[Cite as *State v. Gonzales*, 2010-Ohio-4703.]

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

State of Ohio — Court of Appeals No. WD-09-078

Appellee — Trial Court No. 2007CR0195

v.

Ironia Gonzales — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Ironia S. Gonzales, pro se.

* * * * *

COSME, J.

{¶ 1} Appellant, Ironia S. Gonzales, appeals from a judgment of the Wood County Court of Common Pleas, in which the trial court denied her motion for postconviction relief.

{¶ 2} Appellant claims that she was unavoidably prevented from discovering a ten-pound discrepancy between the weight of marijuana recorded by the arresting officer and that amount recorded by the state's Bureau of Criminal Identification and Investigation ("BCI&I") chemical analyst. Appellant asserts that the difference in the amount documented calls into question whether the evidence was tampered with. Appellant contends that since she was unaware of this discrepancy, she was unable to raise a claim of prosecutorial misconduct and ineffective assistance of counsel during her appeal as of right.

{¶ 3} We conclude, however, that not only was appellant's petition for postconviction relief untimely, the exception provided for in R.C. 2953.21 does not apply. Appellant was not unavoidably prevented from discovering this discrepancy. As well, appellant failed to satisfy her initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and to demonstrate that her defense was prejudiced by counsel's ineffectiveness. Therefore, the judgment of the trial court is affirmed.

I. BACKGROUND

{¶ 4} On September 27, 2007, a jury found appellant guilty of trafficking in marijuana with a specification, a violation of R.C. 2925.03(A)(2) and (C)(3)(f), a felony of the second degree, and possession of marijuana in violation of R.C. 2925.11(A) and (C)(3)(f), a felony of the second degree. Appellant was sentenced to a total term of eight years in prison.

{¶ 5} On October 3, 2007, appellant appealed, raising two assignments of error. Appellant argued that the search of her vehicle and its contents was unconstitutional and that the trial court erred in not granting her motion to suppress evidence and statements resulting from the search. She also argued that her convictions were against the manifest weight of the evidence. This court disagreed, holding that probable cause existed to justify the search of the Jeep and the duffle bags located inside the Jeep's cargo area. This court also held that since appellant had not filed a transcript of her trial, it "must presume the proceedings were valid" and thus, could not find in favor of appellant's argument that her conviction was against the manifest weight of the evidence. *State v. Gonzales*, WD-07-060, 2009-Ohio-168, ¶ 27.

{¶ 6} On July 13, 2009, appellant filed a petition for postconviction relief in the trial court, asserting 22 claims in which she alleged violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Appellant claimed that her trial counsel was ineffective because he did not object to the admission of the marijuana, question the discrepancy in the weight of the marijuana recorded by the arresting officer and that amount recorded by the BCI&I analyst, or argue that the evidence had been tampered with. Appellant argued that counsel was ineffective because he failed to question the sufficiency of the evidence upon which she was convicted.

{¶ 7} On October 9, 2009, the trial court rejected appellant's petition for postconviction relief, observing that "'Petitioner does not question the crime itself,' but that she has filed the petition to uphold the standards of the U.S. Constitution." The trial court

held that since the trial transcript had been filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication on November 13, 2007, appellant's petition was untimely.[1] According to the trial court, any petition should have been filed by May 13, 2008. The trial court also observed that since none of the exceptions set forth in R.C. 2953.23 applied, it could not consider the petition. It concluded that appellant was not unavoidably prevented from discovery of the facts at issue, and concluded that, subsequent to the filing of appellant's petition, the United States Supreme Court had not recognized a new right that applied retroactively to appellant's situation.

{¶ 8} Appellant then filed this appeal on November 25, 2009, asserting that the trial court erred in denying her petition for postconviction relief, in part, because she could not have timely asserted a claim for ineffective assistance of counsel. Appellant complains that since her appellate counsel, who was also her trial counsel, refused to turn the file over to her until she had exhausted her appeals, she was unavoidably prevented from discovery. Appellant argues that this evidence is exculpatory and also insists that her due process rights were violated when the prosecutor knowingly and intentionally failed to disclose this evidence to her.

[1]Appellant did not file a trial transcript. Instead, she filed a transcript of the hearing on her motion to suppress and the deposition testimony of BCI&I analyst.

II. DISCOVERY

{¶ 9} In her first assignment of error, appellant maintains that:

{¶ 10} "The court committed error when declining the appellant's post conviction petition under R.C. Law 2953.21 and 2953.23."

{¶ 11} Appellant argues that the trial court abused its discretion in declining her petition for postconviction relief when it: (A) denied her an evidentiary hearing; (B) concluded that she was not unavoidably prevented from discovery; and (C) concluded that trial counsel was not ineffective.

{¶ 12} We disagree.

{¶ 13} A petition for postconviction relief under R.C. 2953.21 is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. See *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281. See, also, *State v. Macias*, 6th Dist. No. L-01-1391, 2003-Ohio-684, ¶ 10; *State v. Davis*, 7th Dist. No. 08 MA 174, 2009-Ohio-4634, ¶12. "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record." *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, discretionary appeal not allowed (2001), 92 Ohio St.3d 1441. R.C. 2953.21 et seq., affords a prisoner postconviction relief "only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph four of the syllabus. See *State v. McKnight*, 4th

Dist. No. 07CA665, 2008-Ohio-2435, ¶ 16, citing R.C. 2953.21(A)(1); *State v. Calhoun* (1999), 86 Ohio St.3d 279, 283. A postconviction petition does not provide a petitioner a second opportunity to litigate the conviction. *State v. Hessler*, 10th Dist. No. 01 AP-1011, 2002-Ohio-3321, ¶ 32. See *State v. Jackson* (1980), 64 Ohio St.2d 107.

{¶ 14} The denial of a postconviction petition will not be overturned on appeal absent a finding of abuse of discretion. *State v. Williams*, 165 Ohio App.3d 594, 2006-Ohio-617, ¶ 20. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} Appellant acknowledges her petition was untimely filed. The trial court lacks jurisdiction to consider an untimely petition for postconviction relief unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. West*, 2d Dist. No. 08CA0102, 2009-Ohio-7057, ¶ 7. Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for postconviction relief (1) if she was unavoidably prevented from discovering the facts upon which she relies to present her claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to her situation. Id. If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which she suffered, no reasonable factfinder would have found her guilty. R.C. 2953.23(A)(1)(b).

{¶ 16} Although she concedes her petition was untimely filed, appellant argues that the trial court had jurisdiction to consider her petition. Relying on R.C. 2953.23(A)(1)(a),

appellant asserts she was unavoidably prevented from discovering the discrepancy between the amounts of marijuana recorded by the arresting officer and the state's BCI&I agent, thus calling into question the sufficiency of the evidence upon which she was convicted. Appellant argues that the state did not meet its burden for establishing a proper chain of custody and could not show that it was reasonably certain that substitution, alteration, or tampering did not occur. She also questions the credibility of the officer involved and contends that the state was aware of this discrepancy and its exculpatory potential but deliberately refused to disclose it. Appellant also claims that her trial counsel was ineffective when he failed to inquire into the discrepancy. Thus, appellant asserts that the outcome of the trial could have been very different.

{¶ 17} Appellant contends she is entitled to an evidentiary hearing in order to demonstrate evidence of ineffective assistance of counsel, prosecutorial misconduct, and tampering with evidence, which would in turn cast the outcome of the trial in doubt.

A. Evidentiary Hearing

{¶ 18} Under R.C. 2953.21, a petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282. The Supreme Court of Ohio has held that proper bases for dismissing a petition for postconviction relief without holding an evidentiary hearing include: (1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and (2) the operation of res judicata to bar the constitutional claims raised in the

petition. *State v. Calhoun* (1999), 86 Ohio St.3d 279, at paragraph two of the syllabus; *State v. Lentz* (1994), 70 Ohio St.3d 527, 530.

(1) Substantive Grounds for Relief

{¶ 19} It is well settled that, before granting an evidentiary hearing, the trial court must determine whether the petitioner has set forth any substantive grounds for relief, namely "whether there are grounds to believe 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.'" *Calhoun*, 86 Ohio St.3d at 282-283, quoting R.C. 2953.21.

{¶ 20} Furthermore, before a hearing is granted in proceedings for postconviction relief upon a claim of ineffective assistance of trial counsel, the petitioner bears the initial burden to submit evidentiary material containing sufficient operative facts to demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's ineffectiveness. *Calhoun*, 86 Ohio St.3d at 289. See *State v. Jackson* (1980), 64 Ohio St.2d 107, syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693.

(2) Res Judicata

{¶ 21} Another proper basis upon which to deny a petition for postconviction relief without holding an evidentiary hearing is res judicata. *State v. Lentz* (1994), 70 Ohio St.3d 527, 530.

{¶ 22} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus, approving and following *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. It is well-settled that, "pursuant to res judicata, a defendant cannot raise an issue in a [petition] for postconviction relief if he or she could have raised the issue on direct appeal." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161.

{¶ 23} Accordingly, "[t]o survive preclusion by res judicata, a petitioner must produce new evidence that would render the judgment void or voidable and must also show that he could not have appealed the claim based upon information contained in the original record." *State v. Nemchik* (Mar. 8, 2000), 9th Dist. No. 98CA007279. See *State v. Ferko* (Oct. 3, 2001), 9th Dist. No. 20608.

{¶ 24} Similarly, regarding claims of ineffective assistance of trial counsel in postconviction proceedings, where a defendant, represented by different counsel on direct appeal, "fails to raise [in the direct appeal] the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole* (1982), 2 Ohio St.3d 112, syllabus; see *Lentz*, 70 Ohio St.3d at 530.

{¶ 25} Significantly, evidence outside the record alone will not guarantee the right to an evidentiary hearing. *State v. Combs* (1994), 100 Ohio App.3d 90, 97. Such evidence "'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of [*State v. Perry* (1967), 10 Ohio St.2d 175] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'" *State v. Lawson* (1995), 103 Ohio App.3d 307, 315. (Bracketed material added.) (Citation omitted.)

B. Appellant was not Unavoidably Prevented from Discovery

{¶ 26} Applying the above discussed standards for relief, we consider appellant's claim that she was entitled to a hearing because she did not discover the discrepancy in the amount of marijuana collected until after her time for direct appeal and postconviction relief had passed.

{¶ 27} Appellant argues that there existed a discrepancy between the amount of marijuana seized by Sergeant Gazarek of the Perrysburg Township Police Department and the amount recorded by the state's BCI&I analyst, Scott Dobransky. Appellant relies upon the Police Report, the Property Record/Field Report, the deposition testimony of Dobransky, and the transcript of the suppression hearing to suggest that she was unavoidably prevented from discovering this discrepancy.

{¶ 28} The Police Report prepared by Sergeant Gazarek and attached to appellant's petition states five packages together weighing "approximately 160 lbs. were seized." It also notes that the weight of the individual bundles was "consistent with the weights that

were already written on the exterior of the wrapping." The Property Record/Field Report listed the individual weight of each individual package, the total of which is 160 lbs.

{¶ 29} In his deposition, Dobransky testified that the total weight of the marijuana was 150 pounds. On cross-examination, appellant's counsel elicited that Dobransky had removed the packaging in which the product had been wrapped before weighing it. On redirect, the state asked, "What, if anything happens to marijuana over time, in regards to weight, if anything?" Dobransky responded that "[v]egetative material has an inherent amount of moisture present in the plant. It will continue to decompose and lose water weight * * *." On re-cross, appellant's counsel also asked whether "the marijuana would continue to decompose over time and lose water weight," to which Dobransky replied, "Yes."

{¶ 30} Appellant and appellant's counsel, along with the state, were present at the deposition and appellant's counsel was afforded the opportunity to question Dobransky. Further, the parties had stipulated to the chain of custody. Appellant's counsel, Mr. Kelly, stated: "We're confident that these are, in fact, the items taken from the Jeep. We've seen the labels and we've seen the detective and Mr. Helm, we've seen everything take place, so we feel like it's probably okay to stipulate to them."

{¶ 31} Neither the Police Report nor the Property Record/Field Report was submitted into evidence during the deposition or the suppression hearing. The indictment reflected that "the amount of drug involved equals or exceeds twenty thousand grams." Dobransky testified that there are 454 grams in a pound. Thus, the indictment charged

appellant with possession of at least 44 pounds of marijuana. Appellant claims that since the Police Report or the Property Record/Field Report were not submitted at this hearing and neither Sergeant Gazarek nor his partner, Agent Ackley, who inventoried the marijuana, testified about the amount of marijuana they collected, she had no knowledge of the discrepancy.

{¶ 32} Appellant claims that her trial counsel refused to provide her with a copy of the case file, and the discovery received from the state, until after this court ruled on her original appeal. She asserts that because of trial counsel's conduct, she could not have obtained this information before time ran on her direct appeal and petition for postconviction relief.

{¶ 33} A petition for postconviction relief may be dismissed when the record indicates that the petitioner is not entitled to relief and "the petitioner did not submit evidentiary documents containing sufficient operative facts to demonstrate that substantive grounds for relief exist." *State v. Smith* (Feb. 23, 2001), 6th Dist. L-99-1310, citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 38.

{¶ 34} Here, as on the direct appeal, we are again confronted by the fact that there is no trial transcript. Pursuant to App.R. 9(B), the appellant has the burden to provide transcripts on appeal. Without the trial transcript, we cannot ascertain whether the Police Report or the Property Record/Field Report was introduced into evidence and whether Sergeant Gazarek, BCI&I Agent Dobransky, or Agent Ackley testified regarding the weight of the marijuana collected.

{¶ 35} Additionally, appellant's assertions belie the record. Although appellant complains she was unaware of the difference in the amount of marijuana recorded by Sergeant Gazarek and the amount of marijuana recorded by Dobransky, she states in her own brief, "Fact: a highly trained office [sic] of Perrysburg Township Police Department, testified under oath, to his findings of 160 pounds of marijuana at appellant's suppression hearing dated September 11, 2007, and through out all of Perrysburg Police Department confidential reports. Fact: Forensic Scientist, a highly trained, and educated, employed at BCI&I, testified, under oath, of his findings to be 150 pounds of marijuana and Appellant's Evidentiary hearing on September 18, 2007."

{¶ 36} All of the evidence appellant alludes to in her petition, was evidence that was discoverable at the time of trial and which appellant's counsel could have submitted at trial. As such, we conclude that appellant has failed to submit "'new, competent, relevant and material evidence dehors the record.'" *State v. Cowan*, 151 Ohio App.3d 228, 2002-Ohio-7271, ¶ 15, quoting *State v. Redd* (Aug. 31, 2001), 6th Dist. No. L-00-1148.

{¶ 37} We conclude that these facts were known to and discoverable by appellant at the time of the trial court's original judgment and sentence; appellant was not unavoidably prevented from presenting them to the court in a timely manner.

{¶ 38} Thus, we turn to appellant's claim of ineffective assistance of counsel.

C. Trial Counsel was not Ineffective

{¶ 39} In order for appellant to be entitled to an evidentiary hearing in a postconviction relief proceeding on a claim that she was denied effective assistance of

counsel, the two-part *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, test is to be applied. *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203; *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142; *State v. Cole* (1982), 2 Ohio St.3d 112, 114. Appellant must prove that: (1) counsel's performance fell below an objective standard of reasonable representation; and (2) there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. Id.

{¶ 40} Furthermore, before a hearing is granted in proceedings for postconviction relief upon a claim of ineffective assistance of trial counsel, appellant bears the initial burden to submit evidentiary material containing sufficient operative facts that demonstrate "a substantial violation of any of defense counsel's essential duties to his client" and prejudice arising from counsel's ineffectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397. See *State v. Jackson* (1980), 64 Ohio St.2d 107, syllabus; see, also, *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Phillips* (Feb. 27, 2002), 9th Dist. No. 20692.

{¶ 41} Appellant argues that she was enjoined from asserting the ineffectiveness of appellant's trial counsel because her trial counsel was also her appellate counsel. Due to the obvious, inherent conflict of interest, trial counsel cannot be expected to explore and present on appeal the issue of counsel's own ineffectiveness at trial.

{¶ 42} We agree that "counsel cannot realistically be expected to argue his own incompetence." *State v. Cole* (1982), 2 Ohio St.3d 112, 113, fn. 1. See *State v. Carter* (1973), 36 Ohio Misc. 170. Therefore, where the same attorney handles both the trial and an appeal from a conviction, the doctrine of res judicata does not preclude the defendant from raising an ineffectiveness claim in a later petition for postconviction relief.

{¶ 43} Where ineffective assistance of counsel is alleged in a petition for postconviction relief, appellant, in order to secure a hearing on her petition, must proffer evidence which, if believed, would establish not only that her trial counsel had substantially violated at least one of a defense attorney's essential duties to his client but also that said violation was prejudicial to the defendant. *State v. Smith*, 6th Dist. No. L-99-1310. See *State v. Pankey* (1981), 68 Ohio St.2d 58, 59. See, also, *State v. Jackson* (1980), 64 Ohio St.2d 107; *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Hester* (1976), 45 Ohio St.2d 71.

{¶ 44} Generally, the introduction in an R.C. 2953.21 petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata. In this case, however, appellant does not offer any evidence outside the record.

{¶ 45} To establish prejudice, appellant may not necessarily rely upon a showing that, in the absence of the attorney's deficient performance, the outcome of the guilt or penalty phase would have been different. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180. Appellant must show that she was denied some substantive

or procedural right that made the "trial unreliable or the proceeding fundamentally unfair." Id. at 372.

{¶ 46} Additionally, appellant is required to demonstrate that she was prejudiced by defense counsel's tactics, and not just that a better strategy may have been available. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶ 47} In this case, appellant insists that her trial counsel was ineffective because he did not question Sergeant Gazarek and Dobransky about the discrepancy in the weight of the marijuana recorded by them. Appellant claims that her attorney failed to investigate the chain of custody, question the prosecutor's motives for withholding what she asserts is exculpatory evidence, and attack the credibility of the arresting officer.

{¶ 48} However, trial counsel's decision to make or not make objections does not establish ineffective assistance of counsel. *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, ¶ 24. See *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, ¶ 76; *State v. Guenther*, 9th Dist. No. 05CA008663, 2006-Ohio-767, ¶ 74. Appellant's argument that her counsel was ineffective "by not bringing forth that the marijuana had been tampered with," falls short of satisfying her burden of proof that her counsel's failure to object was so serious as to deprive her of a fair trial. "There are numerous avenues through which counsel can provide effective assistance of counsel in any given case, and debatable trial strategies do not constitute ineffective assistance of counsel." *State v. Diaz*, 9th Dist. No. 04CA008573, 2005-Ohio-3108, ¶ 23.

{¶ 49} Furthermore, appellant has failed to demonstrate that absent counsel's ineffectiveness the result of her trial would have been different. Appellant concedes that the difference in the weight of the marijuana does not change the sentencing guidelines, but claims that it does change the fact that "the evidence is tampered with, and insufficient for a conviction."

{¶ 50} As to the sufficiency of the evidence, we note that "[a]lthough the state bears the burden of establishing a proper chain of custody, that duty is not absolute. * * * The state need only establish that it is reasonably certain that substitution, alteration or tampering did not occur. * * * Moreover, breaks in the chain of custody go not to the admissibility of evidence, but to the weight afforded it." *State v. Blevins* (1987), 36 Ohio App.3d 147, 150. (Citations omitted.)

{¶ 51} In this case, appellant was indicted for trafficking and possession of drugs in an amount greater than 20,000 grams, or 44 pounds of marijuana. We cannot say that appellant was prejudiced by trial counsel's refusal to inquire further into the supposed ten pound difference, the loss of some of which the state attributed to the removal of the wrapping prior to weighing and the loss of moisture due to decomposition. As well, the Property Record/Field Report considers the weight an approximation based on the package labels instead of a precise measurement. There is no evidence that the outcome of the trial would have been affected had trial counsel chosen to confront the witnesses concerning the discrepancy in the weight of the marijuana.

{¶ 52} Accordingly, appellant's first assignment of error is not well-taken.

III. DUE PROCESS

{¶ 53} In her second assignment of error, appellant maintains that:

{¶ 54} "The court committed error in the denial of appellant's post conviction petition, which caused an infringement of justice by violating her U.S. Constitutional rights under the 5th, 6th and 14th amendments."

{¶ 55} We disagree.

{¶ 56} Appellant argues that the intentional concealment of the discrepancy in the weight of the marijuana constitutes misconduct by the prosecutor and violates her right to due process of law. In *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, the United States Supreme Court stated, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material * * * to guilt * * * irrespective of the good faith or bad faith of the prosecution." In *United States v. Agurs* (1976), 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342, the court extended the rule of *Brady* to apply to all obviously exculpatory evidence in the hands of the prosecutor, which "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce," even if there be no general or specific request for such exculpatory evidence.

{¶ 57} In this case, appellant contends that she was denied a fair trial and due process because the state withheld exculpatory evidence. Specifically, appellant alleges that the prosecution was aware that there was a difference in the amount of marijuana recorded in the reports of Sergeant Gazarek of the Perrysburg Township Police

Department and the report of Dobransky. To the extent appellant's assignment of error can be construed as an alleged violation of *Brady*, appellant must establish: (1) the prosecutor suppressed information; (2) the information was favorable to the defense; and (3) the information was material. The record is barren that any such evidence was kept from appellant. As appellant herself observes, the weight of the marijuana collected by Sergeant Gazarek was documented in the Police Report and the Property Record/Field Report, was disclosed during the motion to suppress hearing, and was disclosed during Dobransky's deposition. Moreover, appellant concedes that all of the reports and discovery obtained from the state were in trial counsel's possession and this evidence clearly reflected the discrepancy in the weight of the marijuana.

{¶ 58} However, appellant does not suggest that the prosecutor failed to disclose this evidence. Instead, appellant complains that the prosecutor did not specifically note the difference, did not specifically inform her, and suggests that the state should have done the math for her. Appellant further complains that this was evidence that her trial counsel had in his possession, but refused to turn over to her until she had exhausted her direct appeal. Appellant's argument that this evidence was not disclosed to her is unsupported by the record.

{¶ 59} The discrepancy was apparent and minor. Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶1} We conclude that the trial court did not err in denying appellant's petition for postconviction relief because the petition was untimely filed. Appellant was not unavoidably prevented from discovery of the facts upon which she relied to present her claim for relief. Appellant's trial counsel was not ineffective for failing to question the apparent discrepancy in the weight of the marijuana.

{¶2} Wherefore, based upon the foregoing, the judgment of the Wood County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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

Keila D. Cosme, J. _____
CONCUR.
JUDGE