[Cite as *State v. Prater*, 2019-Ohio-2535.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-818
v.	:	(C.P.C. No. 16CR-0927)
Frederick A. Prater, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 25, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

On brief: *Frederick A. Prater, Jr.*, pro se.

APPEAL from the Franklin County Court of Common Pleas

NELSON, J.

{¶ 1} A jury found in 2017 that Frederick A. Prater, Jr. two years earlier had shot at some men and wounded a female bystander. We described the circumstances of that case in our decision of March 13, 2018 affirming his convictions and 23-year total prison sentence for three counts of felonious assault, three gun specifications, and one count of having a weapon while under disability. *State v. Prater*, 10th Dist. No. 17AP-374, 2018-Ohio-932 ("*Prater 1*").

{¶ 2} To give a nutshell of our earlier summary, a man is said to have emerged from a car, thrown a cell phone at people from whom it had been borrowed and who had asked for it back, and then opened fire, striking bystander Stephanie Norvett. Testimony conflicted as to how many shots were fired: one witness heard approximately six shots, one heard two, and one heard one, and while nine shell casings from two different guns were recovered from the scene, eight from the driver's side of the car and one from the

passenger's side, the "jury heard testimony that it is possible that the casings recovered at the scene have nothing to [do] with the crime at issue." *Id.* at ¶ 11, 24.

{¶ 3} The intended targets could not identify Mr. Prater as the shooter, but two said that the shooter had come from the car's passenger seat. *Id.* at ¶ 5, 6, 22. Ms. Norvett, who knew the two males in the car but not their female companion, initially identified Mr. Prater as the shooter. *Id.* at ¶ 6, 8. Months later, she signed an affidavit saying that Mr. Prater was not the shooter, and she later told a detective that she thought that Mr. Prater's companion who had been in the driver's seat had shot her. Then, at trial, she testified that she did not know who shot her, while reconfirming that Mr. Prater had been on the passenger's side of the car. *Id.* at ¶ 8, 9.

{¶ 4} Finding, among other things, that there was sufficient "evidence identifying Prater as the shooter," *id.* at ¶ 22, we affirmed the convictions.

{¶ 5} Mr. Prater then moved to reopen his appeal, urging that his appellate counsel had been ineffective for not assigning as error the trial court's refusal to delay the trial so as to allow time to hunt down and produce an uncooperative witness and its denial of his two post-verdict motions for a new trial. *See State v. Prater*, 10th Dist. No. 17AP-374 (Nov. 6, 2018), memorandum decision on application for reopening, at 1 ("*Prater 2*").

{¶ 6} We denied that motion with regard to the prong involving missing witness Sherita Carter because "Prater's [trial] counsel did not specifically attempt to proffer her expected testimony other than to say she was the third person [beside the two accuseds] in the car and was 'certainly in a position to see what was going on' ": because it was "not in the record, we cannot consider (and could not, in a direct appeal, have considered) what Carter might have had to say," and "[a]bsent evidence about whether counsel had some idea of what Carter would have testified to, Prater's trial counsel not offering into evidence Carter's testimony does not in and of itself support an ineffective assistance argument." *Id.* at 5, 8, 9 (adding that "the record on direct appeal does not provide even a clue about what Carter would have said had she testified"). Similarly, we noted that "the denials of the motions for a new trial were not * * * part of the direct appeal [and never were appealed]," so "reopening the direct appeal would not provide us jurisdiction to review the trial court's [summary] denials of these motions." *Id.* at 11.

{¶ 7} In sum, we denied reopening because "Prater's arguments about appellate counsel's alleged inefficacy rely on assumptions about the facts of the case that are not in the record available on direct appeal." *Id.*

{¶ 8} In the course of our assessment, we elaborated on "further facts" of the matter. "The person in the driver's seat of the car, Isawan Foster, was charged with essentially the same crimes as Prater but was acquitted by the jury. The remaining person in the car was a woman who was not named at trial but who was identified by the name, Sherita Carter." *Prater* 2 at ¶ 3 (record citations omitted).

{¶ 9} Both of those "further facts" are significant to the timely petition for postconviction relief that Mr. Prater filed with the trial court on July 5, 2018 and that the trial court denied on October 1, 2018 (after the Supreme Court of Ohio had denied review of Mr. Prater's direct appeal, but before we had denied his application to reopen that appeal).

{¶ 10} Grounded in claims of ineffective assistance of counsel, Mr. Prater's petition for postconviction relief put forward an affidavit from Ms. Carter dated July 4, 2018 and attesting, among other things, that:

> 4. At the time of the shooting, I was in the back seat of my car, and Prater and Foster were in the front seat.
>
> 5. I had a clear view of all events regarding the shooting, and I was willing to testify that Isawan Foster fired the shots that evening, and Fred Prater did not fire any shots.
>
> 6. On more than one occasion during the trial, I spoke by phone with Mr. James Watson [Defendant Prater's lawyer], and told him what I had witnessed and what I was willing to testify about, and that I would show up at trial to give my testimony.
>
> 7. I never showed up for trial and I hid so that I couldn't be found by police, because Isawan Foster threatened me * * *.
>
> 8. Following conclusion of the trial, I again spoke with Mr. Watson, at which time I explained to him that the reason I did not appear for trial was because of the threats made toward me by Isawan Foster if I testified * * *.

> 9. I regretted not testifying for Fred Prater because I knew the wrong person had been convicted for what Isawan Foster did, and wanted to make amends by telling the truth as soon as I realized the consequences of my actions.

Carter Aff. at ¶ 4-9.

{¶ 11} Ms. Carter's affidavit also attached and reaffirmed a slightly earlier sworn statement, handwritten, dated, and notarized April 4, 2018, recounting that it had been Iswian [sic] Foster who had asked the passers-by for use of their cell phone and who, feeling "rush[ed] * * * to give the phone back," had pulled out a gun and fired against her objections and those of Mr. Prater: Ms. Carter attested that she "just want[ed]" to let Mr. Prater's "lawyer and judge know he didn't have nothing to do with what happened." Carter Aff. at ¶ 10 and attachment.

{¶ 12} Further, the petition submitted an affidavit dated July 5, 2018 from Mr. Prater's then-new-lawyer Charles Koenig attesting, among other things, that former defense counsel Watson had told him that: "following the conclusion of Defendant's trial, he was provided with *copies of social media postings and communications* in which the co-defendant, Isawan Foster, had bragged that he was the person who shot Stephanie Norvett, and that Mr. Watson was prepared to provide evidence of those statements at the [once-anticipated] hearing on the motion for new trial he filed * * * on April 3, 2017." Koeing Aff. at ¶ 7 (emphasis added).

{¶ 13} The Koenig Affidavit also recited that lawyer Watson told him that around April 25, 2017, he had acquired two jailhouse recordings made at the Franklin County Correction Center of telephone conversations initiated by Mr. Prater. *Id*. at ¶ 3-6.

{¶ 14} Those recordings were the subject of yet another affidavit that accompanied the postconviction relief petition, from Ashley Fields who was assisting Mr. Prater and who was on the calls along, she says, with Mr. Prater and Isawan Foster. Her affidavit provides extensive quotations from what she represents to be her accurate transcriptions of those calls as taken from the recordings as they had been subpoenaed by lawyer Watson. She characterizes Mr. Foster as saying that he planned to come to Mr. Prater's sentencing hearing "to explain that he [Foster] did the shooting, so as to help Prater with his appeal," and she quotes him then as saying: "My attorney know I did it—you know what I mean?" She quotes other remarks making it further "clear to me that Isawan admitted that he was

the person who did the shooting for which Prater was convicted and that he expressed remorse for letting Prater take the blame for the shooting." Fields Aff. at ¶ 3, 4, 7, 15, 17, 19.

{¶ 15} The gravamen of the petition was that Mr. Prater had been denied his constitutional right to effective assistance of counsel relating to both of his motions for a new trial on the basis of newly discovered evidence. It remarked, among things, on the failure of two sequential defense counsel to attach any evidentiary material to those motions, and their failure to request an evidentiary hearing either time. Petition at 6. While counsel had offered certain "naked assertions * * *, no evidence supporting those assertions can be found anywhere in the record." *Id.* at 8. "[T]he constitutional issues regarding the lack of competent counsel and how Petitioner was prejudiced by the ineffectiveness of his counsel are impossible to reach other [than] through a post-conviction procedure," the petition urged, "because the evidence supporting those issues is not contained in the record." *Id.* at 10.

{¶ 16} With no witness at trial having directly identified Mr. Prater as the shooter, and because the "two spent .45 caliber casings recovered from the scene were found on the driver's side of the car, where Isawan was seated," and given certain evidence that "only two shots had been fired," *id.* at 17; *see also Prater 1*, 2018-Ohio-932 at ¶ 11 (regarding the two .45 casings), the petition argued that Ms. Carter's eyewitness version that it was Mr. Foster who had borrowed the phone and fired the shots, coupled with evidence that Mr. Foster on various occasions stated that he was the shooter, would have created a "substantial" probability of a "different verdict" if presented to a jury. Petition at 17. In other words, it was important to let the court know of the now-available witness testimony and its significance. But, the petition complains, the two motions seeking to gain a new trial "fell below the minimum standards of representation." *Id.* at 13.

{¶ 17} Before returning to the petition and to the trial court's ruling on it, we digress to examine the two new trial motions that the petition condemns as reflecting ineffective assistance of counsel. They were both rather...succinct, as were the trial court entries denying them.

{¶ 18} The first motion for new trial was filed on April 3, 2017, within two weeks after the jury returned its guilty verdicts (on all relevant counts but the weapon under disability charge, for which the court was the finder of fact). One paragraph long, its three

operative sentences reported "newly discovered evidence" that "co-defendant Isawan Foster has bragged in front of a number of people that he shoot a 'little mama' who was identified as Stephanie Norvett"; that "there is evidence that Iswan [sic] Foster has clearly threatened or influenced Sherita Carter to not be present at the trial"; and that "Sherita Carter was clearly identified as the third person in the vehicle and she gave a statement to the detective where she unequivocally states that Isawan Foster did the shooting and Frederick Prater did not." The motion did not offer further facts or texture or otherwise specify or identify the provenance of the new "evidence" to which it adverted.

{¶ 19} Some three weeks later, on the sentencing date of April 25, 2017, the trial court denied that first new trial motion with a one-sentence order. "Upon review of Defendant's Motion for New Trial filed April 3, 2017, the Court hereby DENIES said motion," the decision explained. April 25, 2017 Decision & Entry Denying Defendant's Motion for New Trial Filed April 3, 2017.

{¶ 20} The second new trial motion, with its memorandum in support again limited to well under one page, reported in full substantive part that "newly discovered evidence * * * of a recorded telephone conversation between the defendant and his co-defendant Foster on April 17, 2017 * * * * [shows that] Foster states at 11:30 minutes in the conversation: 'My attorney know I did it, I told him', referencing to the criminal conviction that defendant Foster faced but that defendant Prater was convicted [sic]." No materials accompanied the motion/memorandum, and again no hearing was requested. May 19, 2017 Memo in Support of Mot. for a New Trial.

{¶ 21} On June 15, 2017, the trial court ruled the way it had on the first new trial motion. "Upon review of Defendant's Motion for New Trial filed May 19, 2017, the Court hereby DENIES said motion. So Ordered." June 15, 2017 Decision & Entry Denying Def.'s Mot. for New Trial Filed May 19, 2017.

{¶ 22} Mr. Prater's July 5, 2018 Petition for Post-Conviction Relief To Vacate or Set Aside Judgment of Conviction sought to avoid the same summary result accorded the new trial motions on which it was premised. In addition to providing the affidavits and recordings sketched above, its caption featured the phrase: "DEPOSITIONS AND EVIDENTIARY HEARING REQUESTED." The petition renewed that request on page 1,

and then again at the end should the trial court not have found the evidentiary material as submitted sufficient on its own to compel the relief sought. Petition at 1, 19-20.

{¶ 23} The trial court wasn't buying. Its Decision and Judgment Entry denied and dismissed the petition without a hearing. The "Background & Facts" section of that decision spelled out in its first paragraph the charges of the indictment, the verdicts, and the sentence. Oct. 1, 2018 Decision & Jgmt. Entry at 1. Its second paragraph recited that new trial motions had been made and denied on certain dates. *Id.* at 2. And the third paragraph noted that this court had affirmed the judgment from trial, and that the Supreme Court had turned away a motion to file a delayed appeal. *Id.* That concluded the "Facts" section. *Id.*

{¶ 24} The trial court's ruling on the petition then turned to "Law and Analysis." It began by observing that "[p]etitions for post-conviction relief are statutory vehicles designed to correct violations of a defendant's constitutional rights." *Id.* (citation omitted); *see* R.C. 2953.21, et seq. (procedures for seeking and evaluating such relief). It then quoted accurately from this court: " 'Postconviction relief is a civil collateral attack on a judgment, not an additional direct appeal of the underlying judgment. * * * [It] allows the petitioner to present constitutional issues that would otherwise be unreviewable on direct appeal because the evidence supporting those issues is not contained in the record of the criminal conviction.' " *Id.*, quoting *State v. Canada*, 10th Dist. No. 16AP-7, 2016-Ohio-5948, ¶ 12. And it correctly stated that a petitioner seeking postconviction relief need not automatically and always receive a hearing. *Id.* at 3; *see, e.g.*, *State v. Lester*, 41 Ohio St.2d 51, 54 (1975) (quoting syllabus of *State v. Perry*, 10 Ohio St.2d 175 (1967): " '1. Unless a petition * * * and the files and records of the case show that the prisoner is entitled to no relief, the court must cause notice of the petition to be served on the prosecuting attorney, grant a hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. 2. Where a petition for postconviction relief * * * does not allege facts which, if proved, would entitle the prisoner to relief, the trial court may so find and summarily dismiss the petition.' "); *State v. Calhoun*, 86 Ohio St.3d 279, 284 (1999) ("The trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant").

{¶ 25} The trial court then addressed the petition's claims of ineffective assistance of counsel, noting the "two-pronged approach set forth in *Strickland v. Washington*, 466

U.S. 668, 687 * * * (1984)." Decision & Jgmt. Entry at 3 (required showing of deficient performance by counsel and resulting prejudice). It correctly said that courts maintain a "strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* at 4 (citation omitted).

{¶ 26} Mr. Prater had "failed to meet the first prong of the *Strickland* test" in alleging deficient performance by his counsel with regard to either motion for a new trial for two reasons, the trial court said. *Id.* at 4-6. First, both motions "were brought pursuant to Crim.R. 33(A)(6) * * * * [, which] does not require evidence to be presented with the motion." *Id.* at 4. Second, "in the context of trials, it is well established that trial strategy is left to the sole discretion of counsel," and "[t]his reasoning is applicable in the instant context, also." *Id.* at 5 (citations omitted).

{¶ 27} And even had counsel's performance regarding the new trial motions been deficient, the trial court continued, there was no showing of prejudice. The trial court listed, without describing, the various affidavits that accompanied the petition and said that because they were all dated after the April 3, 2017 motion for a new trial, "[n]one of the attachments to Defendant's Petition were available to trial counsel when he filed the Motion." *Id.* at 6. And "the CD of the telephone calls" purporting to be between Messrs. Prater and Foster had been quoted in the second motion. "Therefore, * * * there does not exist a reasonable probability that the result would have been different." *Id.*

{¶ 28} Appealing the denial of his petition, Mr. Prater advances three interrelated assignments of error:

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S DUE PROCESS WHEN PETITION FOR POST-CONVICTION, CONTAINED SUFFICIENT OPERATIVE FACTS TO WARRANT A EVIDENTIARY HEARING, VIOLATING THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION TEN OF THE OHIO CONSTITUTION.
>
> [2.] APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED, WHEN TRIAL AND APPELLATE COUNSEL FAILED IN ESSENTIAL DUTY TO INVESTIGATE WITNESSES WHO HAD EVID[ENCE] OF THEIR CLIENTS INNOCENCE, AND THEIR DEFICIENT PERFORMANCE IN FAILURE TO

> SUPPORT MOTION FOR NEW TRIAL, WITH EVIDENCE THAT WAS AVAILABLE THROUGH DUE DILIGENT INVESTIGATION, THEREBY CAUSING PREJUDICE TO APPELLANT.
>
> [3.] THE TRIAL COURT ERRED WHEN DENYING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT CONDUCTING AN EVIDENTIARY HEARING, VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURT[]EENTH AMENDMENT AND OHIO REVISED CO[]DE R.C. 2953.21, WHEN TH[E] COURT ABUSED ITS DISCRETION BY NOT APPLYING THE *CALHOUN* ANALYSIS IN RELATION TO AFFIDA[VI]TS SUBMITTED WITH PETITION.

{¶ 29} The first and third assignments both allege that the trial court erred in denying the petition without an evidentiary hearing, and we consider them together. "[W]e review a trial court's decision to deny a postconviction petition without a hearing under an abuse of discretion standard." *State v. Howard*, 10th Dist. No. 15AP-161, 2016-Ohio-504, ¶ 15; *State v. Gondor*, 112 Ohio St.3d 377, 388, 2006-Ohio-6679, ¶ 58. A court abuses its discretion when its " 'attitude is unreasonable, arbitrary or unconscionable.' " *Gondor* at ¶ 60 (citation omitted).

{¶ 30} The Supreme Court in *Gondor* catalogued some of the advantages that a hearing on a postconviction relief petition as based on ineffective assistance of counsel can provide a trial court judge:

> On postconviction petitions, * * * the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance. The trial judge can delve into the motivation or reasoning of trial counsel through trial counsel's testimony. The court can hear the testimony of witnesses that were never called to testify at the original trial, and can determine the worth of their testimony as well as the witnesses' credibility. The trial judge can ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but was instead careless. As [was done in *Gondor*,] in a postconviction hearing, a judge can hear testimony about what evidence was made available to trial counsel and when it was made available. A trial court in a postconviction proceeding thus plays a unique role in the consideration of ineffective assistance of counsel claims. It is the only court that actually hears testimony on that issue. * * * *

> The postconviction judge sees and hears the live postconviction witnesses, and he or she is therefore in a much better position to weigh their credibility than are the appellate judges.

2006-Ohio-6679 at ¶ 54, 55.

{¶ 31} But "a petitioner is not automatically entitled to an evidentiary hearing." *Howard*, 2016-Ohio-504 at ¶ 20. To get a hearing, "the petitioner bears the initial burden of providing evidence demonstrating a cognizable claim of constitutional error." *Id.* The trial court then must conduct such a hearing unless " 'the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief.' " *Id.* (citations omitted).

{¶ 32} More particularly, and concluding the syllogism from the standards described above, we have explained that "[i]n order to secure a hearing on his claim for postconviction relief based on ineffective assistance of counsel, [a petitioner has] the burden of submitting evidentiary documents containing sufficient operative facts which, if believed, would establish (1) * * * trial counsel substantially violated at least one of counsel's essential duties to his or her client, and (2) [petitioner] suffered prejudice as a result." *Id.* at ¶ 23. In *Howard*, we found that the petition at issue "demonstrate[d] sufficient operative facts that, if believed, [would] indicate his trial counsel was ineffective." *Id.* at ¶ 32. We concluded, therefore, that "the trial court abused its discretion in denying Howard's petition for postconviction relief without a hearing with respect to Howard's claim of ineffective assistance of counsel." *Id.* at ¶ 63.

{¶ 33} We have underscored, and emphasize here again, that "[w]hen a trial court dismisses a post-conviction relief petition without holding an evidentiary hearing, it must enter findings of fact and conclusions of law. R.C. 2953.21 * * *." *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶ 5. The important, rights-protecting purpose of Ohio's postconviction relief statutory system requires comprehensive findings of fact and conclusions of law. *Lester*, 41 Ohio St.2d at 56. As we have reminded: "The findings of fact and conclusions of law should be clear, specific, and complete. They should be comprehensive and pertinent to the issues presented, demonstrate the basis for the decision, and be supported by the evidence." *Banks*, 2011-Ohio-2749 at ¶ 7. (citations omitted.)

{¶ 34} Here, the trial court made no particularized findings of fact, apart from noting the dates of the attached affidavits; it did not assess the evidence presented in the affidavits or revisit the evidence presented at trial. That sort of review was unnecessary, in the trial court's view, because it read the alleged ineffective assistance of counsel in connection with each of the new trial motions as limited entirely to the question of whether evidence had to be submitted along with the motions in order to meet constitutionally required standards of representation. Having answered that question in the negative, and then having noted that the affidavits that accompanied the petition were executed after the dates of the new trial motions, the trial court found that its work was at an end. *See* Decision & Jgmt. Entry at 4-6.

{¶ 35} Although we believe that the trial court's reading of the petition was unduly cramped in not considering Mr. Prater's broader concern that he had received ineffective assistance of counsel "in submitting" the new trial motions in a way that obscured the significance of the newly discovered evidence, we do think that here as in *Banks*, because "the trial court's decision clearly reflects its rationale for denying appellant's petition * * * * [,] it is a final, appealable order." 2011-Ohio 2749 at ¶ 8.

{¶ 36} And the petition did repeatedly return to the failure of counsel to attach evidence to their new trial motions. *See, e.g.*, petition at 3 (first motion "not accompanied by supporting affidavits"), 12 (especially given summary denial of first new trial motion, "it should have been clear [that co-counsel] needed to do more than file an unsupported motion" and not ask for hearing the second time). But read fairly as a whole and in context, despite its frequent phrasing in terms of non-submission of evidence, the petition did claim more broadly the "Ineffective Assistance of Counsel in Submitting Petitioner's April 3, 2017 Motion for New Trial" and the "Ineffective Assistance of Counsel in Submitting Petitioner's May 19, 2017 Motion for New Trial." Petition at 3, 5.

{¶ 37} The gist of the petition was that counsel's pro-forma motions fell beneath the required standard of representation in not communicating salient new evidence. *See also, e.g.*, Petition at 4, fn. 6 ("Ms. Carter provided new, exculpatory evidence, which was neither cumulative nor contradictory to the evidence at trial, but rather, enhanced the trial evidence which pointed to Isawan being the shooter"); 10 ("the evidence of peitioner's innocence is concrete and not hypothetical. * * * [T]he admission of culpability by Isawan, coupled with

the exculpatory (for Petitioner) testimony of Ms. Carter, a disinterested party, present a compelling argument that Petitioner has substantive grounds for the relief sought hereby); 13 ("less-than-zealous effort to seek a new trial cannot be considered strategy"), 17 ("The newly-discovered evidence, if presented at a new trial, had a significant likelihood of resulting in a different verdict"). To be sure, the new trial motions could have been enhanced by attaching actual evidence, but that point elides into the broader argument concerning failure of the motions to communicate what all the new evidence would be.

{¶ 38} We therefore turn to a comparison of what counsel presented to the trial court in the new trial motions and what the evidence now adduced by petitioner (of whatever date) says was available to his counsel at the time of those motions. If that comparison, crediting the petition affidavits for this purpose only, reflects that Mr. Prater on that assumption was deprived of the level of representation to which he was constitutionally entitled, and thereby prejudiced, then his petition warrants a hearing.

{¶ 39} The first new trial motion, filed April 3, 2017 after the March 24 jury verdict and denied April 25, 2017, was the only one of the two new trial motions to mention Sherita Carter. But, while saying that "there is evidence that Iswan [sic] Foster * * * clearly threatened or influenced Sherita Carter not to be present at the trial," it did *not* say (what her later affidavit implies) that Ms. Carter *herself* was telling counsel that she had not appeared for trial because of threats from Mr. Foster and because she had feared for her safety if she "said anything while Isawan was still on trial." *Compare* April 3, 2017 Motion for New Trial *with* Carter Affidavit at ¶ 8 ("Following conclusion of the trial, I again spoke with Mr. Watson, at which time I explained to him that the reason I did not appear for trial was because of the threats made toward me by Isawan Foster if I testified. I never told Mr. Watson during the trial about the threats I had received because I feared for my safety if [I] said anything while Isawan was still on trial").

{¶ 40} Even more significantly, the new trial motion did *not* advise the court that during the trial, Ms. Carter had told defense counsel "that Isawan Foster fired the shots that evening and Fred Prater did not fire any shots," and that she was willing to testify to that effect. *Compare* April 3, 2017 Motion for New Trial (Carter earlier had given such "a statement to the detective") *with* Carter Aff. at ¶ 5, 6 (reciting conversations with defense

counsel "[o]n more than one occasion during the trial" regarding what she said she had witnessed).

{¶ 41} And more significantly still, the new trial motion did *not* tell the trial court that Ms. Carter now was willing and available to provide her eyewitness testimony that Mr. Prater was not guilty. *Compare* April 3, 2017 Motion for New Trial (no mention of witness Carter's availability, desire to come forward, or of her current account of what she had witnessed) *with* Carter Aff. at ¶ 8-9 (after trial ended, "I regretted not testifying for Fred Prater because I knew the wrong person had been convicted for what Isawan Foster did, and wanted to make amends by telling the truth as soon as I realized the consequences of my actions").

{¶ 42} Indeed, the new trial motion adverted to Ms. Carter only secondarily, after first having referenced unspecified evidence that Mr. Foster had "bragged in front of a number of people" that he had been the one to shoot the bystander, Ms. Norvett. Even that point, however, did not convey the actual information that counsel allegedly had acquired that reflected not merely hearsay accounts from one or more unidentified sources, but documentary evidence said to be directly from Mr. Foster himself. *Compare* April 3, 2017 Motion for New Trial (unspecified evidence that Foster "bragged") *with* Koenig Aff. at ¶ 7 ("Mr. Watson also informed me that following the conclusion of Defendant's trial, he was provided with *copies* of social media postings and communications *in which the co-defendant, Isawan Foster, had bragged* that he was the person who shot Stephanie Norvett, and that Mr. Watson was prepared to provide the evidence of those statements at the [never scheduled] hearing on the motion for new trial he filed * * * April 3, 2017") (emphasis added).

{¶ 43} The second new trial motion, filed May 19, 2017 and denied June 15, 2017, still made no mention at all of Ms. Carter's professed willingness to appear and provide her eyewitness account that Mr. Prater had not done the shooting and had actively urged against it. It did not mention Ms. Carter in any way, but did make limited reference to the purported Prater-Foster tape recordings (as characterized in just one sentence, quoting Mr. Foster without context as saying: "My attorney know I did it. I told him"). That new trial motion did not further advise the court that on both calls, Mr. Foster had indicated a plan "to come downtown for Prater's sentencing to explain that he did the shooting, so as to help

Prater with his appeal." *Compare* May 19, 2017 Motion for New Trial *with* Fields Aff. at ¶ 15, 17. Nor did it elaborate on the context of the conversation about the purported communications to Mr. Foster's lawyer, or on the expressions that Ms. Fields, at least, understood to be Mr. Foster's "expressed remorse for letting Prater take the blame for the shooting." *Compare* May 19, 2017 Motion for New Trial *with* Fields Aff. at ¶ 17-19. And it did not even begin to discuss any potential impact of those tapes in conjunction with Ms. Carter's purportedly exculpatory testimony.

{¶ 44} Here, as in *Howard*, we conclude that the petitioner "has provided evidentiary documents containing sufficient operative facts which, if believed, would establish * * * [that] trial counsel substantially violated their duty" to their client. *See* 2016-Ohio-504 at ¶ 26.

{¶ 45} For starters, *neither* new trial motion even attempted to advise the trial court of what Ms. Carter purportedly had been telling defense counsel about Mr. Prater's not having been the shooter, or to let the trial court know that she herself apparently was willing to come forward to say both that she had been deterred from testifying at trial by threats from Mr. Foster, and that Mr. Foster and not Mr. Prater had done the shooting. Especially because no one had testified directly at trial to identify anyone as the shooter, it is hard to fathom how obscuring such information from the court could have been a matter of litigation "strategy." *Compare* Decision & Jgmt. Entry at 5 ("trial strategy is left to the sole discretion of counsel. Decisions about what evidence to present are committed to counsel's professional judgment. This reasoning is applicable in the instant [motion for new trial] context, also") (citations omitted) *with Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir.1992) (counsel failure to "interview promising witnesses" for potential presentation in court "constitutes negligence, not trial strategy"; finding of ineffective assistance of counsel where a "reasonable defense attorney would have recognized that at least potentially, [witnesses] * * * were * * * very critical"; grant of habeas affirmed in part).

{¶ 46} It should go without saying, given the record at trial here, that failing to apprise the court of the availability and apparently exculpatory account of Ms. Carter as a well-positioned eyewitness (albeit one whose credibility would not be immune from challenge, *see* Appellee's Brief at 12-13) would fall beneath constitutionally required defense counsel standards. *See, e.g., Middletown v. Allen*, 63 Ohio App.3d 443, 448 (12th

Dist.1989) ("Where counsel is aware of potential alibi witnesses and fails to subpoena them to ensure their presence at trial, such failure constitutes a substantial violation of an essential duty owed to the accused"; ineffective assistance found where the "missing witnesses would not have merely corroborated appellant's testimony but could have provided an alibi to a weakly supported theft offense"); *State v. Schlosser*, 2d Dist. No. 17192, 1999 Ohio App. Lexis 2386 (May 28, 1999) (counsel failure to follow up on potentially useful witnesses, "if true, is not a matter of trial tactics, but violates an essential duty owed to clients"); *Howard*, 2016-Ohio-504 at ¶ 26 (failure of "duty to make a reasonable investigation" into case violates first prong of ineffectiveness analysis).

{¶ 47} And coupled with other failings indicated by a comparison of the new trial motions with the information the petition affidavits suggest was available to counsel—the failure, for example, to apprise the court of the claimed acquisition of "copies of social media postings and communications in which the co-defendant, Isawan Foster," had said he had been the shooter, *see* Koenig Aff. at ¶ 7, and the failure to spell out for the court the variety of inculpatory remarks attributed to Mr. Foster in connection with the tape recordings, *see* Fields Aff. at ¶ 15-19—the purported desire of Ms. Carter to set the record straight, in her view, would, if credited, establish deficient presentation in the new trial motions under any objective standard. *See, e.g., Gondor*, 2006-Ohio-6679 at ¶ 72, quoting *Stouffer v. Reynolds*, 168 F.3d 1155, 1164 (10th Cir.1999) (" 'cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense' ").

{¶ 48} "To demonstrate prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 391, quoting *Strickland*, 466 U.S. at 694. In this assessment, we are mindful that "[i]n order to warrant the granting of a motion for a new trial in a criminal case based on newly discovered evidence, the defendant must show 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.' " *Howard*, 2016-Ohio-504 at ¶ 51, quoting *State v. Petro*, 148 Ohio St. 505 (1947), syllabus.

{¶ 49} Here again, and without reiterating all of the potential evidentiary significance of the purported testimony, or trying to beat the trial court to an evaluation of credibility, we conclude that "an evidentiary hearing should have been held with regard to trial counsel's failure." *Schlosser*, 1999 Ohio App. Lexis 2386; *see also, e.g., Howard*, 2016-Ohio-504 at ¶ 63 ("trial court abused its discretion in denying Howard's petition for postconviction relief without a hearing with respect to [his] claim of ineffective assistance of counsel"). Mr. Prater's petition provided "evidentiary documents containing sufficient operative facts which, if believed, would establish" both ineffective assistance of counsel and resulting prejudice with regard to each of the new trial motions. *See Howard* at ¶ 44 (remanding to the trial court "with instructions to conduct a hearing on Howard's postconviction relief claim of ineffective assistance of counsel").

{¶ 50} We conclude that on paper, at least, and given the lack of any trial court findings on credibility and testimonial significance in the aftermath of the co-defendant's acquittal, the materials adduced by Mr. Prater disclose a reasonable probability that, if credited, they would change the result of the new trial motions (considering, too, all the factors that courts must find to grant such motions). Again, those materials as now advanced purport to provide what would be exclusive direct eyewitness testimony as to the identity of the shooter, a direct explanation not obtainable during trial as to why Ms. Carter (who had been subpoenaed) had not made herself available at trial, and evidence relating to various claimed post-trial admissions of Mr. Foster: these matters are material, not cumulative of evidence given at trial, and not presented merely by way of impeachment. *See, e.g., Howard* at ¶ 28; *Workman*, 957 F.2d at 1346 (counsel's failure to contact "the only witnesses other than the arresting officers and [the defendant there] himself who saw the events which precipitated [that defendant's] arrest, constituted ineffective assistance of counsel" that prejudiced the defense).

{¶ 51} The trial court's view that the petition demonstrated no prejudice because none of the actual affidavits it provided had been executed by the time the new trial motions were made, *see* Decision & Jgmt. Entry at 6, miscomprehends what the court needed to assess as reasonably available to counsel at the relevant time. What matters was not the

existence of these particular affidavits in this particular form: what matters is what *information* and witnesses counsel had available or knew or should have known at the time. *See, e.g.*, *Gondor*, 2006-Ohio-6679 at ¶ 54 (trial judge in postconviction hearing "can ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but instead careless"). Indeed, a central premise of the petition for postconviction relief as based on the ineffective assistance of counsel was precisely that counsel was aware of but did not appropriately convey to the court the salient information at hand; as noted above, the petition went to some lengths in arguing that counsel should have worked to provide information in evidentiary form. *See, e.g.*, Petition at 12 ("it should have been clear [that co-counsel] needed to do more than file an unsupported motion").

{¶ 52} And on this score of who knew what when, the petition affidavits shed significant light. The Koenig affidavit, for example, recites in part:

> 7. [Counsel] Watson also informed me that following the conclusion of Defendant's trial, he was provided with copies of social media postings and communications in which the co-defendant, Isawan Foster, had bragged that he was the person who shot Stephanie Norvett, and that Mr. Watson was prepared to provide evidence of those statements at the hearing on the motion for new trial he filed herein on April 3, 2017.
>
> 8. Mr. Watson also informed me that following the conclusion of Defendant's trial, he spoke with Sherita Carter, who informed him that the reason she refused to appear for trial and give testimony was because Isawan Foster had threatened her and she feared for her safety. Mr. Watson stated that he was prepared to provide evidence of Ms. Carter's statements at the hearing on his 4/3/17 motion.
>
> 9. Affiant recently spoke with Ms. Carter, and she confirmed to me that she had, in fact, told Mr. Watson after the conclusion of trial that her failure to appear at trial was because of the threats made against her by Isawan Foster if she appeared at trial, and that she had been in fear of her safety.

{¶ 53} The Koenig affidavit also reflects that the electronic recordings of the purported Foster-Prater calls "had been obtained" by the first defense lawyer, Mr. Watson—and thus by defense counsel corporately—"on or about April 25, 2017" (the date on which

the trial court denied the first motion for a new trial and sentenced Mr. Prater). Perhaps not inconsistently, the second, May 19, 2017 new trial motion had said that information on the tapes had "just recently" been conveyed by Mr. Prater's first counsel to his second (primarily appellate) counsel.

{¶ 54} Ms. Carter's affidavit does not explicitly state the date(s) of her post-verdict communications with counsel and her desire "to make amends by telling the truth as soon as I realized the consequences of my actions." The strong implication of her sworn statement, however, is that she "again spoke with Mr. Watson" shortly "[f]ollowing conclusion of the trial" with the March 24 verdicts of guilty (Mr. Prater) and not guilty (Mr. Foster). Carter Aff. at ¶ 6-9; *see also, e.g.*, Koenig Aff. at ¶ 8 (counsel Watson said that he had spoken with Ms. Carter after the trial and learned of the alleged threats and her fear for her safety; he "stated that he was prepared to provide evidence of Ms. Carter's statements at the [never scheduled] hearing on his 4/3/17 motion"). That suggestion is further enhanced by reference in the April 3, 2017 new trial motion itself to unspecified "newly discovered evidence" that Mr. Foster had "influenced Ms. Carter not to be present at trial." April 3, 2017 Motion for New Trial. And a further strong implication of Ms. Carter's affidavit account was that defense counsel understood that having her available to speak at a hearing meant that she would be available to proclaim "that Isawan Foster fired the shots that evening, and Fred Prater did not fire any shots"—for "[o]n more than one occasion during the trial, I spoke by phone with Mr. James Watson, and told him what I had witnessed and what I was willing to testify about * * *." Carter Aff. at ¶ 5, 6. But the trial court was not apprised of Ms. Carter's circumstances and professed desire to speak before the court denied the motion for a new trial on April 25, 2017.

{¶ 55} Because the trial court did not conduct a hearing on the subsequent petition for postconviction relief, it was not in the position presumed by the Supreme Court of Ohio in *Gondor* to "ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but was instead careless." 2006-Ohio-6679 at ¶ 54.

{¶ 56} The trial court also, of course, was not in the position anticipated by the Supreme Court in *Gondor* of "the trial judge [who] holds a hearing and receives testimony on the very issue of ineffective assistance" of counsel and who "can hear the testimony of witnesses that were never called to testify at the original trial, and [thereby] can determine

the worth of their testimony as well as the witnesses' credibility." *Id.*; *see also id.* at ¶ 55 ("The postconviction judge sees and hears the live postconviction witnesses, and he or she is therefore in a much better position to weigh their credibility than are the appellate judges"). Nor did the trial court here appear to consider or assess the credibility of Ms. Carter (or any of the other affiants) on the basis of the sworn statements as submitted: the trial court did not analyze whether these were "appropriate circumstances in postconviction relief proceedings, [to] deem affidavit testimony to lack credibility without first observing or examining the affiant." *See Calhoun*, 86 Ohio St.3d at 284. The trial court here did not assess credibility or reflect on the trial record at all or provide detailed findings of fact to put the matters in context before dismissing the postconviction relief petition as not satisfying the deficiency or prejudice prongs required of ineffective assistance of counsel claims.

{¶ 57} For the reasons explained above, we find that the trial court abused its discretion in denying the petition without a hearing. We are not in a position to say at this juncture whether the trial court should grant the petition or deny it. What we are saying is that under the governing standards, the trial court should hear the petition and then decide it.

{¶ 58} Because we sustain Mr. Prater's first and third assignments of error to the extent that they state that the trial court abused its discretion in denying the postconviction relief petition without a hearing on his claim of ineffective assistance of counsel, we need not reach his second assignment of error. We reverse the trial court's judgment and entry on the petition for postconviction relief, and we remand this matter to the trial court with instruction to conduct a hearing on the petition and decide it in accordance with law.

Judgment reversed; case remanded with instructions.

BROWN and BRUNNER, JJ., concur.

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