

[Cite as *State v. Gray*, 2018-Ohio-3678.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106589

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**LARRY GRAY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-06-487147-B

**BEFORE:** Keough, J., S. Gallagher, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** September 13, 2018

[Cite as *State v. Gray*, 2018-Ohio-3678.]

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[Cite as *State v. Gray*, 2018-Ohio-3678.]  
KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant Larry Gray appeals from the trial court’s judgment denying his petition for postconviction relief. Finding no merit to the appeal, we affirm.

### **I. Background and Procedural History**

{¶2} On May 2, 2006, DeJuan Harvey was shot and killed. In October 2006, a grand jury indicted Gray on one count of aggravated murder with one- and three-year firearm specifications for Harvey’s murder, and one count of having weapons while under disability. Gray waived his right to a jury trial on the weapons while under disability charge, and the trial court found him guilty. The jury trial on the aggravated murder charge ended in a mistrial.

{¶3} At the second jury trial, Darnetta Simpson testified that near dawn on May 2, 2006, she heard a gunshot, looked out her window, and “saw a man shoot the victim four or five more times.” *State v. Gray*, 8th Dist. Cuyahoga No. 90981, 2009-Ohio-1782, ¶ 3. She saw the shooter “skip” and then run away. *Id.*

{¶4} Danuiell Love testified that Gray was the father of her eight-year-old daughter. *Id.* at ¶ 5. She said that Gray and Latasha McClain were at her house in the early morning hours of May 2, 2006, and that Harvey walked by while the three of them were talking on the front porch. She said that McClain argued with Harvey, who was the father of McClain’s daughter, for several minutes, and Harvey then walked away. Love said that Gray and McClain left immediately after Harvey walked away. *Id.*

{¶5} Love testified that less than ten minutes later, she heard a gunshot and then saw Gray standing over a man and shooting him several times. *Id.* at ¶ 6. Love said that she knew that Gray limped when he walked or ran, and she saw the shooter, who was wearing a white tee-shirt and jeans, limp away from the scene. *Id.*

{¶6} Love went to the victim and recognized him as Harvey. *Id.* at ¶ 7. She testified that Harvey's cell phone rang, and when she answered it, the caller screamed that Harvey was her baby's father and asked if he was dead. *Id.*

{¶7} McClain, who was also indicted for Harvey's murder, accepted a plea deal in which she pleaded guilty to obstruction of justice in exchange for her agreement to testify against Gray. *Id.* at ¶ 12.

{¶8} McClain testified that she was with Gray, who was wearing a white tee-shirt and jeans, the evening before and the morning of the shooting. *Id.* at ¶ 9. She testified that she and Gray went to Love's house around 3:00 or 4:00 a.m. on May 2, 2006. She said that while they were there, Harvey walked by, and she got off the porch and argued with him. *Id.* She testified that after Harvey left, she and Gray got in a car and drove in the same direction that Harvey had walked. She said that Gray parked the car and exited, telling her he had to use the bathroom. *Id.* McClain said that she heard five gunshots, and Gray then returned to the car. *Id.*

{¶9} McClain testified that after the shooting, Gray put the clothes he had been wearing in a garbage bag. She testified further that when detectives questioned her about the shooting in the days that followed, Gray coached her on what to say. *Id.* at ¶

10. She said that Gray repeatedly threatened to kill her if she told anyone what happened the morning of the shooting. *Id.* She said that she and Gray left for Florida six days after the shooting, and they got married while they were there. *Id.*

{¶10} The jury convicted Gray of aggravated murder and the accompanying firearm specifications. The trial court sentenced him to 25 years to life for the aggravated murder, consecutive with three years on the firearm specifications, to run concurrent with five years on the having a weapon under disability conviction, for an aggregate sentence of 28 years to life. *Id.* at ¶ 14.

{¶11} In February 2008, Gray appealed his convictions, raising eight assignments of error. In his second assignment of error, he argued that the trial court erred in allowing McClain to testify because the trial court did not tell her until after her testimony on direct examination that she had the right as his wife to refuse to testify against him. *Id.* at ¶ 24. This court rejected Gray's argument, finding that McClain had agreed to testify against Gray as part of her plea agreement, and that when she was informed of her right not to testify, "she stated to the court that she knew she had a right not to testify, but that she chose to do so anyway." *Id.* at ¶ 28. This court also overruled Gray's other assignments of error and affirmed his convictions. *Id.* at ¶ 1.

{¶12} In August 2009, Gray moved the trial court pursuant to Crim.R. 33(A)(6) for a new trial on the basis of newly discovered evidence. Attached to Gray's motion was an affidavit from Brian Donan in which Donan averred that he, not Gray, shot DeJuan

Harvey on May 2, 2006. The trial court summarily denied Gray's motion, and Gray did not appeal this ruling.

{¶13} In October 2009, Gray again moved for a new trial on the basis of newly discovered evidence. This time Gray attached an affidavit from Danuiell Love in which Love recanted her trial testimony. The trial court again summarily denied Gray's motion.

Gray appealed, and this court reversed, holding that because Love's trial testimony was so essential to Gray's conviction, the trial court abused its discretion in denying the motion without an evidentiary hearing. *State v. Gray*, 8th Dist. Cuyahoga No. 94282, 2010-Ohio-5842, ¶ 29.

{¶14} Upon remand, the trial court held a hearing on Gray's motion. At the start of the hearing, Gray's counsel withdrew Donan's affidavit in light of evidence that Donan was incarcerated at the time of the murder. *State v. Gray*, 8th Dist. Cuyahoga No. 97007, 2012-Ohio-2194, ¶ 7. Love then testified that although the signature on the affidavit was hers, she had not prepared the affidavit nor made the statements recanting her trial testimony. *Id.* at ¶ 9. She then reiterated her trial testimony that Gray was responsible for Harvey's death. *Id.*

{¶15} The notary who had notarized Love's affidavit then testified that she could not recall Love actually signing the affidavit in her presence. *Id.* at ¶ 10. In addition, the state presented evidence that the notary public was not a valid notary when the affidavit was signed. *Id.* The trial court again denied Gray's motion for a new trial, and this court affirmed the denial on appeal. *Id.* at ¶ 23.

{¶16} In August 2017, Gray filed a petition for postconviction relief pursuant to R.C. 2953.21. In his petition, Gray argued that he was denied his right to effective assistance of counsel because counsel did not adequately raise the issues of spousal competency and spousal privilege when McClain testified. Gray acknowledged that counsel raised the issue of spousal competency toward the end of McClain’s testimony, but argued that “an effective attorney would have raised this issue at the moment she was called to the witness stand by the state.” Gray argued further than an effective attorney would have objected to the introduction of conversations between him and McClain on the grounds of spousal privilege.

{¶17} Gray also argued in his petition that there was structural error that resulted in a basic unfairness in his trial because after he was tried and sentenced, the judge who conducted his trial was convicted and sentenced in federal district court on unrelated bribery charges.

{¶18} The state opposed Gray’s petition, arguing that it was untimely, barred by res judicata, and without merit. The trial court denied the petition without a hearing as untimely and barred by res judicata, and this appeal followed.

## **II. Law and Analysis**

{¶19} In his single assignment of error, Gray contends that the trial court erred in denying his petition for postconviction relief without a hearing.

### **A. Standard of Review**

{¶20} R.C. 2953.21 provides:

Any person who has been convicted of a criminal offense \* \* \* and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claims for relief.

{¶21} A petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Bell*, 8th Dist. Cuyahoga No. 105000, 2017-Ohio-7168, ¶ 10. Postconviction relief is not a constitutional right; it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is outside the record. *State v. Milanovich*, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975).

{¶22} A criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun* at 282, citing *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing on the petition, the trial court must determine whether there are substantive grounds for relief, i.e., whether there are grounds to believe there was such a denial or infringement of the rights of the petitioner so as to render the judgment void or voidable under the Ohio or United States Constitutions. *Calhoun* at 283. In determining whether there are substantive grounds for relief, the court must consider the petition, the



supporting affidavits, and the documentary evidence, as well as all the files and records pertaining to the proceedings. R.C. 2953.21(D).

{¶23} A trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. The trial court does not abuse its discretion in dismissing a petition without a hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition. *State v. Abdussator*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15.

#### **B. Ineffective Assistance of Counsel Claim**

{¶24} R.C. 2953.21(A)(2) provides that a petition for postconviction relief must be filed "no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction \* \* \*." Gray's petition for postconviction relief was filed over nine years after the trial transcript in his direct appeal was filed in the court of appeals; his petition is obviously untimely.

{¶25} R.C. 2953.23(A)(1) authorizes a trial court to address the merits of an untimely filed petition for postconviction relief only if both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal

or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶26} Gray concedes that his petition is untimely, but contends that he was “unavoidably prevented from discovering the ineffective assistance of trial counsel until such time as he was able to hire private counsel and fully review the case.” He further contends that but for McClain’s testimony, no reasonable factfinder would have found him guilty. Gray’s argument is without merit.

{¶27} Gray was not “unavoidably prevented” in any manner from discovering the basis for his ineffective assistance of counsel claim. Gray knew that his wife testified at his trial; in fact, as noted above, he challenged the admissibility of McClain’s testimony in his direct appeal of his conviction. The fact that Gray’s new counsel reviewed the case years after Gray’s direct appeal and found an alleged constitutional error regarding counsel’s handling of McClain’s testimony is not dispositive of whether Gray was unavoidably prevented from discovering the facts upon which the claim is based. The exception for untimely petitions set forth in R.C. 2953.23 applies to the “discovery of the *facts* upon which the petitioner must rely to present the claim for relief,” not the discovery of *legal advice* from subsequent counsel. (Emphasis added.)

{¶28} Moreover, even if his petition were timely, the doctrine of res judicata bars Gray from raising his claim of ineffective assistance of counsel relating to McClain's trial testimony. 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 of that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction, or on an appeal from that judgment.

*State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶29} In short, res judicata bars the further litigation of issues that were or could have been raised previously in a direct appeal. *State v. Leek*, 8th Dist. Cuyahoga No. 74338, 2000 Ohio App. LEXIS 2909 (June 21, 2000), citing *Perry* at *id.* The evidence supporting Gray's ineffective assistance of counsel claim regarding trial counsel's alleged ineffectiveness relating to McClain's testimony is contained within the record and thus, any ineffective assistance of counsel claim could have been brought on direct appeal. Because Gray did not do so, he is now precluded by res judicata from raising the issue. Accordingly, the trial court did not abuse its discretion in denying Gray's ineffective assistance of counsel claim as untimely filed and barred by res judicata.

### **C. Structural Error Claim**

{¶30} Two types of constitutional errors may occur in the course of a criminal proceeding: trial errors, which are reviewable for harmless error, and structural errors,

which are per se cause for reversal. *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 15. Trial error is error that occurred during the presentation of the case to the jury, and which may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. *Id.* Structural errors, on the other hand, cannot be analyzed under harmless error analysis because they “affect the framework within which the trial proceeds, rather than simply being an error in the trial process itself.” *Id.* Errors found to be structural errors and subject to automatic reversal occur in only a limited class of cases. *Id.* at ¶ 16.

{¶31} It is axiomatic that the Due Process Clause requires a fair trial in a fair tribunal before an impartial judge with no actual bias against the defendant or interest in the outcome of his particular case. *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34. Judicial bias has been defined as ““a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge.”” *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 48, quoting *Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. Judicial bias is distinguished from ““an open state of mind which will be governed by the law and the facts.”” *Id.*, quoting *Pratt* at *id.*

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{¶32} Gray argued in his petition for postconviction relief that structural error occurred during his trial because his trial judge was not impartial. He cited *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013), in which the Sixth Circuit noted that Stephen Terry, the judge who conducted Gray’s trial, was appointed to the bench in April 2007. *Id.* at 610. Terry did not know that the FBI was investigating then Cuyahoga County Auditor Frank Russo on corruption charges, and that federal agents had tapped Russo’s phones. *Id.* On July 17, 2008, Terry had a telephone conversation with Russo, in which Russo asked him to deny motions for summary judgment in two foreclosure cases on Terry’s docket. *Id.* Terry immediately did so. *Id.* He was subsequently indicted on federal political corruption charges, including charges that he accepted gifts and money from Russo in exchange for official action. He was found guilty and sentenced to 63 months in prison. *Id.* at 611.

{¶33} In his petition for postconviction relief, Gray noted that his trial occurred in December 2007, and that he was sentenced on January 4, 2008. Gray then asserted that because Terry was “apparently under investigation” during this time period, he (Gray) did not receive a trial by an impartial judge, a structural error that required automatic reversal of his conviction.

{¶34} As noted earlier, Gray’s postconviction petition was filed some nine years after his conviction. A trial judge may consider an untimely filed petition if the petitioner demonstrates both that he was unavoidably prevented from discovering the facts upon which the claim is based, and that but for the constitutional error, no

reasonable factfinder would have found the petitioner guilty. R.C. 2953.23(A)(1)(a) and (b).

{¶35} For purposes of Gray’s structural error argument, we will assume pursuant to R.C. 2953.23(A)(1)(a) that Gray could not file a timely postconviction petition because he was unavoidably prevented from discovering the facts upon which his structural error claim is based. Gray was sentenced on January 4, 2008, and filed his appeal on February 4, 2008. Terry was indicted in September 2010, and sentenced in October 2011. Thus, Gray could not have discovered the facts relating to Terry in time to file a timely petition for postconviction relief under R.C. 2953.21(A)(2), i.e., within 365 days after the transcript was filed in the appellate court in Gray’s 2008 direct appeal.

{¶36} Nevertheless, Gray’s petition failed to demonstrate pursuant to R.C. 2953.23(A)(1)(b) that but for the constitutional error at trial, no reasonable factfinder would have found him guilty. Indeed, Gray failed to demonstrate any constitutional error whatsoever.

{¶37} The only “evidence” relating to Terry’s alleged bias in Gray’s case was Gray’s averment in an affidavit submitted with his petition that he “was never informed that my trial judge was under investigation for bribery-related charges.” Other than this single averment, which in no way demonstrates that Terry was not impartial in Gray’s case, Gray produced nothing demonstrating that Terry’s rulings in two unrelated foreclosure cases somehow affected his impartiality in Gray’s case. Without any

evidence, Gray's theory that the judge was not impartial in his case because he was biased in two unrelated cases is nothing more than mere speculation.

{¶38} A trial judge may review an untimely petition for postconviction relief where the petitioner demonstrates by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the offense of which he was convicted. R.C. 2953.23(A)(1)(b). Because Gray offered no evidence whatsoever, much less clear and convincing evidence, of any constitutional error, the trial court did not err in denying his structural error claim as untimely filed.

{¶39} The assignment of error is therefore overruled, and the trial court's judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and  
LARRY A. JONES, SR., J., CONCUR