[Cite as *State v. Bates*, 2010-Ohio-3440.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2009 CA 106

v. : T.C. NO. 05CR0416

MANDALE BATES : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 23rd day of July, 2010.

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AMY M. SMITH, Atty. Reg. No. 0081712, Assistant Prosecuting Attorney, 50 E. Columbia Street, 4th Floor, P. O. Box 1608, Springfield, Ohio 45501
Attorney for Plaintiff-Appellee

GEORGE A. KATCHMER, Atty. Reg. No. 0005031, 115 Brookside Drive, Yellow Springs, Ohio 45387
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Mandale Bates appeals from a judgment of the Clark County Court of Common Pleas denying his petition for post-conviction relief without a hearing. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} In August 2005, Bates was convicted of felonious assault with a firearm specification, receiving stolen property, and having weapons while under disability. The trial court sentenced Bates to eight years in prison for the felonious assault and to five years for having weapons while under disability, to be served consecutively to each other and to a three-year term for the firearm specification. The court imposed six months for receiving stolen property, to be served concurrently with the other offenses.

{¶ 3} Bates filed a direct appeal from his convictions and sentence. We affirmed Bates's convictions, but reversed his sentence under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and remanded for resentencing. *State v. Bates*, Clark App. No. 2005 CA 83, 2006-Ohio-4146. The trial court re-imposed the same sentence in September 2006.

{¶ 4} In September 2009, Bates filed a petition for post-conviction relief. He asserted that his trial attorney rendered ineffective assistance by failing to obtain a copy of a police report that could have been used to discredit a victim's identification of him at trial. The victim, Jamie Cromwell, had claimed that she recognized Bates from a prior incident for which she had filed a police report. Bates states that he "demanded" that his trial attorney obtain a copy of the police report, and trial counsel told Bates that he (counsel) had tried to get the report but was unable to. Bates's current counsel claims to have discovered that Bates's trial counsel had not attempted to get the report; current counsel indicates that he was able to "get this report promptly without any difficulty." Bates states that the police report did not describe the suspects, and the report could have been used to undermine the credibility of Cromwell's identification at trial.

{¶ 5} Bates thus claimed that the untimeliness of his petition should be excused, because he did not discover until after trial that his trial attorney had not tried to obtain the police report, and his prior counsel did not discuss the possibility of post-conviction relief.

{¶ 6} Bates supported his petition with his own affidavit, affidavits from his wife and his present attorney, and a copy of the police report. Bates requested a hearing on his petition.

{¶ 7} The State opposed Bates's petition, arguing that it was untimely and failed to satisfy the requirements to permit review of an untimely petition. The State argued that Bates was aware of the police report and could have obtained the report himself with reasonable diligence. The State further argued that the police report would not have affected the outcome of Bates's trial.

{¶ 8} On October 20, 2009, the trial court overruled Bates's petition, stating, "Upon review of the record, defendant's pleadings and the trial transcript, the Court finds defendant's petition to vacate or set aide sentence is OVERRULED." The court does not explicitly state if its decision is based on a lack of timeliness or lack of effect on the outcome. In the context of a ruling on a motion to withdraw a plea, Justice Resnick once noted that "*** the trial court's failure to specify any reasons in its journal entry denying the motion severely hampers any consideration of whether an abuse of discretion occurred[;] *** the failure to explain the reasoning places significant obstacles in the way of meaningful appellate review when, as here, so many variables are potentially relevant to a trial court's consideration." *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶52, quoted by *State v. Veneroni*, Miami App. No. 06-CA-23, 2007-Ohio-444, ¶6. The same is true in a

ruling denying a post-conviction relief petition without a hearing.

{¶ 9} However, based on the language of the trial court's ruling, the trial court implicitly found that Bates's untimeliness was excused (i.e., there was no need to review the transcript if the decision were based on the timeliness of the motion), but that he failed to establish that, if not for his trial counsel's alleged ineffectiveness, he would not have been convicted. Moreover, such interpretation of the court's rationale actually favors Bates by finding that the jurisdictional hurdle – timeliness – has been overcome.

II

{¶ 10} In his sole assignment of error, Bates claims that the trial court erred in denying his petition for post-conviction relief without a hearing.

{¶ 11} "A post[-]conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. See, also, *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶48. If a defendant has filed a direct appeal of his or her conviction, a petition for post-conviction relief must be filed no later than 180 days after the trial transcript is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Bates filed a direct appeal of his conviction in August 2005, and the transcript of proceedings was filed in this Court on November 2, 2005. Bates's petition for post-conviction relief was filed in September 2009, which was after the 180-day deadline set forth in R.C. 2953.21(A)(2) had passed.

{¶ 12} The trial court lacks jurisdiction to consider an untimely petition for post-conviction relief, unless the untimeliness is excused under R.C. 2953.23(A)(1). *State v. West*, Clark App. No. 08 CA 102, 2009-Ohio-7057, ¶7. Pursuant to R.C.

2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief (1) if he was unavoidably prevented from discovering the facts upon which he relies to present his claim, or (2) if the United States Supreme Court recognizes a new right that applies retroactively to his situation. Id. "The phrase 'unavoidably prevented' means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *State v. McDonald*, Erie App. No. E-04-009, 2005-Ohio-798, ¶19. In addition, the petitioner must also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b). In this case, Bates would be required to show that, if not for his trial counsel's failure to obtain the police report and to cross-examine Cromwell with that information, he would not have been convicted.

{¶ 13} The post-conviction relief statutes do "not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required." *State v. Jackson* (1980), 64 Ohio St.2d 107, 110. Rather, in addressing a petition for post-conviction relief, a trial court plays a gatekeeping role as to whether a defendant will receive a hearing. *Gondor* at ¶51. "Before a hearing is granted, the petitioner bears the initial burden *** to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness." *Jackson*, 64 Ohio St.2d at 111. A trial court may 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."

State v. Calhoun (1999), 86 Ohio St.3d 279, paragraph two of the syllabus; *Gondor* at ¶51.

{¶ 14} We review the trial court's denial of Bates's petition for an abuse of discretion. *Gondor* at ¶52.

{¶ 15} According to Bates's affidavit, Bates told his trial attorney to get a copy of the police report of the prior incident about which Cromwell had complained because he (Bates) "was never there." Bates's trial attorney "stated [to Bates] that he had tried to get the report but couldn't." Bates's affidavit further provides:

{¶ 16} "5. I only discovered later, after my trial and after obtaining present counsel that no attempt had been made to get this report and that present counsel obtained this report for me recently,

{¶ 17} "6. Since this report gives no identification or description not even the race of the men she saw, if I had known that this report was available and that my attorney never attempted to get it, I would have asked for other counsel,

{¶ 18} "7. Neither my trial counsel nor my appellate counsel ever spoke to me about post conviction relief. I relied upon them for handling my case thoroughly and providing me with all options.

{¶ 19} "8. My present attorney has been investigating my case and has pursued three witnesses who could help with my case, however, the witnesses could not be located[.]"

{¶ 20} Bates's wife, Relda Bates, also provided an affidavit. It stated, in its entirety:

{¶ 21} "1. I am the wife of Mandale Bates, the Defendant in Clark County Case No. 05-CR-416,

{¶ 22} "2. After my husband discovered that his attorney had not attempted to get evidence or witnesses he thought essential to his case, he asked me to contact an attorney to re-open his case.

{¶ 23} "3. After several inquiries, I contacted George A. Katchmer in August, 2008.

{¶ 24} "4. There were witnesses my husband wanted Mr. Katchmer to contact and Mr. Katchmer spent several months attempting to find and speak to these witnesses but was unable to,

{¶ 25} "5. Mr. Katchmer discussed this matter with me and Mandale and we agreed to move forward without these witnesses at present."

{¶ 26} George Katchmer, Bates's current counsel, stated in his affidavit that he learned that Cromwell had "claimed to have seen Mr. Bates prior to the break-in that is the subject matter of this case due to a complaint to the police about men in her yard." Katchmer "obtained the police report for that prior incident (attached hereon) without any trouble or delay[.]" Katchmer further stated that he attempted to located three witnesses who would testify that the complainants had recanted their accusations. He explained: "This search went on for a year and involved numerous telephones calls and an attempt to find a correct address for one critical witness[.] It was finally determined to proceed without these witnesses[.]"

{¶ 27} Beginning with the first requirement under R.C. 2953.23(A)(1)(a), i.e., that Bates was unavoidably prevented from discovering the facts he relies upon, it appears that the trial court implicitly concluded that Bates's untimeliness was excused. In other words, the trial court implicitly concluded that Bates's evidence

was sufficient to demonstrate that he was unavoidably prevented from obtaining the police report and learning of the lack of details in the report, which demonstrated his trial counsel's alleged ineffectiveness, in a timely manner. The trial court did not abuse its discretion in reaching this apparent conclusion.

{¶ 28} Although Bates was aware of the existence of the police report prior to trial, he states that his trial attorney informed him that he had attempted to obtain the police report and was unable to do so. Having received that information from his trial attorney, it was reasonable for Bates to assume that a good faith effort had been made by his attorney and that he (Bates) would not achieve a different result if he attempted to obtain the police report himself. Not only did Bates's trial attorney not obtain the report, but he allegedly misled Bates into believing that it could not be obtained.

{¶ 29} In addition, although Bates's affidavit and his wife's affidavit are inconsistent as to when Bates learned that his trial attorney had not, in fact, attempted to get the police report – Relda Bates says he discovered this fact before hiring Mr. Katchmer, whereas Bates states that he did not learn that no attempt had been made until after obtaining present counsel – both affidavits indicate that Bates did not learn of his trial counsel's failure to attempt to obtain the police report until well after the 180-day period for filing a timely petition for post-conviction relief had expired. Finally, although there was an apparent delay between Mr. Katchmer's obtaining the police report and the filing of Bates's petition, the trial court could have found this delay to be reasonable, considering that Mr. Katchmer was actively searching for witnesses to support Bates's petition and even Mr. Katchmer's prompt

filing of a petition for Bates would have been untimely.

{¶ 30} Although Bates's evidence supported a finding that the untimeliness was excused, the trial court did not abuse its discretion in apparently concluding that Bates did not satisfy the second requirement of R.C. 2953.23(A)(1)(b), i.e., that, if not for his trial counsel's ineffectiveness, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶ 31} To establish ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524. Bates claims that, if not for his trial counsel's alleged failure to obtain the police report and to discredit Cromwell's identification of him with that report, no reasonable factfinder would have found him guilty.

{¶ 32} The Springfield police report attached to Mr. Katchmer's affidavit is for an incident reported at 8:38 p.m. on Saturday, May 7, 2005, from a caller at 2323 Irwin Avenue, Cromwell's residence. The caller reported that she had caught two males in her backyard, and they had fled in a black Blazer toward Reading Drive

when she "hollered" at them. The caller indicated that she did not know the men, but they were wearing red shirts. The police report provided no further details regarding the suspects. The report was redacted to remove the name of the caller and the caller's telephone number; we presume that Cromwell was the caller, and the parties do not suggest otherwise.

{¶ 33} Although the police report does not describe the two men in Cromwell's yard, the report does not suggest that Cromwell was unable to describe the suspects further or that she would not recognize the two men if she saw them again. And, the fact that the report exists corroborates Cromwell's testimony that she had filed a previous report due to a prior incident. Moreover, the offenses for which Bates was convicted arose from events occurring on May 17, 2005, i.e., ten days after Cromwell called the police to report the two men in her backyard. The two events thus occurred within a relatively short period of time. In short, Bates's new evidence – the police report – does not establish that Cromwell's identification of Bates was unreliable or inaccurate.

{¶ 34} Furthermore, the State presented additional compelling evidence that Bates committed the offenses on May 17, 2005. Most notably, Cromwell testified that Bates and his co-defendant fled her home when they saw the lights of an approaching police cruiser. Springfield Police Officer Dan Harris, the first law enforcement officer to arrive at the scene, testified that when he was at the intersection of Irwin Avenue and Reading Drive, which was very near to Cromwell's

home,[1] he observed "the defendants [Bates and his co-defendant] getting into a maroon Pontiac Bonneville" on Reading Drive. Harris stated that he saw Bates, the driver, close the back door of the car, and once the two men were inside, the vehicle "took off at a high rate of speed not turning on the headlights or anything like that ***." Harris pursued the vehicle for approximately eleven blocks, after which Bates and his co-defendant exited the vehicle and fled on foot in opposite directions. Other officers soon apprehended them. Harris approached the car and located several items, including a black handgun, which Cromwell and her boyfriend had both seen, and a cooler containing various items removed from the Irwin Drive residence, including several rings, personal papers, marijuana, a wallet, and driver's licenses belonging to the victims.

{¶ 35} Accordingly, Bates did not establish, as required by R.C. 2953.23(A)(1)(b), that, if not for his trial counsel's failure to obtain the police report and to cross-examine Cromwell with it, no reasonable jury would have convicted him. The trial court did not abuse its discretion in denying Bates's petition for post-conviction relief without a hearing.

{¶ 36} The assignment of error is overruled.

III

{¶ 37} The judgment of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

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[1]2323 Irwin Avenue is one home away from the corner of Irwin Avenue and Reading Drive.

Copies mailed to:

Amy M. Smith
George A. Katchmer
Hon. Douglas M. Rastatter