

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| | : | No. 08AP-134 |
| Plaintiff-Appellee, | : | (C.P.C. No. 07CR-4014) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Darrin Brodbeck, | : | |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on June 4, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Todd W. Barstow, for appellant.

ON APPLICATION FOR REOPENING

T. BRYANT, J.

{¶1} Defendant-appellant, Darrin Brodbeck, filed an application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. Brodbeck*, 10th Dist. No. 08AP-134, 2008-Ohio-6961. The State of Ohio filed a memorandum in opposition to defendant's application. Because defendant's application fails to present a genuine issue of whether he was deprived of effective assistance of appellate counsel, we deny his application to reopen.

{¶2} By indictment filed June 6, 2007, defendant was charged with one count of murder, one count of tampering with evidence, and one count of domestic violence, all

with firearm specifications, stemming from the shooting death of his girlfriend, Christine Turner. The jury found defendant guilty of murder, tampering with evidence, and the firearm specifications; the trial court found defendant guilty of domestic violence, but not guilty of the firearm specification. The trial court sentenced defendant in accordance with law.

{¶3} In his appeal, defendant argued that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Defendant also argued that his trial counsel was ineffective in failing to investigate certain aspects of the physical evidence and cross-examine the state's witnesses about this physical evidence. Finally, defendant argued that the trial court erred in admitting impermissible character evidence about Turner. This court disagreed with defendant's contentions and affirmed his convictions.

{¶4} App.R. 26(B) permits applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]" App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶5} In order to prevail, defendant must establish "a colorable claim" of ineffective assistance of appellate counsel under the standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *State v. Lee*, 10th Dist. No. 06AP-

226, 2007-Ohio-1594, ¶2, citing *State v. Sanders*, 75 Ohio St.3d 607, 1996-Ohio-38. *Strickland* requires the defendant to demonstrate: (1) counsel was deficient for failing to raise the issue defendant now presents, and (2) defendant had reasonable probability of success if the issue was presented on appeal. *Lee*, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶6} Appellate counsel has wide latitude and thus the discretion to determine which issues and arguments will prove most useful on appeal. *Id.*, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶17. Moreover, appellate counsel is not required to argue assignments of error which are without merit. *Id.*

{¶7} In his application, defendant proposes one assignment of error:

Mr. Brodbeck was denied the effective assistance of trial counsel because trial counsel failed to move to dismiss the charges based on a violation of due process when the State destroyed materially exculpatory or potentially useful evidence. *Strickland v. Washington* (1984), 466 U.S. 668; *California v. Trombetta* (1984), 467 U.S. 479, 489; *Arizona v. Youngblood* (1988), 488 U.S. 51, 58, 109 S.Ct. 333; Fifth, Sixth, and Fourteenth Amendments of the United States Constitution; Sections 10, and 16, Article I of the Ohio Constitution.

{¶8} Defendant contends appellate counsel was ineffective in failing to argue that trial counsel was ineffective in failing to move to dismiss the charges against him based upon the state's destruction of evidence material to the issue of defendant's guilt, i.e., washing blood spatter from Turner's hands before it could be analyzed by blood-spatter experts.

{¶9} In *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, the Supreme Court of the United States considered whether a criminal defendant is denied due process of law by the state's destruction of evidence. The Supreme Court stated:

The Due Process Clause of the Fourteenth Amendment, as interpreted in [*Maryland v. Brady* (1963), 373 U.S. 83, 83 S.Ct. 1194], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant materially exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant. * * * We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id. at 57-58.

{¶10} Thus, pursuant to *Youngblood*, the legal consequences of the state's destruction of evidence differs depending upon whether the evidence is classified as "materially exculpatory" or "potentially useful." "Materially exculpatory" evidence is that which both possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta* (1984), 467 U.S. 479, 489, 104 S.Ct. 2528, 2534. Destruction of materially exculpatory evidence warrants dismissal irrespective of the culpability of the state. In contrast,

"potentially useful" evidence is that which would not exonerate the defendant in and of itself, but which is testable, and the results of those tests could have been exculpatory. *State v. Geeslin*, 3d Dist. No. 10-05-06, 2006-Ohio-1261, ¶11, citing *Youngblood*. Destruction of potentially useful evidence does not violate due process unless the state acted in bad faith in doing so. *Id.*

{¶11} Defendant argues due process violations under either classification of the evidence, alternatively. Defendant maintains that the blood-spatter evidence is materially exculpatory and that the state's destruction of that evidence requires dismissal of the case without proof of bad faith by the state. Alternatively, defendant contends that the destruction of the blood-spatter evidence was in bad faith, and due process was violated even if the evidence was considered only potentially useful.

{¶12} The critical issue at trial was whether the gunshot wound to the head that killed Turner was self-inflicted or inflicted by defendant. Dr. Joseph Ohr, the forensic pathologist who performed Turner's autopsy, opined that he could not determine the manner of death, as the gunshot wound could have been self-inflicted or inflicted by someone else. Similarly, Robert Young, the state's blood-spatter expert, testified that he could not conclude to a reasonable degree of scientific certainty whether Turner's death resulted from a homicide or a suicide, as the evidence was "not inconsistent with either possibility." (Tr. 546.)

{¶13} Defendant contends that the blood-spatter evidence on Turner's hands was materially exculpatory because, when considered with Young's written report, it would have conclusively established that Turner shot herself. Defendant also contends that Young's report establishes that the blood-spatter evidence was of such a nature that

defendant would be unable to obtain comparable evidence by other reasonably available means. Defendant has attached a copy of Young's report to his application and cites several excerpts from the report in support of his contentions.

{¶14} For example, defendant notes that Young opined that crime-scene photographs depicting tiny high velocity blood spatterings on Turner's right forearm and thumb indicated that Turner shot herself and that the washing of her hands precluded a detailed evaluation of the nature of that blood spatter. Defendant further notes that Young stated that if Turner's head wound was self-inflicted, a close observation of her hands was critical.

{¶15} In general, defendant has the burden of demonstrating that the destroyed evidence is materially exculpatory. *State v. Sutton*, 7th Dist. No. 08 MA 26, 2009-Ohio-1203, ¶12, citing *Trombetta*, at 489-90. Further, dismissal is not warranted unless there is a reasonable probability that the result of the proceeding would have been different had the evidence not been destroyed. *Id.*, citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 61.

{¶16} As noted by the state, Young's report was never admitted as an exhibit at trial and was never entered into the appellate record in defendant's direct appeal. Accordingly, defendant's claim that his appellate counsel should have relied on the report in arguing that trial counsel was ineffective is without merit. "[A] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Hooks*, 92 Ohio St.3d 83-84, 2001-Ohio-150, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402. Thus, "the effectiveness of appellate counsel [cannot] be judged by adding new matter to the record

and then arguing that counsel should have raised these new issues revealed by this newly added material." *Id.* Accordingly, this court will not consider Young's report in assessing whether there is a genuine issue of appellate counsel's effectiveness.

{¶17} Further, the exculpatory value of the blood-spatter evidence was not apparent before it was destroyed. It was not known whether the blood-spatter evidence would tend to exonerate or implicate defendant in the shooting. Indeed, after reviewing crime scene photographs of Turner, Young opined that the blood on her right hand was consistent with either (1) her firing the gun herself, (2) her holding her hand up in a defensive posture, or (3) a blood-soaked object (such as her brain) coming into contact with her hand after she fell to the floor. (Tr. 527-28.) Young further testified that he "didn't find anything conclusive one way or the other." (Tr. 528.) Moreover, defendant's reliance on Young's report demonstrates that further testing of the blood-spatter evidence was required to determine its exculpatory value. Under *Youngblood*, such evidence does not constitute materially exculpatory evidence. Rather, it constitutes evidence potentially useful to the defense for which proof of bad faith in its destruction is necessary to establish denial of due process.

{¶18} "The term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another.' " *State v. Keggan*, 2d Dist. No. 06CA11, 2006-Ohio-6829, quoting *State v. Smith*, 2d Dist. No. 20247, 2005-Ohio-1374.

{¶19} Defendant fails to demonstrate bad faith on the part of the state. As part of its investigation, the police took numerous photographs of the crime scene, many of which depicted Turner's body, including her hands. The fact that the police thoroughly documented Turner's body through photographic evidence suggests that the police had no ulterior motive in washing Turner's hands. Indeed, as the state notes, if the intention of the police was to withhold exculpatory evidence from the defense, photographing Turner's hands would have been counterproductive.

{¶20} Moreover, defendant incorrectly asserts that the police "made certain" that all other blood-spatter evidence at the scene was preserved. (Application, 5.) A significant portion of the state's case against defendant were the blood stains on other parts of Turner's body – particularly her upper arms and feet – which demonstrated that she had been dragged after she was shot. These blood stains were not preserved. Instead, Young, the state's own expert, had to rely on crime-scene photographs to examine these blood stains. The fact that the state itself had to settle for photograph-based examinations negates defendant's claim of bad faith.

{¶21} Finally, defendant's reliance on *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, is misplaced. In that case, the defendant argued that the trial court erred in failing to suppress testimony by the arresting officer regarding the defendant's performance of field sobriety tests when the police cruiser videotape showing those tests had been destroyed. The court concluded that because the videotape may have supported the defendant's version of his actions during the stop, it was potentially useful. The court further found that the arresting officer's destruction of the videotape, while not totally intentional, rose to the level of bad faith. Accordingly, the court concluded that the

trial court should have suppressed the officer's testimony regarding evidence that may have been recorded by the videotape, including field sobriety tests or statements made by the defendant.

{¶22} In so holding, the court emphasized the "obvious ease" in preserving the videotape and the police's own regulations requiring preservation of the videotape evidence. *Id.* at ¶36. The court further noted that the videotape was the only direct evidence available to show the defendant's condition at the time of his DUI arrest. *Id.* In the instant case, it would have been far from easy to preserve the blood on Turner's hands, given the impending and necessary fingerprinting and autopsy. Further, defendant fails to point to any policy requiring the preservation of this type of blood-spatter evidence. Finally, examination of the photographs of Turner's hands provided a reasonably comparable alternative to an in-person examination.

{¶23} Because the record does not support defendant's contention that trial counsel was ineffective in failing to move to dismiss the charges based upon a due process violation, defendant's appellate counsel was not ineffective in failing to raise the issue. As the issue defendant sets forth in his application does not raise a colorable claim of ineffective assistance of appellate counsel, we deny defendant's application.

Application denied.

FRENCH, P.J., and McGRATH, J., concur.

T. BRYANT, J., retired, formerly of the Third Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
