[Cite as *State v. Montgomery*, 2015-Ohio-500.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-1091 (C.P.C. No. 10CR-12-7125)
Caron Montgomery,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 10, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, *Kathryn Sandford*, *Shawn P. Welch* and *Lisa Lagos*, for appellant.

ON APPLICATION FOR RECONSIDERATION

TYACK, J.

{¶ 1} Defendant-appellant, Caron Montgomery, has filed an application for reconsideration of this court's December 30, 2014 decision in *State v. Montgomery*, 10th Dist. No. 13AP-1091, 2014-Ohio-5756. That case was an appeal from the judgment of the Franklin County Court of Common Pleas dismissing a petition for post-conviction relief without an evidentiary hearing. This court reversed, sustaining the following two assignments of error:

> [I.] The trial court erred by dismissing appellant's post-conviction petition where he presented sufficient operative facts and supporting exhibits to merit at minimum an evidentiary hearing and discovery.

> [II.] The trial court erred in dismissing appellant's post-conviction petition without holding an evidentiary hearing and affording him the opportunity to conduct discovery.

{¶ 2} In its merit brief in the initial appeal, Montgomery requested this court to "remand his post-conviction case to the trial court with instructions to allow Montgomery to conduct the discovery he has requested to fully develop the issues, followed by an evidentiary hearing on the merits."

{¶ 3} In sustaining the two assignments of error, this court stated as follows:

> In sustaining them, we do not indicate that discovery, such as presented in a normal civil case, should be allowed. 'A post-conviction relief petitioner is not entitled to discovery to help him or her establish substantive grounds for relief.' *State v. Gulertekin*, 10th Dist. No. 99AP-900 (June 8, 2000).

Id. at ¶ 24.

{¶ 4} Now that Montgomery has established sufficient operative facts to warrant an evidentiary hearing, Montgomery has asked us to clarify whether we are holding that the decision whether to grant discovery is for the trial court to decide or whether Montgomery is not entitled to discovery.

{¶ 5} The state has responded to the application for reconsideration by stating that our decision to remand for an evidentiary hearing was in error and that Montgomery should not receive any discovery preparatory to any such hearing. The state further indicated that it intends to appeal the decision to the Supreme Court of Ohio to rectify what it believes are various errors committed in the decision.

{¶ 6} The test generally applied to an application for reconsideration is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for reconsideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. Reconsideration will be denied where the moving party simply seeks to "rehash the arguments [the party] made in its appellate brief." *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127-28 (1oth Dist.1992). "Importantly, an appellate court will not grant '[a]n application for reconsideration * * * just because a party disagrees with the logic or

conclusions of the appellate court.' " *State v. Harris*, 10th Dist. No. 13AP-1014, 2014-Ohio-672, ¶ 8, quoting *Bae v. Dragoo & Assoc., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶ 2.

{¶ 7} Criminal post-conviction proceedings in Ohio are governed by statute and have been held to be "quasi-civil" in nature by the Supreme Court of Ohio. R.C. 2953.21; *State v. Nichols*, 11 Ohio St.3d 40, 42 (1984).

{¶ 8} Ohio appellate courts, including this district, have routinely rejected granting post-conviction relief petitioners the right to obtain discovery to help him or her establish substantive grounds for relief. *State v. Gulertekin*, 10th Dist. No. 99AP-900 (June 8, 2000). "Ohio law is clear that discovery is not available in the initial stages of a postconviction proceeding." *State v. Cunningham*, 3d Dist. No. 1-04-19, 2004-Ohio-5892, ¶ 69, citing *State v. Byrd*, 145 Ohio App.3d 318, 332 (1st Dist.2001). This court has stated that "during the initial stage of a post-conviction relief proceeding, 'no right to discovery of evidence outside the record exists.' " *Gulertekin* citing *State v. Wickline*, 10th Dist. No. 93APA10-1411 (June 28, 1994).

{¶ 9} In *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, ¶ 20-28, another petition for post-conviction relief, this court specifically addressed the issue of civil discovery:

> The first assigned error alleges that, as the petitioner in a civil matter, Bethel was entitled to discovery under the Ohio Rules of Civil Procedure. This argument is specifically refuted by mandatory case law, which prevents us from even considering it.
>
> To avoid the effects of res judicata, criminal appellate counsel typically attempt to develop new factual information to be considered in petitions. As in any other ordinary civil proceeding, the way attorneys do this is through discovery. This is exactly what Bethel's counsel sought to do in the post-conviction proceeding.
>
> Although it makes sense-since post-convictions are civil proceedings-to conduct discovery in accordance with the civil rules, the Supreme Court of Ohio has held that petitioners are not automatically entitled to civil discovery. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 1999-Ohio-314, 718 N.E.2d 426 (per curiam) certiorari

> denied (2000), 529 U.S. 1116, 120 S.Ct. 1977 (citing *State v. Spirko* [1998], 127 Ohio App.3d 421, 429, 713 N.E.2d 60, appeal not allowed, 83 Ohio St.3d 1430, 699 N.E.2d 946); see, also, *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99AP-900 (holding that during initial stages of post-conviction relief proceedings there is no right to discovery of evidence outside the record) (quoting *State v. Wickline* [1994], 71 Ohio St.3d 1430; *State v. Fugett* [Dec. 8, 1998], Franklin App. No. 98AP-396).
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> In Love, the petitioner was convicted of voluntary manslaughter and aggravated robbery. Years later, he filed an original action in mandamus in the court of appeals to compel the Cuyahoga County Prosecutor's Office to turn over ballistics and autopsy reports relevant to the criminal trial. He claimed that he was entitled to these records because they constituted exculpatory evidence, which supported his postconviction relief. The court of appeals denied the writ, and the Supreme Court affirmed. This holding is based on the court's interpretation of post-conviction proceedings as a statutorily-created right, and because the statute granting the right does not specifically include the right to civil discovery, the court has concluded that none exists. See *Calhoun*, supra, at 281 (citing *Murray v. Giarratano* [1989], 492 U.S. 1, 10, 109 S.Ct. 2765) ("State collateral review itself is not a constitutional right."); cf. *State v. Scudder* (1998), 131 Ohio App.3d 470, 481, 722 N.E.2d 1054 (Tyack, J., dissenting). The irony here is that post-conviction relief is specifically designed to allow defendants who believe they were wrongly convicted to attack their convictions using material outside of the trial court record, but if they are not entitled to discovery, there is little chance they will ever obtain any evidence or defenses that are outside of the record.
>
> The reason for the Supreme Court of Ohio's strong stance limiting petitioners' rights in post-conviction proceedings is summed up as follows: It may be useful to note that cases of post-conviction relief pose difficult problems for courts, petitioners, defense counsel and prosecuting attorneys alike. Cases long considered to be fully adjudicated are reopened, although memories may be dim[,] and proof difficult. The courts justifiably fear frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose. *Calhoun*, at 282 (quoting *State v. Milanovich* [1975], 42 Ohio St.2d 46, 51, 325 N.E.2d 540).

> Bethel's counsel asserts that these limitations on discovery are inconsistent with due process and equal protection. See appellant's brief, at 10, citing *Evitts v. Lucey* (1985), 469 U.S. 387, 401, 105 S.Ct. 830 (requiring states that provide appellate review to do so in accordance with the Due Process Clause). Be that as it may, we are not the proper authority to consider the merits of this argument. If there is indeed a federal right to discovery in post-conviction proceedings, that right must either be recognized by the Supreme Court of Ohio, or forced upon them by a federal court. See, e.g., *Keener v. Ridenour* (C.A.6, 1979), 594 F.2d 581, 590 (holding that in habeas proceedings, the federal courts may review issues not previously decided by state courts of Ohio). Until then, stare decisis prevents us from ruling in a manner that conflicts with that of the Supreme Court of Ohio. See, e .g., *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89 (citing *Battig v. Forshey* [1982], 7 Ohio App.3d 72, 74; *Thacker v. Bd. of Trustees of Ohio State Univ.* [1971], 31 Ohio App.2d 17, 23, 285 N.E.2d 380 reversed on other grounds) ("A court [of appeals] is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled."); cf. *Keener*, ibid. ("Interpretation of Ohio's appellate and post-conviction remedies belongs with the highest judicial tribunal of Ohio, not with the federal courts of appeal. Amendment of statutes is the prerogative of the Ohio Legislature").
>
> Stare decisis has two aspects: (1) that in the absence of overriding considerations courts will adhere to its own previously announced principles of law; and (2) that courts are bound by and must follow decisions of a reviewing court that has decided the same issue. *Thacker*, ibid; *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444. "Under this principle, we are bound by and must follow the decisions of the Ohio Supreme Court. To do otherwise would do violence to the doctrine that ours is a government of law, not of men." *Thacker*, ibid.
>
> The Supreme Court of Ohio is, of course, free to overrule its own prior decisions, but until it does so, we have no choice but to follow the rule of law set forth in *Love*. We realize that this decision may be inimical to the concept that petitions are civil proceedings, however, the *Love* court has already decided that petitioners in postconviction proceedings are not automatically entitled to discovery, and we are bound by that decision. Id. at 159.

> Accordingly, we must overrule the first assigned error.

Id. at ¶ 20-28.

{¶ 10} Based on this reasoning and our own precedent, we stand by our original statement that we are not holding that Montgomery is automatically entitled to full civil discovery as contemplated by the Ohio Rules of Civil Procedure.

{¶ 11} However, it appears to be undecided by the Supreme Court of Ohio whether a petitioner may be entitled to some limited discovery once an evidentiary hearing is granted in a post-conviction relief case.

{¶ 12} In *State v. Twyford*, 7th Dist. No. 98-JE-56 (Mar. 19, 2001), the Seventh District Court of Appeals interpreted the Supreme Court of Ohio as holding there are no circumstances in which a post-conviction petitioner may be entitled to discovery. The court stated the following:

> Prior to the issuance of the Love decision, there existed some authority for the basic proposition that the allowance of discovery in a postconviction proceeding was a matter within the sound discretion of the trial court. See [*State v. Wiles* (1998), 126 Ohio App.3d 71], *Wiles*, supra, at 77, citing *State v. Smith* (1986), 30 Ohio App.3d 138, 140. However, that authority has no further value as precedent. That is, pursuant to Love and Spirko, there are no circumstances under which a defendant in postconviction proceedings can be entitled to discovery.

{¶ 13} However, Montgomery has cited cases indicating that discovery may be warranted and it is within the discretion of the trial court whether to allow some form of limited discovery. *State v. Sherrills*, 8th Dist. No. 61882 (Jan. 16, 1992) (implying it is within the discretion of the trial court to allow discovery once a petitioner meets the burden of production demonstrating substantive grounds for relief); accord, *State v. Drummond*, 7th Dist. No. 05 MA 197, 2006-Ohio-7078, ¶ 113-123. *See also State v. Samatar*, 10th Dist. No. 03AP-1057, 2004-Ohio-2641, ¶ 21 ("Appellant concedes that Ohio courts have clearly found that the decision to permit discovery is a matter fully within the discretion of the trial court and acknowledges that, in *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99AP-900, this court held that a post-conviction relief

petitioner is not entitled to discovery to help him/her establish substantive grounds for relief.").

{¶ 14} There is also some indication that federal courts would recognize the right to some limited form of discovery. For example, in *Cowans v. Bagley*, 236 F.Supp.2d 841, 865 (S.D.Ohio 2002), a federal district court stated:

> Ohio courts typically require claims to be supported by some sort of evidentiary *documents before the courts will grant additional factual development through discovery or a hearing*. Ohio's procedure is not unreasonable, *Jamison v. Collins*, 100 F.Supp.2d 521, 567-68 (S.D.Ohio 1998), and the Court notes that petitioner managed to submit evidentiary documents in support of other claims he raised in postconviction, even without the benefit of discovery or expert funds.

(Emphasis added.)

{¶ 15} Since the State of Ohio has stated that it intends to appeal our December 30, 2014 decision to the Supreme Court of Ohio, it may receive clarification or perhaps a more definitive statement from that tribunal as to whether any discovery is permitted in post-conviction proceedings, particularly where, as here, the petitioner has established substantive grounds for relief, and established the need for an evidentiary hearing.

{¶ 16} In the meantime, we find that it is within the sound discretion of the trial court whether to grant some limited form of discovery to Montgomery in order to permit additional factual development of his post-conviction claims.

Application for reconsideration granted.

DORRIAN and BRUNNER, JJ., concur.