

[Cite as *State v. Kilbarger*, 2015-Ohio-2177.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26284
	:	
v.	:	Trial Court Case No. 2010-CR-3114/2
	:	
A.J. KILBARGER, JR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 5th day of June, 2015.

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HALL, J.

{¶ 1} A.J. Kilbarger appeals the dismissal of his petition for post-conviction relief.

Finding no error, we affirm.

I. FACTS

{¶ 2} Kilbarger was convicted of possession of cocaine and possession of marijuana. We affirmed his conviction in *State v. Kilbarger*, 2d Dist. Montgomery No. 25584, 2013-Ohio-2577, against the following background:

* * * Kilbarger was indicted on the above charges as well as drug trafficking and engaging in a pattern of corrupt activity. The evidence against him was obtained through execution of a search warrant at his home. Agent Charlie Stieglmeyer of the Ohio Bureau of Criminal Investigation obtained the warrant by presenting the issuing judge with a probable-cause affidavit. Following his indictment, Kilbarger moved to suppress the evidence. He argued that Stieglmeyer's affidavit contained false or misleading statements or material omissions in violation of *Franks* [*v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)]. He also asserted that the affidavit failed to establish probable cause even absent a *Franks* violation.

The trial court held a December 2, 2011 hearing on the *Franks* issue. At the conclusion of the hearing, it held that Kilbarger had "failed to make a preliminary showing by a preponderance of the evidence that the affiant, with an intent to mislead, either excluded crucial information from the affidavit or provided false or misleading information in the affidavit." (*Franks* Tr. at 109). Therefore, the trial court found no viable *Franks* issue and overruled that portion of the suppression motion. It separately concluded

that Stiegelmeyer's affidavit established probable cause for a search warrant and overruled the remainder of the suppression motion. The trial court later denied reconsideration of its *Franks* ruling. At trial, a jury acquitted Kilbarger on the drug-trafficking and corrupt-activity charges but found him guilty of possessing cocaine and marijuana.

(Citations omitted.) *Kilbarger* at ¶ 3-4. On appeal, Kilbarger alleged that the trial court erred by denying his motion to suppress, contending that the search-warrant affidavit contained false or misleading statements or material omissions in violation of *Franks*. He also alleged that the trial court erred by finding that the affidavit established probable cause for a search warrant. We rejected both allegations.

{¶ 3} In March 2014, Kilbarger filed a petition for post-conviction relief. He also requested an evidentiary hearing on the petition. The State filed a motion to dismiss the petition and motion for summary judgment. The trial court overruled Kilbarger's petition and sustained the State's motion for summary judgment.

{¶ 4} Kilbarger appealed.

II. ANALYSIS

{¶ 5} In his sole assignment of error, Kilbarger alleges that the trial court erred when it sustained the State's motion for summary judgment on his petition for post-conviction relief. Kilbarger also alleges that the court erred by failing to first hold an evidentiary hearing.

{¶ 6} R.C. 2953.21 pertinently provides that "[a]ny 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.” R.C. 2953.21(A)(1)(a). But the petition must be filed within 180 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 or adjudication.” Former R.C. 2953.21(A)(2).¹ R.C. 2953.23 prohibits a court from entertaining a petition filed beyond this period unless, pertinent here, the petitioner makes two preliminary showings:

(a) * * * [T]he 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 * * *.

(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 * * *.

R.C. 2953.23(A)(1). Here, the trial court found that Kilbarger’s petition is untimely and found that he failed to make either showing.

{¶ 7} As to the first showing, Kilbarger’s contention is not that he could not have discovered “facts” necessary for his constitutional claim—that Stiegelmeier lied. Kilbarger has emphatically contended all along—in his motion to suppress and in his direct appeal—that Stiegelmeier lied in the affidavit. Indeed, in the prior appeal we analyzed nine specific instances raised by Kilbarger where he contended that the agent falsely provided information in the search-warrant affidavit. In this instant appeal of his

¹ An amendment to R.C. 2953.21(A)(2) went into effect on March 23, 2015, that increases the time to file to 365 days.

post-conviction-relief petition, Kilbarger's contention is that he could not have discovered additional *evidence* supporting his claim that Stiegemeyer lied, that evidence being Spurlock's assertion that Spurlock never implicated Kilbarger like Stiegemeyer averred in his search-warrant affidavit and testified to at the suppression hearing. Kilbarger has failed to show that was "unavoidably prevented" from discovering this evidence. He subpoenaed Spurlock to appear as a witness at the *Franks* hearing, but Spurlock failed to appear. Defense counsel mentioned this to the trial court at the end of the hearing but said that he probably would not have called him anyway. The court offered to issue a show-cause order to compel Spurlock's attendance:

The Court takes very seriously someone not honoring a subpoena in this case, but I guess I'm looking at the fact it is a moot point at this point in time. If he was not going to be called as a witness, I'm a little bit uncomfortable issuing sanctions on a show-cause order under those circumstances.

Certainly if he would have been called or it was your intention to call him, I certainly would do that; but the Court will note that he has failed to show today and if he doesn't appear as subpoenaed when you need him, *

* * the Court will take appropriate actions.

(Sup. Tr. 123). Nothing in the record suggests that Kilbarger ever asked the trial court at or after that December 2, 2011 hearing to take any action to compel Spurlock's attendance. The record reflects that the defense subpoena for Spurlock to appear at the December 2, 2011 hearing was served on Spurlock at his address in Moraine, Ohio. Furthermore, Spurlock was listed on the trial witness list filed by the defense. There is no

doubt that Spurlock was the confidential informant referred to in the search warrant affidavit. The defense was aware of this information at least before the December, 2012 trial.² Consequently, we question Kilbarger’s claim, stated in his affidavit, that he “did everything humanly possible trying to locate Spurlock and get his information and to get him in Court.” Affidavit of A.J. Kilbarger, ¶ 9. There is no information about what, if any, efforts Kilbarger made to obtain information from Spurlock, or to have him appear in court, either at the motion hearing or at trial, even though the trial court indicated that it would assist by commanding Spurlock’s appearance. It was not until two years after the initial assertion that Stieglmeyer lied—after the trial, conviction, sentencing, and appeal—that the Spurlock affidavit was signed. Moreover, the Spurlock affidavit was signed more than four months before the petition was filed without explanation for that filing delay.

{¶ 8} “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 Rainey*, 2d Dist. Montgomery No. 23851, 2010-Ohio-5162, ¶ 13, quoting *State v. McDonald*, 6th Dist. Erie No. E-04-009, 2005-Ohio-798, ¶ 19. Spurlock was an important source of information about Kilbarger and Spurlock had participated in four drug purchases from Robert McCarthy, Kilbarger’s cohort and co-defendant. One of the drug transactions involved delivery of drugs from Kilbarger to McCarthy and then to Spurlock. Kilbarger’s affidavit falls far short of demonstrating reasonable diligence to obtain whatever information Spurlock might claim to have.

{¶ 9} A trial court lacks jurisdiction to consider an untimely petition for post-conviction relief unless the petitioner makes *both* of the showings required by R.C.

² The trial transcript is replete with references to Jesse Spurlock as the confidential informant.

2953.23(A)(1). See *State v. Greathouse*, 2d Dist. Montgomery No. 24084, 2011-Ohio-4012, ¶ 12. Kilbarger’s failure to satisfy the first showing, that he was unavoidably prevented from discovering the facts to support his petition, means that the trial court was required to dismiss it.

{¶ 10} Finally, Kilbarger claims that the trial court erred by not holding an evidentiary hearing on the petition. But a court may dismiss a post-conviction petition without an evidentiary hearing if the petition shows that the petitioner is not entitled to relief. R.C. 2953.21(C). Because Kilbarger’s petition was untimely, the trial court did not err when it denied it without holding a hearing.

{¶ 11} The sole assignment of error is overruled.

{¶ 12} The trial court’s judgment is affirmed.

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FAIN, J., concurs.

FROELICH, P.J., dissenting:

{¶ 1} I dissent.

{¶ 2} Kilbarger could not conduct a meaningful cross-examination of the search warrant’s affiant (BCI Agent Stiegelmeyer) without at least talking to Spurlock, particularly in light of Spurlock’s sworn statements in his (Spurlock’s) affidavit that the agent’s testimony concerning his (Spurlock’s) statements to the agent was fabricated. Kilbarger states in his affidavit that he was unable to locate and obtain a statement from Spurlock until Spurlock decided to come out of hiding and contact Kilbarger’s counsel, at which time Kilbarger’s petition for post-conviction relief would be untimely.

{¶ 3} We have held under similar circumstances that a petitioner was entitled to a

hearing on whether he was unavoidably prevented from asserting his claim in a timely manner. See *State v. Mackey*, 2d Dist. Clark No. 2014-CA-68, 2015-Ohio-899. In *Mackey*, the defendant was convicted after trial of several drug-related offenses. Five years later, he filed a petition for post-conviction relief, arguing that he was unavoidably prevented from securing affidavits from two witnesses who testified against him at trial; the witnesses recanted their trial testimony in their affidavits, which were attached the petition.

{¶ 4} Mackey also had attached his own affidavit, explaining why he was unavoidably prevented from obtaining the two witnesses' affidavits in a timely manner. He stated that both witnesses heavily abused drugs, were in and out of jail, and one was serving a federal prison sentence. Mackey's counsel was able to obtain a statement from the one in prison, but was unable to get it notarized until he was released. In addition, they "would simply not talk to him out of fear of the police." One witness allegedly would not recant her incriminating testimony because she had been threatened by authorities that her children would be taken away from her. Finally, Mackey stated in his affidavit that he was unable to obtain the exculpatory testimony in the witnesses' affidavits until they freely and voluntarily provided it. *Mackey* at ¶ 16. We found that Mackey's affidavit "established that he was entitled to a hearing in order to establish that he was 'unavoidably prevented' from the discovery that [the witnesses] recanted their incriminating trial testimony against him." *Id.* at ¶ 17.

{¶ 5} The uncontradicted evidence at this point is that Kilbarger could not contact Spurlock and thus was unaware that Spurlock would testify that he (Spurlock) had never spoken to the agent regarding Kilbarger. Kilbarger's affidavit stated that he had

repeatedly subpoenaed Spurlock, but Spurlock failed to appear each time. Spurlock “sent word” to Kilbarger that he was “in hiding.” Kilbarger stated that he “did everything humanly possible trying to locate Spurlock and get his information and to get him in Court.” Kilbarger stated that, after he was convicted, a friend was able to locate Spurlock, who again relayed that he had been “in hiding” and was afraid of others because of his activities as an informant. Kilbarger stated that, after locating Spurlock, he immediately contacted his current attorney. Kilbarger avered in his affidavit that he “was unable to discover the facts in Spurlock’s affidavit until Spurlock decided to come out of ‘hiding’ and provide the same, although I and my previous attorney did all in our power to locate him to obtain the information.”

{¶ 6} In my view, Kilbarger’s affidavit, like the affidavit in *Mackey*, created an issue of fact as to whether he was unavoidably prevented from discovering the facts upon which he relies to present his claim for relief, warranting a hearing on that issue.

{¶ 7} The parties dispute whether Kilbarger adequately demonstrated that he did everything “humanly possible” to locate and obtain a statement from Spurlock. The State emphasized at oral argument that Spurlock was served at his residence, which was known. However, Spurlock stated in his affidavit that he was told by Agent Stiegemeyer that he was not needed at Kilbarger’s trial. The majority notes that defense counsel informed the trial court at the end of the *Franks* hearing that counsel probably would not have called Spurlock anyway, which raises questions as to trial counsel’s efforts to secure Spurlock’s testimony.

{¶ 8} These concerns illustrate the need for an evidentiary hearing to flesh out whether Kilbarger did everything “humanly possible” to locate Spurlock, both before and

after his conviction. While Kilbarger may have known of Spurlock's residence and had Spurlock served there, the affidavit testimony also indicates that the agent may have interfered with Spurlock's attendance at court proceedings and that, at some point, Spurlock went into hiding. At a hearing, trial counsel also could be called to explain his efforts to obtain testimony from Spurlock.

{¶ 9} I certainly share the concerns expressed by the trial court regarding Spurlock's knowledge and veracity. But if Spurlock's statements are true, other questions, such as whether the warrant would have been issued and, if not, whether a reasonable fact finder would have found Kilbarger guilty, should be addressed. The trial court should have held an evidentiary hearing, first on the question of whether Kilbarger was unavoidably prevented from discovering the facts upon which he relies in his petition for post-conviction relief, and then, if necessary, on the post-conviction relief petition itself.

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