[Cite as *State v. Greathouse*, 2010-Ohio-1617.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

C.A. CASE NO. 23259

v.

: T.C. NO. 05 CR 852

TERRANCE L. GREATHOUSE : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 9th day of April, 2010.

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Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Terrance L. Greathouse appeals from a decision of the Montgomery County Court of Common Pleas, General Division, in which the trial court overruled his second petition to vacate and set aside his judgment of conviction. Greathouse filed his second petition on October 23, 2008. In a written decision filed on January 30, 2009, the trial court overruled Greathouse's petition. Greathouse filed a timely notice of appeal with this Court on February 20, 2009.

I

{¶ 2} We set forth the history of the case in *State v. Greathouse,* Montgomery App. No. 21536, 2007-Ohio-2136 (hereinafter "*Greathouse I*"), and repeat it herein in pertinent part:

{¶ 3} "In late December, 2001, S.F., a female, left her mother's home around 7:00 a.m. to go to work. The house was located on King's Highway, in Dayton, Ohio. While scraping the car windows, S.F. noticed an individual standing across the street, at a trailer park. When S.F. went to get in the driver's side of the car, she felt a hand jab her in the back. She was told to get in the car, and was jabbed again. S.F. crawled into the car, over the gearshift, and sat in the passenger seat. The person who had jabbed her put the car into gear and drove off. S.F. tried twice to look at the individual (later identified as Greathouse), but his hand pushed her face into the passenger side window. Greathouse told S.F. not to look at him. He said that he would crash the car and burn the car with her inside if she tried to look at him. Greathouse also threatened several times to kill S.F. He told her he had a gun and would shoot her and dump her body beside the car.

{¶ 4} "After driving around for a while, Greathouse pulled the car into a field

next to Sunwatch Indian Village. He got out of the car, came around to the passenger side, and raped S.F. It was very painful because S.F. was menstruating and had inserted a tampon. Greathouse then returned to the driver's side, and drove to several ATMs, where he forced S.F. to withdraw money. S.F. was able to withdraw $200 at one ATM, but was unsuccessful at obtaining money at two or three other machines. Finally, Greathouse dropped S.F. off a few blocks from her home. He dumped out her purse and removed the battery from her cell phone. During the ride, Greathouse also told S.F. that he could see her house from where he lived, and that he would come back and burn her house, with her family in it, if she called the police.

{¶ 5} "S.F. walked home, went into the house, fell on the floor, and started crying. S.F. told her mother to call her church and to call her father, because she needed to go to the hospital. S.F.'s mother testified at trial and stated that S.F. was shaking and crying. S.F. said she had been raped. S.F. also told her father the same thing.

{¶ 6} "S.F. arrived at the hospital with her father and a rape examination was performed. The nurse specifically recalled the case because S.F. was extremely emotional and upset and was very scared. The nurse indicated this was one of the worst cases she had seen, because S.F. was so frightened. During the pelvic exam, the doctor removed a tampon from S.F., and this evidence was placed in the rape kit, along with vaginal, oral, and rectal swabs and smears, dried stains, the victim's blood standard, a pubic hair combing and standard, fingernail scrapings, and a head hair standard. The police collected the rape kit and turned it over to the Miami Valley

Regional Crime Lab.

{¶ 7} "While at the hospital, S.F. was also interviewed by a police officer. She described the suspect as a dark-complected, clean-shaven man between the ages of 25 and 35, who was about five feet, nine inches tall, and weighed around 175 pounds. Later that day, S.F. changed the description of the suspect to about six feet, two inches, and 200 pounds.

{¶ 8} "S.F. was driving a rental car (a 2002 Toyota Corolla) at the time, because she had been involved in an auto accident a few weeks earlier. The police located the Corolla around 11:00 a.m. the same day, on Forsythe Avenue, which was about three or four football fields away from S.F.'s house, as the crow flies. The Corolla was towed to the police garage and was examined for evidence, but no fingerprints were found.

{¶ 9} "Most of the evidence in the rape kit was negative for the presence of sperm. However, both the tampon and dried stain were positive for the presence of sperm, and were retained at the lab. The rest of the rape kit was sent back to the police department. DNA testing was performed on the tampon and two DNA profiles were obtained: a 'known' standard for S.F., and an 'unknown' standard. The latter profile was entered into a DNA database at the lab and was compared with other samples throughout the local area and the state. At the time, no matches were made with the existing DNA profiles in the database.

{¶ 10} "In December, 2004, the Crime Lab was notified that the DNA sample matched another sample in the database. Greathouse was identified as the match, and the police subsequently obtained two buccal or cheek swabs from Greathouse.

When those were compared with the DNA profile obtained from the tampon, the probability of finding a similar match in the general population was one in three quintillion. The numerical cutoff used by the laboratory to say that a DNA sample comes from a specific individual is one in 6.5 trillion, and the probability number obtained from this particular sample was much higher than that. Accordingly, the forensic scientist who testified for the State was able to say with a reasonable degree of scientific certainty that the DNA profile from the tampon came from Greathouse.

{¶ 11} "When Greathouse was questioned by the police, he denied knowing who S.F. was, and denied raping her. After being shown a picture of S.F., Greathouse stated that he did not know S.F. Greathouse denied having consensual sex with S.F., and said he did not know her name or her face. Greathouse also indicated that in December, 2001, he lived on Queens Avenue, near both Forsythe (where the car was found) and Kings Highway (where S.F. lived and was abducted)."

{¶ 12} After a jury trial, Greathouse was found guilty on all counts and convicted of kidnapping, rape, two counts of aggravated robbery, intimidation of a crime victim, and firearm specifications on all five counts. The trial court subsequently sentenced him to a total of fifty years in prison, and Greathouse appealed.

{¶ 13} While his direct appeal was still pending before this Court, Greathouse filed his first petition to vacate and set aside his sentence pursuant to R.C. 2953.23 on November 13, 2006. In his petition, Greathouse argued that his sentence was unconstitutional and should be reversed pursuant to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In a written decision

issued January 30, 2007, the trial court dismissed Greathouse's petition holding that any alleged constitutional violations in a petition for post-conviction release must be raised based upon facts outside of the record, while any error contained in the record must raised by direct appeal rather than in a petition for post-conviction release. *State v. Powell* (1993), 90 Ohio App.3d 260.

{¶ 14} In *Greathouse I*, issued on May 4, 2007, we affirmed Greathouse's convictions but reversed his sentence and remanded for re-sentencing in light of the Ohio Supreme Court's holding in *Foster* . We note that at his re-sentencing, Greathouse ultimately received the same fifty year prison sentence he had been ordered to serve earlier.

{¶ 15} As previously noted, Greathouse filed a second petition to vacate and set aside the judgment of conviction on October 23, 2008. In the second petition, Greathouse argued that R.C. 2953.23 was unconstitutional, that his indictment was defective, and that he received ineffective assistance of counsel at the trial level. The trial court dismissed Greathouse's petition as untimely filed and found that Greathouse had failed to establish that he was unavoidably prevented from discovery of the operative facts upon which he relied to present his claims for relief.

{¶ 16} It is from this judgment that Greathouse now appeals.

II

{¶ 17} Greathouse's sole assignment of error is as follows:

{¶ 18} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY DENYING APPELLANT'S POST-CONVICTION PETITION AND/OR BY NOT CONDUCTING AN EVIDENTIARY HEARING WHEN THE FACTS OF PETITION

PROVE APPELLANT'S ACTUAL INNOCENCE, DENIAL OF THE ASSISTANCE OF EFFECTIVE COUNSEL, AND THAT THE POST-CONVICTION PROCESS IS FLAWED CONSTITUTIONALLY, THEREBY DENYING APPELLANT HIS RIGHTS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS, BUT NOT LIMITED TO."

{¶ 19} In his sole assignment, Greathouse contends that the trial court erred when it overruled his second petition for post-conviction relief as untimely. Greathouse also argues that if his second petition was untimely, then the record clearly establishes that he was unavoidably prevented from discovery of the underlying facts which form the basis of his claim for relief. We disagree.

{¶ 20} Initially, we note that Greathouse's attack on the constitutionality of R.C. 2953.23 is baseless. Other than his bare assertions regarding his lack of legal knowledge, Greathouse's petition fails to set forth any discernable basis upon which we could address the alleged unconstitutionality of R.C. 2953.23.

{¶ 21} Greathouse's claim that the trial court erred in failing to order that a hearing be held on his petition is, likewise, without merit. R.C. 2953.21 confers a conditional right to a hearing. A petitioner has the initial burden to submit with the petition evidentiary documents containing operative facts sufficient to demonstrate substantive grounds for relief that merit a hearing. *State v. Jackson* (1980), 64 Ohio St.2d 107, 111; *State v. Kapper* (1983), 5 Ohio St.3d 36, 38; *State v. Pankey* (1981), 68 Ohio St.2d 58, 59. A hearing is not required unless there is a showing that substantive grounds for relief exist. *State v. Moreland* (Jan. 7, 2000), Montgomery App. No. 17557. Broad conclusory allegations are insufficient, as a matter of law, to

require a hearing. *Id*. A petitioner is not entitled to a hearing if his claim for relief is belied by the record and is unsupported by any operative facts other than a defendant's own self-serving affidavit or statements in his petition, which alone are legally insufficient to rebut the record on review. *Kapper, supra; State v. Vanderpool* (Feb. 12, 1999), Montgomery App. No. 17318. After a thorough review of the record in this case, we find that Greathouse's second petition was not supported by anything other than his own allegations in the petition and his affidavit. Thus, we hold that the trial court did not err when it overruled his petition without holding an evidentiary hearing.

{¶ 22} In the present case, Greathouse was charged with aggravated robbery in violation of R.C. 2911.01(A)(1), which generally prohibits displaying or using a deadly weapon during the commission of a theft offense or in fleeing from such an offense. We have held that *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, does not apply to an indictment charging the deadly-weapon form of aggravated robbery in violation of R.C. 2911.01(A)(1). *State v. Smith*, Montgomery App. Nos. 21463 and 22334, 2008-Ohio-6330, ¶72-73 (citing with approval cases from other appellate districts for the same proposition); *State v. Johnson*, Montgomery App. No. 22656, ¶53. Based on *Smith* and *Johnson*, we conclude that Greathouse's aggravated robbery indictment was not defective and did not violate *Colon*.

{¶ 23} Greathouse places a great deal of emphasis on the fact that he did not go to school past the sixth grade and that he is proceeding without the benefit of an attorney in the instant appeal. Simply put, Greathouse essentially asks this Court for some of degree of leniency in light of his professed lack of education, legal or

otherwise. "Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standard as other litigants." *Yocum v. Means*, Darke App. No. 1576, 2002-Ohio-3803. A litigant proceeding pro se "cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter." Id. (Internal citations omitted). It is undisputed that Greathouse filed his first petition for post-conviction relief on November 12, 2006, which the trial court subsequently dismissed on January 30, 2007. On October 23, 2008, Greathouse filed a second petition for post-conviction relief. The record discloses that the transcript from Greathouse's trial was filed in this Court on October 10, 2006. Under R.C. 2953.21(A)(2), Greathouse's petition would have to have been filed no later than 180 days after October 10, 2006, which would have been by April 8, 2007. By filing his second petition on October 23, 2008, Greathouse was clearly outside the 180-day limit imposed by R.C. 2953.21(A)(2).

{¶ 24} However, potential exceptions to the 180-day time limit are found in R.C. 2953.23(A), which provides:

{¶ 25} "(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶ 26} "(1) Both of the following apply:

{¶ 27} "(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.

{¶ 28} "(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."

{¶ 29} In his petition, Greathouse claimed that he received ineffective assistance at the trial level because his counsel failed to have the tampon that was removed from the victim during her sexual assault examination tested for presence of the victim's DNA. Additionally, Greathouse argued that his counsel was ineffective for failing to ask the victim to explain her reasoning for inserting a tampon after she had been raped. Greathouse also cites additional evidentiary issues which occurred at trial in support of his claim that he received ineffective assistance. We also note that Greathouse asserts that he did not receive the transcripts from his trial within the 180-day time limit imposed by R.C. 2953.21(A)(2), and that restricted his ability to timely file a second motion for post-conviction relief.

{¶ 30} The only errors that Greathouse complains of occurred during trial when his trial counsel allegedly made tactical decisions regarding evidence presented by the State. Simply put, based on the issues presented in his second

untimely petition, Greathouse was not unavoidably prevented from discovering the facts upon which he relied to present his claim for relief. Greathouse has offered no evidence, short of conjecture and speculation, in order to establish the extraordinary circumstances contemplated by R.C. 2952.23. In short, Greathouse has attempted to argue his "actual and factual innocence" based on his unsupported allegation of ineffective assistance of counsel. Because Greathouse cannot satisfy the mandatory requirements of R.C. 2953.23(A), his petition for post-conviction relief is subject to dismissal on the basis of untimeliness.

{¶ 31} Greathouse's sole assignment of error is overruled.

III

{¶ 32} Greathouse's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

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