[Cite as *State v. Stoutamire*, 2009-Ohio-6228.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0108**
- vs -	:	
DWAYNE A. STOUTAMIRE,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 CR 148.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Lynn Maro, Maro and Schoenike Co., 7081 West Boulevard, #4, Youngstown, OH 44512 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Dwayne A. Stoutamire appeals from the judgment of the Trumbull County Court of Common Pleas, which denied his petition for postconviction relief and granted the state's motion for summary judgment.

{¶2} Mr. Stoutamire argues on appeal that the trial court erred in awarding summary judgment to the state and dismissing his postconviction petition because he introduced evidence of prosecutorial misconduct and alleged operative facts of a

constitutional violation thus entitling him to an evidentiary hearing. He further contends that the trial court erred in denying his motion for leave to amend his petition after the state filed its motion for summary judgment.

{¶3} Specifically, the trial court found that Mr. Stoutamire failed to set forth specific facts which demonstrate a genuine issue of material fact as to whether the state "withheld" the criminal records of four of the state's 28 witnesses prior to trial. The trial court found no Crim.R. 16 violation inasmuch as the state is duty-bound to only produce information it knows. The trial court further found that the witnesses' prior criminal histories of which the state was unaware were public records, which could have been easily obtained by Mr. Stoutamire during discovery. Finally, the trial court found that the absence of the criminal records which may have been used by defense counsel for impeachment purposes "did not undermine the outcome if his trial" in light of the overwhelming evidence that was presented. Therefore, the court found no *Brady* violation occurred in this case.

{¶4} Nor did the court find Mr. Stoutamire's counsel was ineffective, as even without the criminal histories available for impeachment purposes, trial counsel engaged in aggressive cross-examination of all the witnesses, and actively participated in voir dire, opening statements, and closing arguments. Thus, the court concluded that there was no reasonable probability that cross-examination as to the witnesses' convictions in this case would have undermined the confidence of the outcome of his trial.

{¶5} We find Mr. Stoutamire's arguments are without merit because he did not allege any substantive grounds for relief that would warrant an evidentiary hearing. We agree with the trial court that Mr. Stoutamire failed to allege any prosecutorial

misconduct or a valid ineffective assistance of counsel claim. He further failed to demonstrate the trial court abused its discretion in denying his motion to amend his petition because the document reflecting Ms. Gordon's misdemeanor conviction had, per the assistant prosecutor's affidavit, been a part of the state's file, which was shown to Mr. Stoutamire's trial counsel, but apparently "missed" by his trial counsel per counsel's second affidavit. The change in focus between the first affidavit submitted with the post conviction relief petition, and the second affidavit submitted with his motion to amend from the state's failure to produce Ms. Gordon's conviction to trial counsel's own personal failure, does not change the underlying nature of the claim warranting leave to amend. Thus, we affirm.

{¶6} **Substantive and Procedural Facts**

{¶7} This appeal stems from two separate incidents that occurred on January 9, 2007 and February 19, 2007. The first concerned a shooting, and the second, a domestic dispute. The domestic dispute between Mr. Stoutamire and Ms. Jessica Gordon, the only witness to testify to both incidents, produced a lead in the shooting investigation, eventually leading to Mr. Stoutamire's arrest and conviction for both incidents.[1]

{¶8} Both incidents were tried before one jury, who found Mr. Stoutamire guilty of felonious assault with a firearm specification, a second degree felony in violation of R.C. 2903.11(A)(2)&(D) and R.C. 2941.145; abduction with a firearm specification, a third degree felony in violation of R.C. 2905.02(A)(1)&(B) and R.C. 2941.145;

1. The underlying facts of both incidents were addressed in Mr. Stoutamire's direct appeal, *State v. Stoutamire*, 11th Dist. No. 2007-T-0089, 2008-Ohio-2916, discretionary appeal not allowed by *State v. Stoutamire*, 2008-Ohio-5467.

aggravated robbery with a firearm specification, a first degree felony in violation of R.C. 2911.02(A)(1)&(C) and R.C. 2941.145; and two counts of having weapons under disability, third degree felonies in violation of R.C. 2923.13(A)(3)&(B). The jury acquitted Mr. Stoutamire on the charge of attempted murder.

{¶9} On direct appeal, Mr. Stoutamire challenged the joinder of the two incidents in one trial, the jury instruction on complicity after jury deliberations had already begun, the refusal of the trial court to give the jury an instruction on the lesser included offense of abduction, unlawful restraint; as well as raising arguments that the jury verdict was against the manifest weight of the evidence and that he was denied his right to a fair trial due to the cumulative errors that occurred during trial. We found Mr. Stoutamire's appeal to be without merit and affirmed the trial court.

{¶10} While his direct appeal was pending, Mr. Stoutamire filed a petition for postconviction relief pursuant to R.C. 2953.21, alleging newly discovered evidence. Specifically, he offered evidence de hors the record of criminal histories of four of the 28 witnesses presented against him at trial, asserting that these histories would have been used for impeachment during trial. Thus, he raised issues of prosecutorial misconduct, ineffective assistance of counsel, as well as, again, raising the issue of whether the trial court erred in instructing the jury on complicity after jury deliberations had already begun.

{¶11} The state responded with a motion for summary judgment, offering evidentiary material rebutting the assertion that the nondisclosure was a result of prosecutorial misconduct. The state also offered evidence that the one criminal history that was known, that of Ms. Gordon, was disclosed to Mr. Stoutamire's trial counsel.

Mr. Stoutamire's trial counsel admitted that he was given the state's file, and that he is not aware of how he inadvertently missed Ms. Gordon's criminal history sheet.

{¶12} Mr. Stoutamire then filed a motion for leave to amend his petition to include a fourth claim of ineffective assistance of counsel in response to the submission by the state with its motion for summary judgment that it had indeed revealed Ms. Gordon's criminal history to defense counsel during discovery and prior to trial. The court denied Mr. Stoutamire's motion to amend, finding his claim to be without merit because the issue was already raised in the second claim of his initial petition.

{¶13} In awarding summary judgment to the state, the trial court found that Mr. Stoutamire failed to allege any substantive grounds for relief that would warrant an evidentiary hearing. The court found that no prosecutorial misconduct occurred, that Mr. Stoutamire's counsel was not ineffective in his defense, and finally, that the complicity instruction argument was addressed and dismissed upon direct appeal. The trial court concluded that in light of the overwhelming evidence presented against Mr. Stoutamire, there was no reasonable probability that the use of the criminal histories for impeachment purposes during the cross-examination of the four witnesses at issue would have undermined confidence in the outcome of the trial.

{¶14} Mr. Stoutamire now timely appeals, raising the following three assignments of error for our review:

{¶15} "[1.] The trial court erred in granting summary judgment and denying Appellant an evidentiary hearing on his petition for post-conviction relief, thus depriving Appellant of liberties secured by U.S. CONST. amend. VI and XIV and OHIO CONST. art. I., sec. 1,2,10, and 16, including meaningful access to the courts of this State.

{¶16} "[2.] The trial court erred in denying Appellant a hearing on his petition, thus depriving Appellant of liberties secured by U.S. CONST. amend. XIV and Ohio CONST. art. I, sec. 1,2,10, and 16, including meaningful access to the courts of this State.

{¶17} "[3.] The Trial Court Erred When it Denied Appellant's Motions for Leave to Amend His Post-conviction Petition, Denying Him Due Process of Law and a Fair Trial in Violation of His Rights under the Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution."

{¶18} **Postconviction Relief Standard of Review**

{¶19} R.C. 2953.21 provides, in relevant part:

{¶20} "(A)(1)(a) 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 claim for relief.

{¶21} "***.

{¶22} "(C) *** Before granting a hearing on a petition ***, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the

proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and court reporter's transcript. *** If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."

{¶23} "The Supreme Court of Ohio explained in *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, that '[i]n postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing. In *State v. Calhoun* (1999), 86 Ohio St.3d 279, paragraph two of the syllabus, this court held that a trial court could dismiss a petition for postconviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." This court reversed the judgment of the appellate court in *Calhoun*, holding that "the trial court *did not abuse its discretion* in dismissing the credibility of [the] affidavits," which served as the basis for his petition. (Emphasis sic.) Id. at ¶51, citing *Calhoun* at 286.

{¶24} "Thus, the court determined 'that the trial court's gatekeeping function in the postconviction relief process is entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. We established in *Calhoun* that a court reviewing the trial court's decision in regard to its gatekeeping function should apply an abuse-of-discretion standard. The consistent approach is to grant that same level of deference to the trial court in regard to its post-hearing decision.' Id. at ¶52.

{¶25} "The Supreme Court of Ohio recently affirmed that we review postconviction proceedings for an abuse of discretion in *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, stating that '[r]ecently, in *State v. Gondor*, we considered the standard for appellate review of post-conviction proceedings. We held that abuse of discretion is the appropriate standard: "[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; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence."' Id. at ¶45, citing *Gondor* at 60." *State v. Vinson, Jr.,* 11th Dist. No. 2007-L-088, 2008-Ohio-3059, ¶25-27.

{¶26} Thus, we review the denial of Mr. Stoutamire's postconviction petition for an abuse of discretion. "The term 'abuse of discretion' connotes more than error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." Id. at ¶28, citing *Gondor* at ¶46, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157; *State v. Keenen* (1998), 81 Ohio St.3d 133, 137. See, also, *State v. Hillman,* 10th Dist. Nos. 06AP-1230 and 07AP-728, 2008-Ohio-2341, ¶61.

{¶27} **Right to an Evidentiary Hearing**

{¶28} Although his assignments of error at first blush are styled the same, Mr. Stoutamire raises different issues under each. In each assignment of error, however, he argues he was entitled to an evidentiary hearing. Thus, we must note initially, that "[a] criminal defendant attempting to challenge his conviction through a petition for postconviction relief is not entitled to a hearing simply by filing the petition." Id. at ¶30, quoting *State v. Delmonico,* 11th Dist. No. 2004-A-0033, 2005-Ohio-2882, ¶13, citing

State v. Cole (1982), 2 Ohio St.3d 112, 113. "The trial court has a duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing." Id. "Specifically, R.C. 2953.21(C) provides, in relevant part: 'Before granting a hearing on a petition [for postconviction relief], the court shall determine whether there are substantive grounds for relief.' Where a petitioner fails to set forth substantive grounds for relief, he or she has failed to adduce adequate evidence to warrant a hearing." Id.

{¶29} Thus, in order to be granted a hearing on his petition, Mr. Stoutamire was required to introduce adequate evidence of substantive grounds that would warrant relief.

{¶30} **Prosecutorial Misconduct - Alleged *Brady* Violation**

{¶31} In his first assignment of error, Mr. Stoutamire contends the trial court erred in denying his petition and awarding the state summary judgment because he, in sum, alleged a prima facie case of prosecutorial misconduct, by way of a *Brady* violation. Specifically, he alleges that the state failed to disclose the criminal histories of four witnesses, thus the lack of this impeachment material deprived him of an effective cross-examination. We find this argument to be without merit because not only did the state not withhold this evidence, but the evidence was unknown to the state despite a diligent search, and all of the witnesses' criminal histories were public records, which the defense could have uncovered in preparation for trial. From the evidence before the trial court, the record of one of the four witnesses was indeed a part of the case file, but was "missed" by defense counsel.

{¶32} "In *Brady v. Maryland* (1963), 373 U.S. 83, the United States Supreme Court held that '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.'" *State v. Davis*, 5th Dist. No. 2008-CA-16, 2008-Ohio-6841, ¶53, citing *Brady* at 87. "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." Id., see *Strickler v. Greene* (1999), 527 U.S. 263, 281-82; *Bell v. Bell* (6th Cir., 2008) 512 F.3d 223, 231.

{¶33} The failure of the state in this case, however, to disclose the criminal histories of the four witnesses, three of which were unknown to the state after a diligent search, and one of which *was* indeed disclosed, does not equate to a *Brady* violation.

{¶34} Specifically, the state conducted a background check on each of the four witnesses, David Palm, Sally Palm, Samantha Bumbico, and Jessica Gordon, which revealed only that Ms. Gordon had a criminal conviction for a misdemeanor theft. This was admittedly disclosed to defense counsel, who stated he inadvertently "missed" this information or, if he saw it, he failed to copy it, although he was given the state's file prior to trial.

{¶35} To conduct criminal background checks, the state used the Ohio Attorney General's Ohio Law Enforcement Gateway, or "OHLEG." The prosecutor averred in his affidavit that it is his custom and practice to use this reliable source, and that none of the three witnesses were listed in the system. The state also provided defense counsel with the city of Warren police histories for these witnesses, which included Ms. Gordon's theft conviction. The state then personally questioned each witness. While extremely troubling, but not surprising, each witness denied having a criminal record.

{¶36} Defense counsel discovered this information after trial, when, at the urging of Mr. Stoutamire and his family, he called several counties, and discovered that Fred Brady, a state's witness who was not called at trial and Mr. Stoutamire's accomplice in the Peterman shooting, had a criminal history. Defense counsel investigated further, and checked court dockets from several counties, which revealed the criminal histories of the four witnesses at issue.

{¶37} Mr. Stoutamire fails to allege how this rises to the level of prosecutorial misconduct. This was information unknown to the state prior to and during trial despite a diligent search. More fundamentally, court records are matters of public record, and were discoverable by the defense in preparation of trial. See *Davis* at ¶56 (municipal court records are matters of public record); *State v. Ross*, 9th Dist. No. 23028, 2006-Ohio-4352, ¶27, ("*Brady* does not require that a party disclose information which is part of a public record"); *State v. Clark*, 12th Dist. No. CA2008-09-113, 2009-Ohio-2101, ¶15 (the state did not suppress evidence of the civil lawsuit, whether purposefully or inadvertently). Furthermore, "[e]vidence *de hors* the record must be more than evidence which was in existence and available to the defendant at the time of trial and which could and should have been submitted at trial if the defendant wished to make use of it." *Vinson* at ¶37, quoting *State v. McCaleb*, 11th Dist. No. 2004-L-003, 2005-Ohio-4038, citing *State v. Coleman*, 1st Dist. No. C-900811, 1993 Ohio App. LEXIS 1485, 22.

{¶38} The state did not "suppress" any evidence, nor did it prevent Mr. Stoutamire from learning of the witnesses' criminal histories independently prior to trial. There is no evidence that the state even knew of the convictions despite independently

searching and questioning each witness. Quite simply, Mr. Stoutamire has failed to demonstrate a *Brady* violation.

{¶39} Most fundamentally to a petition for postconviction relief, Mr. Stoutamire failed to demonstrate that the evidence in question is material in that it would have probably changed the outcome of the trial.

{¶40} The state presented the testimony of 28 witnesses. The three witnesses present at the shooting of Mr. Peterman, whose criminal convictions were not uncovered by either the state or defense counsel, were David Palm, Mr. Palm's mother, Sally Palm, and Samantha Bumbico. The jury was presented with evidence that David Palm had gun residue on his hands and that he, along with Mrs. Palm, went to Mr. Peterman's in order to purchase crack cocaine. Mr. Palm further testified that he was the one who informed Mr. Peterman his car window was lowered in the parking lot, which prompted Mr. Peterman to leave the apartment. Mr. Peterman was shot in the parking lot as he was closing his car window. Mr. Palm also testified that when he went inside to purchase the crack cocaine, he left $320 on the kitchen table, even though he only purchased $315. When the police entered the apartment they found the money had vanished. Thus, the jury was presented with overwhelming evidence that both David and Sally Palm were drug users, as well as evidence that could potentially have implicated Mr. Palm instead of Mr. Stoutamire in the shooting, the very evidence defense counsel sought to establish on his cross-examination of these witnesses.

{¶41} Ms. Samantha Bumbico was an eyewitness, among many, at the scene following the shooting. Specifically, Ms. Bumbico testified that she saw two people standing in front of Mr. Peterman's vehicle, and then observed each run in a different

direction, one wearing a dark "hoodie," the other a red one. She saw them both run to a red car. Mr. Palm testified that he was driving a red vehicle that evening.

{¶42} As found by the trial court, the state introduced ample evidence linking Mr. Stoutamire to the shooting. An "associate" of Mr. Stoutamire, Mr. Joseph Brown, testified that the day before the shooting Mr. Stoutamire informed him that he wanted to commit a robbery. In front of Mr. Brown, Mr. Stoutamire and Mr. Brady began discussing possible victims. Mr. Stoutamire remarked that he was "willing to hit anybody," and that "he was thirsty to do a lick."

{¶43} The state also offered physical evidence of the shooting that implicated Mr. Stoutamire as well. Ms. Gordon gave the police five bullets in a brown paper bag, together with a plastic bag of clothes that were supposedly Mr. Brady's. The bullets were later identified as fitting a .40 caliber weapon, the weapon used to shoot Mr. Peterman. She also identified the pants Mr. Stoutamire was wearing during the shooting, which had red spots on them.

{¶44} Second, as to the domestic dispute between Mr. Stoutamire and Ms. Gordon, aside from her own testimony, the state presented testimony of several eyewitnesses. The police were actually called to the scene by a neighbor, Ms. Annette Wilson, who heard a girl, later identified as Ms. Gordon, screaming. She observed Ms. Gordon run to the police when they arrived, where she then threw herself on one of the vehicles yelling "Help me! Help me!" Ms. Patrice Rice, another neighbor, saw Mr. Stoutamire pull a gun on Ms. Gordon, which prompted her to immediately call 911. She observed Mr. Stoutamire pulling Ms. Gordon out of the car, and then holding the gun to her head. When searching the vehicle, Officer Jeffrey Miller located a silver revolver, a

.38 special, with a wooden handle under the driver's seat of the vehicle. Thus, even without Ms. Gordon's testimony, there was ample evidence that a violent altercation occurred between Mr. Stoutamire and Ms. Gordon, and that Mr. Stoutamire threatened Ms. Gordon with a gun.

{¶45} We agree with the trial court that "[i]n light of the overwhelming evidence presented against Petitioner, the Court agrees that there is no reasonable probability that such cross examination [of the witness' criminal convictions] would undermine confidence in the outcome of this trial."

{¶46} Not only was no evidence withheld, but even if it were, "[n]o constitutional violation occurs if the evidence that was allegedly withheld is merely cumulative to evidence presented at trial." *State v. Gillispie,* 2d Dist. Nos. 22877 and 22912, 2009-Ohio-3640, ¶50.

{¶47} Mr. Stoutamire's first assignment of error is without merit.

{¶48} **Ineffective Assistance of Counsel**

{¶49} In his second assignment of error, Mr. Stoutamire alleges that his counsel was ineffective in failing to discover the witnesses' criminal histories, especially that of Ms. Gordon. Ms. Gordon was the only witness whose criminal history was uncovered by the state and shared with defense counsel. Both the state and defense counsel agree Ms. Gordon's criminal conviction for a misdemeanor theft was shared with defense counsel. Mr. Stoutamire's counsel admits he inadvertently overlooked the information. We do not find this error to rise to the level of ineffective assistance of counsel under the circumstances of this case. Thus, we find Mr. Stoutamire's second assignment of error is without merit.

{¶50} "In determining whether counsel's performance constitutes ineffective assistance, an appellate court must find that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result." *Clark* at ¶18, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. "In performing its review, an appellate court is not required to examine counsel's performance under the first prong of the *Strickland* test if an appellant fails to prove the second prong of prejudicial effect." Id., citing *State v. Arrone*, 12th Dist. No. CA2008-04-010, 2009-Ohio-1456, ¶21. "In demonstrating prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id., citing *Strickland* at 694. Further, "[a] strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance." Id., citing *Strickland* at 689.

{¶51} Mr. Stoutamire failed to demonstrate that the outcome of the trial would have been different if he had knowledge of the criminal convictions of Mr. Palm, Mrs. Palm, Ms. Bumbico, and Ms. Gordon.

{¶52} Moreover, defense counsel stated in his affidavits that although the evidence was "material," he was not "sure" if he would have used the convictions in his cross-examination in any case. Thus, defense counsel stated in his first affidavit, "[i]n Affiant's experience, impeachment by prior conviction can palpably impact upon the jury's assessment of credibility of a witness, *though the decision as to whether to impeach or not with a prior conviction is a strategic one made by counsel, like all strategic trial decisions after assessment of all the facts and circumstances.*" (Emphasis

added.) Thus, even in hindsight, defense counsel does not affirmatively state he would have used this evidence to impeach the witnesses.

{¶53} Under the circumstances of this case, we determine that the trial court did not abuse its discretion in finding that defense counsel's failure to discover the existence of the criminal convictions at issue did not have a prejudicial effect on the outcome of appellant's trial.

{¶54} Mr. Stoutamire's second assignment of error is without merit.

{¶55} **Motion for Leave to Amend Petition**

{¶56} In his third assignment of error, Mr. Stoutamire alleges the trial court erred in denying his motion for leave to amend his petition to add a fourth claim, that of ineffective assistance of counsel. Mr. Stoutamire, however, already raised an ineffective assistance of counsel claim in his original petition. He was merely seeking to add a fourth claim so that he could attach a second affidavit from his trial counsel, where his defense counsel is more direct in his admission that he overlooked Ms. Gordon's conviction history given to him by the state. Thus, we find no abuse of discretion in the trial court's denial of his motion for leave to amend. Mr. Stoutamire's third assignment of error is without merit.

{¶57} "Pursuant to R.C. 2953.21(F) *** a petitioner may only supplement the petition with leave of court after the state has filed an answer. Thus, a trial court has discretion in granting or denying leave to amend." *State v. Lorraine* (Sept. 1, 2000), 11th Dist. No. 99-T-0060, 2000 Ohio App. LEXIS 3982, 10, citing *State v. Phillips* (Feb. 3, 1999), 9th Dist. No. 18949, 1999 Ohio App. LEXIS 245, citing *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 121-122.

{¶58} As we noted above, Mr. Stoutamire's claim of ineffective assistance of counsel necessarily fails as he failed to establish that his trial counsel was deficient in this instance for his failure to uncover the criminal history of four witnesses presented at trial.

{¶59} For argument's sake, the difference between his defense counsel's first and second affidavit is inconsequential, and contained information his defense counsel had at hand in his first affidavit. The slight difference is that in the first affidavit, defense counsel lays the blame more heavily on the state for his own inadvertent oversight of Ms. Gordon's criminal record. In the second affidavit, defense counsel directly admits the state provided him with discovery that "exceeded the extremely narrow confines" of Crim.R. 16, allowed him to view the state's entire file, and gave him permission to copy anything he might want and did not have. He then states that he did not have any of the convictions of any of the witnesses, meaning, to him, that "either they were not in the documents that I viewed, or that if they were there, I was objectively unreasonable in failing to secure these documents and obtain certified copies of convictions for impeachment use at trial." Defense counsel also reiterates in this second affidavit that "while I might not have attempted such impeachment, depending upon how I felt the testimony played out, I should have those weapons at my disposal."

{¶60} We do not find the trial court abused its discretion in denying Mr. Stoutamire leave to amend his petition to add this fourth claim, which is virtually indistinguishable from the second claim of his original petition. Moreover, it would have made no difference in the outcome because it does not change the fact that an evidentiary hearing was not warranted in this case.

{¶61} Mr. Stoutamire's third assignment of error is without merit.

{¶62} As Mr. Stoutamire's failed to set forth substantive grounds for relief that would warrant an evidentiary hearing, the trial court did not abuse its discretion in dismissing his petition and awarding summary judgment to the state.

{¶63} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶64} Finding that appellant has made a prima facie case of a *Brady* violation, I would reverse and remand on the basis of the first two assignments of error.

{¶65} "The denial of due process may be a sufficient basis for a petition for postconviction relief. See *State v. Walden* (1984), 19 Ohio App.3d 141, ***, paragraph four of the syllabus. In *Brady v. Maryland*, 373 U.S. 83, 87, *** (1963), the United States Supreme Court held that 'the suppression by the prosecution of evidence favorable to the accused upon request violates due process where evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' This rule also applies to impeachment evidence. *United States v. Bagley* (1985), 473 U.S. 667, ***. Evidence is material under *Brady* 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *State v. Johnston* (1988), 39 Ohio St.3d 48, ***, paragraph five of

the syllabus. 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' Id." *State v. Aldridge* (1997), 120 Ohio App.3d 122, 137.

{¶66} In this case, the failure by the state to disclose the criminal records of four of its witnesses was clearly inadvertent. However, one of those witnesses was Mr. Palm, who might be considered an alternate suspect. The fact that he has a criminal record might tell with a jury, under skillful examination by defense counsel. Appellant's right to confront an important witness was, therefore, violated. Consequently, this evidence was material under *Brady/Bagley*, since it undermines confidence in the trial's outcome. Appellant deserves a hearing.

{¶67} I respectfully dissent.