[Cite as *State v. Vess*, 2011-Ohio-3118.]

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

State of Ohio

Appellee

v.

Robin Vess

Appellant

Court of Appeals No. OT-10-038

Trial Court Nos. CRB 1000080 A-Z
CRB 1000081 A-P

DECISION AND JUDGMENT

Decided: June 24, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Leonard W. Yelsky, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Municipal Court finding defendant-appellant Robin Vess guilty of 42 counts of animal cruelty in violation of R.C. 959.13(A)(1). For the reasons that follow, we affirm.

{¶ 2} On January 29, 2010, humane society officers arrived at appellant's farm in Ottawa County to investigate the condition of the horses on that farm in response to a call made to the humane society. That night, a decision was made to remove the horses from that location. On February 1, 2010, the Ottawa County Humane Society filed a criminal complaint against appellant, charging her with 42 counts of animal cruelty, stemming mainly from her alleged failure to provide adequate food and water to the horses on her farm. Trial to a jury began on April 27, 2010.

{¶ 3} In its case in chief, the prosecution presented four witnesses. The first was Shayna Roberts, a humane society officer present at appellant's farm on January 29, 2010, who testified as to her observations of the condition of the horses, and who authenticated the photographs of each horse, which the prosecution entered into evidence. The second witness was Nancy Miller, who had known appellant for many years through their common involvement with the Arabian Horse Club of Greater Toledo. Miller testified regarding whether appellant was knowledgeable about horses, the amount and type of food that horses generally eat, and her general observations of appellant's horses a few days after they were removed from the farm. Finally, the prosecution presented two experts, veterinary doctors Avery and Lavigne, both of whom personally viewed the horses and testified extensively as to the condition of the horses and that the cause of the horses' condition was malnutrition.

{¶ 4} On April 30, 2010, the jury found appellant guilty on all the counts as charged. Following the guilty verdict, appellant moved for a new trial on the grounds of

newly discovered evidence. In support of her motion, appellant provided two affidavits from third parties claiming that Miller revealed to the charging humane society officer, Nancy Silva, that Miller was testifying in the case because she had a "vendetta" against appellant. Appellant argued that this newly discovered evidence entitled her to a new trial because Miller's testimony was tainted by the vendetta, and because the prosecutor committed a *Brady* violation by not disclosing this exculpatory evidence to the defense.

{¶ 5} The trial court denied appellant's motion on the grounds that it failed to satisfy the requirements for granting a new trial based on newly discovered evidence as articulated in *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370. However, the trial court did not address appellant's claim of a *Brady* violation, except to say in the judgment entry's conclusion: "A jury considered several days of witness testimony, plus over fifty (50) exhibits admitted into evidence, before finding [appellant] guilty of all forty-two (42) counts of animal cruelty. *[Appellant] does not suggest any misconduct on the part of the jury, prosecuting attorney, or witnesses for the State. (Criminal Rule 33(A)(2)).* Furthermore, [appellant] does not suggest any irregularity in the proceedings or rulings of the Court to conclude that [appellant] was otherwise prevented from having a fair trial. (Criminal Rule 33(A)(1))." (Emphasis added.)

{¶ 6} On September 24, 2010, the trial court sentenced appellant to the maximum term of 90 days on each count, subject to the aggregate maximum sentence for misdemeanors of 18 months. The trial court suspended all but one day of the sentence on each count on the condition that appellant is placed on probation and abides by certain

terms for the next five years. The trial court further ordered appellant to pay a fine of $100 and costs on each case for a total of $8,711.87. On October 22, 2010, the trial court stayed the execution of the sentence pending this appeal.

{¶ 7} Appellant now raises the following two assignments of error:

{¶ 8} 1. "TRIAL COUNSEL FOR ROBIN VESS PROVDED VESS WITH INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE COURSE OF HIS PRETRIAL PREPARATION AND IN HIS TRIAL CONDUCT."

{¶ 9} 2. "IT CONSTITUTED PREJUDICIAL ERROR WHEN THE TRIAL COURT OVERRULED AND DENIED ROBIN VESS' MOTION FOR NEW TRIAL."

Ineffective Assistance of Counsel

{¶ 10} In support of her first assignment of error, appellant argues that her trial counsel was ineffective in that he failed to adequately inform appellant of the consequences of not accepting the state's offer to dismiss 39 counts of cruelty to animals in exchange for appellant's plea of guilty to three counts of cruelty to animals. Alternatively, appellant argues that her trial counsel was ineffective for failing to request discovery that could have allowed counsel to attack the testimony of the state's experts.

{¶ 11} To prevail on a claim of ineffective assistance of counsel, appellant must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To meet this

standard, appellant must satisfy a two-prong test. First, appellant "must show that counsel's performance was deficient," which can be shown by demonstrating that counsel's representation fell below an objective standard of reasonableness. *Strickland* at 687-688. Under this prong, "judicial scrutiny of counsel's performance must be highly deferential * * * a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Bradley* at 142 (quoting *Strickland* at 689). Second, appellant "must show that the deficient performance prejudiced the defense." *Strickland* at 687. To establish prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

{¶ 12} For her first claim of ineffective assistance of counsel, appellant alleges that her attorney's performance was deficient because he failed to perform his duty to advise her fully on whether a particular plea is desirable. In support of this allegation, appellant refers solely to an affidavit that she filed in the trial court in support of her motion to suspend the execution of the sentence, in which she states:

{¶ 13} "9. Attorney Davis told me that the State offered a plea bargain to me. According to Davis the bargain the State offered to me was that I would plead guilty to 3 counts of animal cruelty and that 39 counts would be dismissed by the State.

{¶ 14} "10. Attorney Davis told me further that if I accepted the plea deal (a guilty plea to three counts) he could not guarantee that I would not receive jail time. Moreover, Davis told me that he would "win" at trial in this matter – as to all 42 counts. More than

once, and several times Davis told me that he felt "good" about his chances of winning at trial.

{¶ 15} "11. Attorney Davis never told me the sentence that I could receive if convicted at trial on all 42 counts of animal cruelty. Attorney Davis never told me that I could receive 18 months total jail time if convicted on all 42 counts, and he never told me that several thousand dollars of fines could be levied against me if convicted on all 42 counts of animal cruelty.

{¶ 16} "* * *

{¶ 17} "13. Attorney Davis never told me the maximum jail sentence nor did he tell me the maximum fines that could be imposed if I accepted the plea agreement offered and plead guilty to three counts of animal cruelty.

{¶ 18} "14. Had I been fully informed of the ramifications of accepting the State's plea offer compared to the ramifications of being found guilty of 42 counts of animal cruelty, I would have seriously considered accepting the State's plea offer to plead guilty to three counts of animal cruelty."

{¶ 19} Appellant points to no other facts, and our review of the record fails to reveal any, that would support the allegation that appellant's trial attorney failed to inform her of the consequences of accepting or rejecting the state's plea offer. Thus, the only evidence in the record available to us for the determination of this claim is appellant's own affidavit in support of her motion to suspend the execution of the sentence. The

state argues that this is insufficient, and resolution of this issue requires additional evidence from outside the record. We agree.

{¶ 20} "[W]hen the trial record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation." *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (citing *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304). The General Assembly has provided procedures for such an evidentiary hearing through the postconviction remedies of R.C. 2953.21. *State v. Cooperrider* at 228.

{¶ 21} It may or may not be that appellant can demonstrate sufficient facts to state a claim of ineffective assistance of counsel. However, we hold that appellant's self-serving affidavit is insufficient, without additional facts from the record, to support this court's determination of the issue. In *State v. Walker* (Dec. 29, 2000), 6th Dist. No. L-99-1383, this court stated that claims for ineffective assistance of counsel based on conversations occurring between trial counsel and the appellant that are not contained in the record may only be raised in an action for postconviction relief. In *Walker*, the appellant claimed that his trial counsel was ineffective because "his trial counsel incorrectly advised him as to the applicable law regarding the consequences of accepting a plea bargain in that appellant's trial counsel grossly overstated the probable sentencing range." Id. In deciding that his claim was not barred by res judicata, this court concluded that "[Walker's] claim of ineffective assistance of trial counsel relied on evidence outside the record and, therefore, was not and could not have been raised on direct appeal to this

court." Id. Similarly, in the present case, because appellant's claim relies on conversations between her and her trial counsel that are not contained in the record, the appropriate forum is not a direct appeal, but rather is a postconviction relief hearing under R.C. 2953.21.

{¶ 22} In contrast to her first claim, the lack of a written request in the record for discovery pursuant to Crim.R. 16 provides us with sufficient information to determine appellant's second claim of ineffective assistance—that her trial counsel was deficient when he failed to request discovery from the state that could have allowed him to attack the testimony of the state's expert witnesses. To support her claim, appellant argues that her trial counsel's failure to request discovery was unreasonable because, without discovery, "defense counsel could not know that Dr. Avery would not even be able to form an opinion based upon reasonable medical certainty at trial * * * [and] could not have prepared for the garbled, disjointed, and ill prepared testimony of Dr. Lavigne." In addition, appellant asserts that because of this failure, she suffered prejudice when she was found guilty on all 42 counts. We disagree.

{¶ 23} The general rule in Ohio is that "even debatable trial tactics do not constitute a deprivation of the effective assistance of counsel." *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (quoting *People v. Miller* (1972), 7 Cal.3d 562, 573-74, 102 Cal.Rptr. 841, 498 P.2d 1089). Specifically, "the decision of whether to submit a request for discovery 'is presumed to be a trial tactic which does not constitute ineffective assistance of counsel.'" *Toledo v. Flugga*, 6th Dist. No. L-06-1121,

2007-Ohio-0098, ¶ 12 (quoting *State v. Whittsette*, 8th Dist. No. 85478, 2005-Ohio-4824, ¶ 35). Here, appellant's own affidavit indicates that her trial counsel's decision not to pursue discovery was a tactic aimed at protecting some of her information from the prosecution. Notably, appellant states that "Mr. Davis told me that he was not going to ask the State for Discovery [sic] because that would then give them the write [sic] to demand it in return, and he did not want to be in the position to have to release our information." Thus, we hold that the conduct of appellant's trial counsel constituted a trial tactic, and appellant, therefore, has failed to satisfy the first prong required to show ineffective assistance of counsel.

{¶ 24} Moreover, appellant has failed meet the second prong of *Strickland*—that a reasonable probability exists that the trial outcome would have been different had her trial counsel been effective. Appellant hinges her claim on the blanket assertion that competent counsel would have requested discovery, and, consequently, (1) would have known that "Dr. Avery would not even be able to form an opinion based upon reasonable medical certainty at trial," and (2) could "have prepared for the garbled, disjointed, and ill prepared testimony of Dr. Lavigne."

{¶ 25} As a first matter, our review of the trial transcript has revealed, contrary to appellant's assertion, that Dr. Avery did in fact testify to a reasonable degree of medical certainty that the horses' condition was caused by malnutrition, and that Dr. Lavigne's testimony was not garbled, disjointed, or ill prepared. Further, appellant in no way describes how the "discovery, tests or reports on the work done by the two State

veterinary doctors" would have enabled counsel to impeach those doctors. As such, appellant has failed to provide us with any arguments from which we could conclude that a reasonable probability exists that the trial outcome would have been different had her trial counsel requested discovery.

{¶ 26} Therefore, because appellant has failed to satisfy both prongs of the *Strickland* test as to the claim based on a failure to seek discovery, and because direct appeal is not the appropriate forum for a claim of ineffective assistance of counsel based on facts outside of the record, appellant's first assignment of error is not well-taken.

Motion for a New Trial

{¶ 27} Appellant raises as her second assignment of error that the trial court erred in denying her a new trial. Appellant's brief in support of her "Motion for New Trial Based on Newly Discovered Evidence" contained two arguments: (1) the alleged bias of Miller, as evidenced by her "vendetta" against appellant, was newly discovered evidence that entitled appellant to a new trial, and (2) the prosecution's failure to disclose this evidence constituted a violation pursuant to *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 28} The trial court, in denying the motion, found that appellant failed to meet the six criteria required for a new trial based on newly discovered evidence as outlined in *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370. Specifically, the trial court found that appellant "failed to establish (1) that she was unavoidably prevented from obtaining the 'newly discovered' evidence; (2) that a strong probability that the trial results would

have been changed [sic]; and (3) that Miller's alleged bias is anything more than an attack on her credibility as a witness providing testimony at trial."

{¶ 29} Appellant now bases her assignment of error solely on the argument that a new trial was warranted because of the *Brady* violation; and requests that this court review this issue under a due process analysis. *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898. The state, on the other hand, argues that this court must apply an abuse of discretion standard when reviewing a trial court's denial of a motion for new trial based on newly discovered evidence. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 82. Because appellant properly raised the issue of the *Brady* violation in the trial court, we believe a fair adjudication requires us to apply the appropriate due process analysis on appeal. Nevertheless, we conclude that under either standard, appellant is not entitled to a new trial.

<u>Brady Violation</u>

{¶ 30} Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, supra, at 87. Notably, this doctrine has been extended such that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley* (1995), 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490. In addition, this doctrine applies whether there has been a specific request, a general request, or, as here, no request by the

defendant for exculpatory evidence. *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶ 31} Appellant's theory of this assignment of error is essentially that Miller testified at the trial because she had a vendetta against appellant, and therefore she was a biased witness. In addition, because Miller stated that she had a vendetta in the presence of Silva, Silva consequently had knowledge of Miller's bias. Further, because Silva was an officer for the Ottawa County Humane Society, the arresting agency in the case, the prosecutor had a duty to learn of the exculpating evidence, in this case, Miller's bias. Finally, because the prosecutor did not disclose the exculpating evidence, appellant's due process rights were violated.

{¶ 32} Appellant's theory fails, however, because a *Brady* violation only occurs when the prosecutor suppresses *material* evidence. The United States Supreme Court has defined whether evidence is material as "[whether] there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston*, supra, at 61 (quoting *United States v. Bagley*, supra, at 682). Assuming for the purposes of this analysis only that Miller had a vendetta and was consequently biased against appellant, we conclude based on our analysis of Miller's testimony in conjunction with the other testimony produced at trial that a reasonable probability does not exist that the result of the proceeding would have been different had the evidence been disclosed.

{¶ 33} Miller first testified as to appellant's status as a knowledgeable horse owner. On this issue, knowledge of Miller's alleged bias would not have altered the outcome of the trial because several of appellant's witnesses also testified to this fact.

{¶ 34} Miller next testified as to how much food and water horses generally consume, and how much food should generally be kept on hand. On this issue, any prejudice that could have been caused by Miller's bias was effectively nullified on cross-examination, where appellant's trial counsel elicited that the amount of food required is usually determined by what the horse looks like, and that Miller could not testify as to how much food appellant's horses would need. Further, substantial other testimony existed specifically as to the amount of food located in appellant's barn, whether that food was sufficient to feed appellant's horses, and as to how much food had recently been ordered by appellant. As such, on this issue we cannot say a reasonable probability exists that the trial outcome would have been different had Miller's alleged bias been disclosed.

{¶ 35} The final issue Miller testified to was the condition of the horses. Miller's testimony on this issue was limited to two responses, one on direct examination in which she said, "My observations of the horses were they all had blankets on, but a couple of them the blankets were pulled forward to show other people, and I observed they were very thin. The horses were very lethargic and very quiet and really disinterested. Just looked like horses that were depressed and very thin." The second response was on re-direct where Miller testified as to the thinness of one particular horse. On this issue, we again cannot say that Miller's alleged bias created a reasonable probability that the trial

outcome would have been different in light of the voluminous specific and detailed testimony of the state's two expert witnesses regarding the condition of the horses, the testimony of Shayna Roberts regarding the condition of the horses, and the admission into evidence of over 50 photograph exhibits depicting the horses.

{¶ 36} Therefore, we hold that the exculpatory evidence of Miller's alleged bias is insufficient to undermine confidence in the outcome of trial. Consequently, appellant's claim of a *Brady* violation must fail, and she is not entitled to a new trial.

Newly Discovered Evidence

{¶ 37} Turning to the trial court's denial of the motion for new trial based on newly discovered evidence, as an initial matter, we note that in her brief in support of her motion, appellant has confused the newly discovered evidence with the potentially exculpatory evidence that the prosecutor may have had a duty to disclose. Appellant claimed that the newly discovered evidence was the fact that Miller testified because of a vendetta against appellant. Actually, however, the evidence is the statements of the affiants, not the facts contained in those statements; indeed, like all evidence, the statements are the means by which those facts are proven. Applying that principle, contrary to appellant's assertion, the newly discovered evidence is not that Miller testified because of a vendetta. Rather, the newly discovered evidence is the statements from the affiants, Linda Logan and A. Kristina Burkhart. The distinction is significant.

{¶ 38} For example, for appellant to prove that a new trial is warranted on the basis of newly discovered evidence, such evidence must be admissible in the new trial.

See *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, at paragraph one of the syllabus (requiring that hearsay evidence meet one of the hearsay exceptions to allow it to support a motion for a new trial). Here, a statement from Miller revealing that she testified because she had a vendetta against appellant would have been admissible. In contrast, the evidence offered by appellant in the form of Linda Logan's statement that she heard Miller say in the presence of Silva that she had a vendetta against appellant, and A. Kristina Burkhart's statement that Linda Logan told her that Miller said in the presence of Silva that she had a vendetta against appellant, constitutes inadmissible hearsay. Thus, the trial court would not have abused its discretion had it denied appellant's motion for a new trial solely on the grounds that the newly discovered evidence was inadmissible. Nevertheless, the trial court indulged appellant's claim of newly discovered evidence, and still denied her motion for a new trial. We will now review the trial court's decision.

{¶ 39} An appellate court applies an abuse of discretion standard when reviewing an order granting or denying a motion for new trial pursuant to Crim.R. 33. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76, 564 N.E.2d 54. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 40} In Ohio, "[t]o warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new

evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus.

{¶ 41} The trial court found that appellant failed to satisfy the first, third, and sixth requirements. We need not go that far. Because we determined above that appellant has not demonstrated even a reasonable probability that Miller's alleged bias would have resulted in a different outcome, we hold that the trial court did not abuse its discretion when it found that the newly discovered evidence did not disclose a "strong probability" that it would change the result of the trial. Thus, because appellant failed to satisfy all six requirements, the trial court's denial of appellant's motion for a new trial based on newly discovered evidence was not in error.

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

{¶ 43} For the foregoing reasons, the judgment of the Ottawa County Municipal 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

Thomas J. Osowik, P.J.

Stephen A. Yarbrough, J. _______________________________
CONCUR.
JUDGE

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JUDGE

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.