

[Cite as *State v. Bays*, 2003-Ohio-3234.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 2003 CA 4
v.	:	T.C. NO. 94 CR 30
RICHARD R. BAYS	:	(Criminal Appeal from Common Pleas Court)
	:	Defendant-Appellant
	:	
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OPINION

Rendered on the 20th day of June, 2003.

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WOLFF, J.

{¶1} Bays appeals from the trial court’s denial of his petition for postconviction relief following an evidentiary hearing pursuant to a remand from this court.

{¶2} In December 1995, Bays was found guilty by a three-judge panel in the

Greene County Court of Common Pleas of the aggravated murder and aggravated robbery of Charles Weaver, a seventy-six year old acquaintance who had been confined to a wheelchair. Bays had used the stolen money to buy crack cocaine. The evidence against Bays included his confession to the police and his reenactment of the crime, which the trial court refused to suppress. Bays offered evidence in mitigation, including testimony about his low level of mental functioning and longstanding substance abuse, but the evidence was found to be entitled to little weight. The judges imposed a sentence of death for aggravated murder and ten to twenty-five years for aggravated robbery. Bays appealed, and both this court and the Supreme Court of Ohio affirmed his conviction. *State v. Bays* (Jan. 30, 1998), Greene App. No. 95-CA-118, and *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216. The United States Supreme Court denied certiorari. *Bays v. Ohio* (2000), 529 U.S. 1090, 120 S.Ct. 1727.

{¶3} In July 1996, Bays filed a petition for postconviction relief pursuant to R.C. 2953.21. The trial court dismissed the petition without a hearing, and Bays appealed. We concluded that Bays' evidentiary documents had warranted a hearing on "his allegations concerning his trial counsel's ineffectiveness in having failed to present witnesses and other evidence during the defendant's case-in-chief and in having failed to call Bays' wife, Martha, and her son, Scott, as witnesses during the suppression hearing and during the guilt phase of the trial." We remanded the case to the trial court for an evidentiary hearing. *State v. Bays* (Jan. 30, 1998), Greene App. No. 96-CA-118.

{¶4} At the evidentiary hearing, Martha Bays testified that police officers had pressured her to convince Bays to confess in exchange for an eight-year sentence. According to Martha Bays, she subsequently told Bays to tell the police what had

happened, but she did not tell him about the offer of leniency. Martha Bays' son testified that he had seen Bays using crack cocaine shortly before he confessed to the police. Bays offered some other evidence about the motives of an inmate who had testified against him as well. After the hearing, the trial court concluded that Bays' evidence had not been credible, and it again denied the petition for postconviction relief.

{¶5} Bays raises five assignments of error on appeal from the most recent denial of his petition.

{¶6} "1. THE TRIAL COURT ERRED BY NOT GRANTING RELIEF ON APPELLANT'S POSTCONVICTION PETITION, WHERE THE EVIDENCE ADDUCED AT THE EVIDENTIARY HEARING, IN CONJUNCTION WITH HIS POSTCONVICTION PETITION EXHIBITS, SHOWED THAT APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶7} Bays claims that trial counsel was ineffective in addressing several issues at his suppression hearing and at trial: his drug use and borderline intellect as affecting the voluntariness of his confession, his drug use shortly before his confession, coercion of his wife to get him to confess, and the credibility of an inmate who testified against him. General evidence regarding Bays' drug use and borderline intellect has been thoroughly addressed in prior proceedings. We will briefly address each of the other issues raised under this assignment of error.

{¶8} At the hearing on the petition for postconviction relief, Bays' stepson, Ryan Scott Pleukharp, testified that he had seen Bays using crack cocaine in the bathroom at their house just before the police arrived to take him in for questioning on November 19, 1993. Bays confessed to Weaver's murder a short time later. Bays' wife partially

corroborated Pleukharp's testimony by testifying that Pleukharp had told her of his observation the next day. Martha Bays also testified that she had later found drug paraphernalia on the ledge above the bathroom door. Martha Bays claimed that she had relayed all of this information to Bays' attorney at their first meeting but that he had not used it at the suppression hearing.

{¶9} The trial court found the testimony of Pleukharp and Martha Bays to be lacking in credibility, and, in our view, this conclusion was a reasonable one. On cross-examination, Martha Bays appeared to concede that, in an unrelated case, she had encouraged her son to deny involvement in a crime to which he had already confessed. Moreover, it had been determined in earlier proceedings in this case that the police had not engaged in coercive conduct and that any alleged impairment on Bays' part was not apparent to the officers. See *Bays*, 87 Ohio St.3d 15, 23, 1999-Ohio-216. Even if Bays had used crack cocaine at the time alleged, the voluntariness of his confession was not implicated if the police officers did not know of and take advantage of that fact. *State v. Smith*, 80 Ohio St.3d 89, 112, 1997-Ohio-355, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515.

{¶10} Bays also offered testimony from his wife that police officers had encouraged her to convince Bays to confess in exchange for an eight-year sentence. As discussed supra, the trial court could have reasonably concluded that Martha Bays' testimony lacked credibility. However, even if her testimony had been credible, Martha Bays conceded that, although she had told her husband to tell the police the truth, she had never told him of the alleged offer of leniency prior to his confession. As such, there is no likelihood that this evidence would have affected the outcome of a

suppression hearing on the voluntariness of Bays' confession, and counsel was not ineffective in failing to present it.

{¶11} Finally, Bays contends that his attorney was ineffective in failing to present the testimony of Richard Henson, Jr. about a fellow inmate, Larry Adkins. Adkins had testified at Bays' trial that Bays had admitted to Adkins his involvement in Weaver's murder. At the evidentiary hearing, Henson testified that Adkins had talked with him about his plan to get a deal from the state in exchange for testifying against Bays. Henson further testified that he had not been interviewed by Bays' attorney prior to trial and, although present at the courthouse, had not been called to testify on Bays' behalf. Even if we assume, for the sake of argument, that Bays' attorney should have interviewed Henson and did not do so, we would nonetheless conclude that counsel did not act ineffectively. Henson's testimony did not suggest that Adkins' statements were untruthful, only that he hoped to get a favorable deal from revealing his conversations with Bays. In other words, Henson's testimony related to Adkins' motivation in coming forward but not the truthfulness of his statements. As such, we are confident that Henson's testimony would not have affected the outcome of the trial.

{¶12} The first assignment of error is overruled.

{¶13} "II. THE TRIAL COURT ERRED BY LIMITING THE SCOPE OF THE EVIDENTIARY HEARING AND BY NOT ALLOWING RELEVANT TESTIMONY FROM APPELLANT'S EXPERT WITNESS, WHO WOULD HAVE SUPPORTED APPELLANT'S GROUNDS FOR RELIEF, AND, FURTHER, BY ALLOWING IMPROPER IMPEACHMENT ON CROSS-EXAMINATION, THUS VIOLATING APPELLANT'S RIGHT TO AN ADEQUATE STATE CORRECTIVE PROCESS."

{¶14} Bays claims that the trial court's refusal to consider evidence about the effect of his substance abuse on his psychological functioning at the time of his confession was unreasonable because the court was supposed to consider the totality of the circumstances surrounding the confession. He also claims that the state improperly attempted to impeach his wife by asking her questions about a case involving her son. Bays presented the testimony of three experts on neuropsychology and chemical dependency in the mitigation phase of his trial. On direct appeal, we considered whether the trial court ought to have also considered the testimony of these experts at a second suppression hearing. The court had refused to do so. We found that the trial court had correctly concluded that the experts' findings had not warranted reconsideration of the suppression issue. We also expressly found, "as a matter of law, [that] Bays had the mental capacity to have waived his Miranda rights knowingly and intelligently." This issue was not properly raised in Bays' petition for postconviction relief or his appeal therefrom, and we did not instruct the trial court to consider this issue on remand. For these reasons, we will not consider this argument at this time.

{¶15} Bays also contends that the trial court impermissibly allowed the prosecutor to comment upon the case involving Martha Bays' son at the evidentiary hearing on remand. The prosecutor questioned whether Martha Bays had encouraged her son to deny his involvement in a crime in which he had been prepared to admit his role. The prosecutor pursued this questioning in order to challenge the veracity of Martha's Bays' statements in support of her husband. Bays contends that this line of questioning was irrelevant and "implied that an accused does not have the right to contest the charges the state has brought against him." We disagree. The questions

explored Martha Bays' willingness to lie in criminal proceedings to obtain a favorable outcome and was therefore relevant to the credibility of her testimony.

{¶16} The second assignment of error is overruled.

{¶17} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PETITIONER TO CONDUCT COMPLETE DISCOVERY BEFORE THE EVIDENTIARY HEARING."

{¶18} Bays argues that the trial court abused its discretion by limiting his right to discovery during the postconviction proceedings. Bays sought a wide range of information related to the circumstances of his confession.

{¶19} This court and the Supreme Court of Ohio considered the voluntariness of Bays' confession on direct appeal and found that Bays had not been coerced into making a confession. Much of the information sought by Bays in discovery was not narrowly tailored to the issues on remand, which were primarily related to his alleged drug use shortly before the November 19, 1993 confession and the alleged pressure asserted on Bays' wife to get him to confess. Rather, Bays' discovery requests appeared to have been aimed at reopening all issues relevant to the voluntariness of his confession. This is clearly not what we intended on remand, and the trial court properly barred such discovery.

{¶20} We further note that R.C. 2953.21 governs the trial court's jurisdiction, and the statute does not confer upon the trial court the power to conduct and compel discovery under the Civil Rules. *State v. Dean*, 149 Ohio App.3d 93, 95-96, 2002-Ohio-4203, at ¶10; *State v. Lundgren* (Dec. 18, 1998), Lake App. No. 97-L-110. Regardless of whether a petitioner for postconviction relief is sentenced to a period of confinement

or to death, he receives no more rights than those granted by R.C. 2953.21. Thus, we reject Bays' argument that, because this was a death penalty case, he was entitled to more due process. The statute's failure to provide for discovery does not violate Bays' constitutional rights because he has no constitutional right to a state postconviction proceeding generally. See *State v. Franklin*, Montgomery App. No. 19041, 2002-Ohio-2370, at ¶61.

{¶21} The third assignment of error is overruled.

{¶22} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PETITIONER TO AMEND HIS POSTCONVICTION PETITION SO THAT IT CONFORMED TO THE EVIDENCE AFTER THE EVIDENTIARY HEARING."

{¶23} Bays contends that the trial court should have permitted him to amend his petition because he had an absolute right to do so until a responsive pleading was filed. He claims that the state never filed a responsive pleading. The parties disagree as to whether Civ.R. 15 or R.C. 2953.21(F) controls the amendment process.

{¶24} Bays filed a motion to amend his petition five days after the trial court's initial decision on his petition for postconviction relief. The trial court denied that motion while Bays' appeal of the denial of his petition was pending. In our opinion, we questioned whether we had jurisdiction to consider the denial of the motion to amend because it had been filed after the notice of appeal was filed. We noted, however, that the trial court did not abuse its discretion in denying a motion that was filed after its decision had been rendered. See *Bays*, (Jan. 30, 1998), Greene App. No. 96-CA-118.

{¶25} As discussed supra, Bays' 1996 appeal from the denial of his petition for postconviction relief resulted in a remand for the trial court to conduct a hearing on three

discrete issues. The trial court was permitted to consider those issues only. Accordingly, the trial court did not abuse its discretion in refusing to allow Bays to amend his petition on remand, and we need not address whether the rule or the statute would have governed such an amendment.

{¶26} The fourth assignment of error is overruled.

{¶27} “V. CONSIDERED TOGETHER, THE CUMULATIVE ERRORS SET FORTH IN APPELLANT’S SUBSTANTIVE GROUNDS FOR RELIEF MERIT REVERSAL OR REMAND FOR A PROPER POSTCONVICTION PROCESS.”

{¶28} Because we have found no error in the trial court’s decision, we likewise find no cumulative error. The fifth assignment of error is overruled.

{¶29} The judgment of the trial court will be affirmed.

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FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

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