio-4738 ("*Solether I*").

{¶ 2} Briefly, the facts of this cause are as follows. Appellant, Richard Solether, was charged with one count of rape, in violation of R.C. 2907.02(A)(2). Id. at ¶ 2. At appellant's trial, he and the victim presented differing testimony as to whether the sexual conduct between the two was consensual or nonconsensual. Id. at ¶ 2-3. Of importance to appellant was the fact that the victim failed to immediately report the alleged rape. However, Detective Robert Gates testified at appellant's trial that "based on his training and experience, it was not uncommon for sexual assault victims not to report the assault immediately." Id. at ¶ 6. The jury found appellant guilty on the one count of rape, and the trial court sentenced him to four years in prison. Id. at ¶ 1.

{¶ 3} On September 6, 2007, appellant timely appealed his conviction to this court. Id. During the pendency of this direct appeal, appellant filed his petition for postconviction relief pursuant to R.C. 2953.21 and a motion for a new trial pursuant to Crim.R. 33. The petition for postconviction relief was based upon the state's purported violation of *Brady v. Maryland*, (1963), 373 U.S. 83, in failing to disclose the victim's polygraph results so that appellant could use that information to impeach the testimony of Detective Gates. According to appellant, Gates' testimony was used to bolster the credibility of the victim's testimony. Appellant also filed a motion for a new trial based upon this "newly discovered" evidence, to wit, the polygraph results, that allegedly demonstrate that the victim was not truthful. Appellant again maintained that these results could be used to impeach the testimony of Detective Gates.

{¶ 4} On October 7, 2008, the trial court entered a judgment denying both appellant's petition for postconviction relief and his motion for a new trial based upon newly discovered evidence. Appellant appeals that judgment and asserts as error in the proceedings below:

{¶ 5} "The trial court abused its discretion in denying Solether's petition for post-conviction [sic] relief because the state's failure to produce the polygraph results constitutes a due process/*Brady* violation that undercuts Solether's ability to effectively cross-examine the state's expert witness under the Sixth Amendment."

{¶ 6} "II. The trial court abused its discretion in denying Solether's motion for a new trial which presented compelling new evidence of the complaining witness's untruthfulness that would have been used to effectively cross-examine the expert testimony under the Sixth Amendment."

{¶ 7} For the following reason, appellant's Assignment of Error No. I is barred by the doctrine of res judicata. This court rendered its decision in *Solether I* on September 19, 2008. At that time appellant's petition for postconviction relief was pending in the court below. Relying on *Brady v. Maryland*, supra, appellant's second assignment of error in *Solether I* alleged that the state violated his due process rights under the Sixth Amendment to the United States Constitution by failing "to produce material exculpatory evidence which hindered [his] ability to cross-examine" the testimony of Detective Gates. *Id.* at ¶ 26. In particular, appellant argued that "the state's failure to disclose the victim's polygraph examination results, indicating deception, prejudiced his ability to cross-

examine" Gates who, according to appellant, "bolstered" the victim's testimony/credibility. Id. We concluded that there was no *Brady* violation at trial because "polygraph examination results are not admissible to impeach or corroborate trial testimony." Id. at ¶ 32-33.

{¶ 8} "*Constitutional issues that have been or could have been litigated before conviction or on direct appeal * * * cannot be considered in postconviction proceedings under the doctrine of res judicata.*" (Emphasis added.) *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, ¶ 19, citing *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph seven of the syllabus. Here, this court considered and decided the due process issue raised by appellant in his petition for postconviction relief. Therefore, that issue could not be raised in that petition, and we find appellant's Assignment of Error No. I not well-taken.

{¶ 9} Appellant's Assignment of Error No. II contends that the trial court abused its discretion in overruling his Crim.R. 33 motion for a new trial based upon newly discovered evidence; specifically, the results of the victim's polygraph test. It is undisputed that appellant sought to use this newly discovered evidence at trial to impeach Officer Gate's testimony. To repeat, as we determined in *Solether I*, "polygraph examination results are not admissible to impeach or corroborate trial testimony." Id. at ¶ 32. Consequently, appellant's Assignment of Error No. II is found not well-taken. See *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3 (The law of the case doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and

reviewing levels.") See, also, *State v. Cline*, 2d Dist. No. 08CA21, 2009-Ohio-7041, ¶ 23. Therefore, the trial court did not err in overruling appellant's motion for a new trial, and his Assignment of Error No. II is found not well-taken.

{¶ 10} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.