[Cite as *State v. Stojetz*, 2010-Ohio-2544.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-013
	:	O P I N I O N
- vs -		6/7/2010
	:	
JOHN STOJETZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 96CR-10-086

Stephen J. Pronai, Madison County Prosecuting Attorney, Daniel H. Huston, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Timothy Young, Ohio Public Defender, Kelly L. Schneider, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, John C. Stojetz, appeals a decision of the Madison County Court of Common Pleas denying his petition for postconviction relief.

{¶2} Appellant was indicted in 1996 on one count of aggravated murder in violation of R.C. 2903.01(A) with a death penalty specification of committing aggravated murder while a prisoner in a detention facility. The charge stemmed from an incident which occurred on April 25, 1996 wherein appellant, then an inmate at the Madison Correctional Institution ("MCI"), and five fellow inmates entered Adams Alpha ("Adams

A") Unit, the cell block at MCI which housed juveniles tried and convicted as adults, and chased Damico Watkins, a 17-year-old black juvenile inmate, throughout Adams A, stabbing him to death.

{¶3} On April 8, 1997, a jury found appellant guilty and appellant was subsequently sentenced to death. His conviction and death sentence were upheld by the Ohio Supreme Court. *State v. Stojetz*, 84 Ohio St.3d 452, 1999-Ohio-464. On March 4, 1998, appellant filed a petition for postconviction relief, which the trial court denied. Appellant's appeal of the denial of this petition to this court was dismissed for failure to prosecute, and the court denied his request to reopen the appeal. The Ohio Supreme Court declined to accept appellant's appeal of this court's decision. See *State v. Stojetz*, 95 Ohio St.3d 1458, 2002-Ohio-2230.

{¶4} On April 12, 2000, appellant filed a motion for new trial pursuant to Crim.R. 33(A)(6), which was overruled by the trial court. Appellant timely appealed the trial court's decision denying his motion, and this court affirmed the court's decision. *State v. Stojetz*, Madison App. No. CA2002-04-006, 2002-Ohio-6520.

{¶5} Appellant filed another petition for postconviction relief, a motion for new trial, and a motion for discovery on January 6, 2009. On May 20, 2009, the trial court denied his petition and motions. Appellant appeals the trial court's decision, raising three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT DENIED HIS SUCCESSOR POST-CONVICTION PETITION AS TIME-BARRED. U.S. CONST. AMEND. XIV [sic]."

{¶8} In his first assignment of error, appellant argues that the requirements of R.C. 2953.23 for successive postconviction relief petitions should not apply to him in this

case. Further, appellant argues he satisfied the statutory requirements for a successive postconviction relief petition on each of his three grounds for relief.

{¶9} A petition for postconviction relief must be filed no later than 180 days after the date on which the trial transcript is filed with the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Pursuant to R.C. 2953.23(A)(1), a court may entertain an untimely petition if the petitioner demonstrates either: (1) he was unavoidably prevented from discovering facts necessary for the claim for relief; or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner is able to satisfy one of these two conditions, he must then demonstrate that, but for the constitutional error at trial, no reasonable fact-finder would have found him guilty of the offenses of which he was convicted. R.C. 2953.23(A)(1)(b).

{¶10} Appellant does not dispute that he filed his petition outside the applicable period for doing so. Appellant simply maintains the requirements of R.C. 2953.23 should not apply in this case. However, the requirements of R.C. 2953.23 are mandatory, and a trial court does not have the discretion to consider a second, successive petition for postconviction relief that does not satisfy those requirements. *State v. Davie*, Trumbull App. No. 2000-T-0104, 2001-Ohio-8813.

{¶11} Next, appellant argues that he met the requirements of R.C. 2953.23. Appellant maintains he was unavoidably prevented from discovering facts necessary for his claim for relief. In his first ground for relief, appellant claims the state violated the rule set forth in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, when it allegedly withheld records regarding an incident when appellant was attacked and his throat was cut while he was in prison. Appellant argues this evidence was material to his claim that he suffers from post-traumatic stress disorder ("PTSD") and that the incident for which

he was charged and convicted was a response to being threatened while in prison.

{¶12} In *Brady*, 373 U.S. 83, 87, the United States Supreme Court held, "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." Id. at 87. Evidence is "material" only if there is a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed to the defense. *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375. "A successful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice." *State v. Davis*, Licking App. No.2008-CA-16, 2008-Ohio-6841, ¶53, citing *Strickler v. Greene* (1999), 527 U.S. 263, 281-282, 119 S.Ct. 1936. Further, it is the burden of the defense to prove a *Brady* violation has risen to the level of denial of due process. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33.

{¶13} After reviewing the record, we find appellant's argument to be barred by the doctrine of res judicata. "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 an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Accordingly, appellant is precluded from raising these issues in a second petition for postconviction relief when he could have raised them in his direct appeal. See *State v. Barton*, Warren App. No. CA2006-10-127, 2008-Ohio-2736. Moreover, appellant was certainly aware of the facts underlying this claim, as they existed since September 1987

and appellant first raised the issue at trial. While appellant arguably might not have been aware of records documenting the prior prison attacks, appellant has failed to demonstrate how he was prevented from obtaining them.

{¶14} Further, according to the record appellant failed to disclose to the state that he planned to use the report and testimony of Dr. Eberhard Eimer, a licensed clinical psychologist. During the penalty phase, appellant's mitigation focused on his theory that his attack on the victim was in response to feeling threatened. In support of this theory, appellant presented Dr. Eimer's report and testimony. Dr. Eimer testified that appellant "was provoked easily * * * is worried all the time, * * * is scared for his life, [and] he is intensely fearful and on guard." Dr. Eimer continued, stating that "[appellant] views his world as a threatening place in which there's no place to hide or find safety. His pronounced fearfulness appears to be a controlling part of his life and dominates his thought patterns and overshadows any other feelings." Dr. Eimer diagnosed appellant with PTSD, which he attributed to a near death experiences including the incident where appellant's throat was cut and another experience where appellant allegedly was hung.

{¶15} We find it disingenuous of appellant to fail to notify the state that it planned to use Dr. Eimer's opinions regarding the "near death experiences" and then later argue the state violated *Brady* by purposely withholding reports of those incidents. Regardless, appellant has failed to demonstrate the state withheld the reports or that the reports are material to its mitigation attempts given appellant's knowledge of the incidents.

{¶16} In appellant's second and third grounds for relief, he argues the state violated its duty to correct materially false or inaccurate information during trial. A prosecutor, as a state agent, has a constitutional duty to ensure that a defendant has a fair trial. *State v. Staten* (1984), 14 Ohio App.3d 78, 83, citing *Mooney v. Holohan*

(1935), 294 U.S. 103, 113, 55 S.Ct. 340. Part of this duty requires a prosecutor to correct any testimony that he knows to be false. Id., citing *Napue v. Illinois* (1959), 360 U.S. 264, 269, 79 S.Ct. 1173.

{¶17} During the state's cross-examination of Dr. Eimer, the state attempted to neutralize Dr. Eimer's testimony by exposing his failure to seek independent verification of information provided by appellant, questioning the validity of appellant's MMPI personality test scores, and emphasizing various inconsistencies in statements made by appellant. During this questioning, the following transpired, regarding the prior prison attack on appellant:

{¶18} "Prosecutor: Let's turn to your clinical interview notes. * * * [Appellant] alleged to you he was hung, yes?

{¶19} "Dr. Eimer: I am not positive whether I learned that from him or his sister.

{¶20} "Q: Who would be the better source of that?

{¶21} "A: He would be. I think I did.

{¶22} "Q: Which sister, Lorrie?

{¶23} "A: I think I did [hear] from him actually.

{¶24} "Q: You are not sure?

{¶25} "A: I think I heard it from him—from his sister first and then him.

{¶26} "Q: Did you attempt to verify that allegation?

{¶27} "A: No.

{¶28} "Q: Whatsoever?

{¶29} "A: No, not at all.

{¶30} "* * *

{¶31} "Q: Are you making a diagnosis he suffers from post traumatic stress disorder?

{¶32} "A: Yes.

{¶33} "Q: I'm assuming you are attributing this to one of those potential traumatic experiences?

{¶34} "A: Yes.

{¶35} "Q: Did you attempt to verify the existence of that?

{¶36} "A: No, I did not.

{¶37} "Q: My question is do you agree with me or disagree external independent verification of [the incident] might be important as the foundation of your evaluation?

{¶38} "A: It would be important.

{¶39} "Q: But you chose not to do that?

{¶40} "A: I didn't choose to, I failed to.

{¶41} "Q: The next allegation [was] his throat was cut from one side to the other with a straight edged razor?

{¶42} "A: Yes.

{¶43} "Q: Same question, did you verify that?

{¶44} "A: In the sense that he showed me his scar.

{¶45} "Q: Did it run from one side to the other?

{¶46} "A: Yes.

{¶47} "Q: Did you attempt to ascertain the severity of the underlying incident?

{¶48} "A: No.

{¶49} "Q: Whether it was stitched up inpatient hospitalization?

{¶50} "A: I did not. I have already indicated all my sources of information so I did not have any further sources.

{¶51} "Q: If we're dealing with something as a potentially traumatic episode which contributes or is the foundation of the post traumatic stress disorder, don't you

agree we have to have originally a traumatic experience?

{¶52} "A: Yes.

{¶53} "Q: And other than what this man told you, you don't know whether those experiences ever in fact took place?

{¶54} "A: I would find it hard to imagine how else he would have obtained the scar such as the one that he did show me.

{¶55} "Q: Could it have been a cut or could [it] have been a slash?

{¶56} "A: Yes.

{¶57} "Q: Could [it] have been a superficial would or severe wound [and if it was] a superficial would, would that in any manner affect the severity of the traumatic experience?"

{¶58} "A: Yes.

{¶59} "Q: But you don't know whether it was superficial?

{¶60} "A: No.

{¶61} "Q: Or severe wound?

{¶62} "A: It might have just been a scratch on the skin."

{¶63} After reviewing the record, including the above testimony, again we find appellant's argument to be barred by the doctrine of res judicata. *Perry*, 10 Ohio St.2d 175, paragraph nine of the syllabus. Even assuming for the sake of argument that the prosecutor's attempts to neutralize Dr. Eimer's testimony were inappropriate, appellant could have raised this issue in his direct appeal as the prior incidents were known to appellant well in advance of his trial. Accordingly, appellant is precluded from raising these issues in a second petition for postconviction relief. See *Barton*, 2008-Ohio-2736.

{¶64} Appellant's first assignment of error is overruled.

{¶65} Assignment of Error No. 2:

{¶66} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT DENIED HIS REQUEST TO FILE A NEW TRIAL MOTION."

{¶67} In his second assignment of error, appellant argues he was unavoidably prevented from discovering his new evidence within 120 days of the jury verdict under Crim.R. 33(B) and R.C. 2945.80.

{¶68} The decision "to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed." *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶69} A new trial may be granted on the motion of the defendant "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6). Such a motion must be made within 120 days of the end of the proceedings if the basis for the motion is the discovery of new evidence. Crim.R. 33(B). If it is made to appear "by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." Id.

{¶70} In order to prevail on a motion for a new trial based on newly discovered evidence, the moving party is required to establish 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, syllabus.

{¶71} As we discussed above in resolving appellant's first assignment of error, appellant has failed to demonstrate that he was unavoidably prevented from discovering the evidence supporting his motion for new trial pursuant to Crim.R. 33(B). Specifically, appellant has failed to establish that the evidence has been discovered since the trial, could not have been discovered in the exercise of due diligence before trial, is material to the issues, and is not merely cumulative to former evidence. Id. Accordingly, the trial court did not abuse its discretion in denying appellant's motion for leave to file a delayed motion for a new trial.

{¶72} Appellant's second assignment of error is overruled.

{¶73} Assignment of Error No. 3:

{¶74} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT DENIED HIS MOTION FOR DISCOVERY."

{¶75} The granting or overruling of discovery motions in a criminal case rests within the sound discretion of the trial court. *State v. Craft*, 149 Ohio App.3d 176, 2002-Ohio-4481, ¶10. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Hancock*, 2006-Ohio-160, ¶130.

{¶76} Contrary to appellant's argument, he is not "entitled to discovery" to support his claims for relief. "[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. It is not a constitutional right, and it affords a petitioner no rights beyond those granted by statute. Id. Further, "[t]here is no requirement of civil discovery in post-conviction proceedings." *State v. Samatar*,

Franklin App. No. 03AP-1057, 2004-Ohio-2641, ¶23, citing *Love v. Cuyahoga Cty. Prosecutor's Office* (1991), 87 Ohio St.3d 158. After reviewing the record, we find the trial court did not abuse its discretion in denying appellant's motion for discovery. Appellant has already obtained much of the information he claims is necessary to support his petition, and there is nothing in the record to indicate the trial court's denial of this motion was made in an unreasonable, arbitrary, or unconscionable manner.

{¶77} Appellant's third assignment of error is overruled.

{¶78} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.