[Cite as *State v. Jackson*, 2015-Ohio-2941.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 14CA94
GREGORY JACKSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2011CR0560 D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BAMBI COUCH PAGE Richland County Prosecutor 38 S. Park Street Mansfield, OH 44902	GREGORY L. JACKSON #623-110 Ricland Correctional Inst. Box 8107 Mansfield, OH 44901

Gwin, P.J.

{¶1} Defendant-appellant Gregory L. Jackson appeals the November 14, 2014 Judgment Entry of the Richland County Court of Common Pleas denying his motion for new trial, or in the alternative, petition for post conviction relief ["PCR"]. Plaintiff-appellee is the State of Ohio.

Facts and Procedural History

{¶2} This Court recently upheld appellant's convictions and sentences for two counts of Having Weapons While Under a Disability, felonies of the third degree in violation of R.C. 2923.13 and one count of Possession of Heroin, in an amount exceeding ten grams but not exceeding 50 grams, a felony of the second degree in violation of R.C. 2925.11(A). See, *State v. Jackson* 5th Dist. Richland No. 2012-CA-20, 2012-Ohio-5548. ["*Jackson I"*].

{¶3} This Court denied Jackson's motion to re-open his direct appeal pursuant to App.R. 26(B) on August 9, 2013. This Court denied Jackson's motion to reconsider that decision on September 10, 2013.

{¶4} On March 7, 2013, the trial court overruled Jackson's motion for jail time credit. Jackson's appeal from that decision was dismissed on June 12, 2013 because Jackson failed to file his brief in our Court.

{¶5} On March 11, 2014, Jackson filed a motion for leave to file a motion for a new trial and post conviction relief pursuant to R.C. 29563.21, a motion for a new trial and supporting memorandum. The state responded on March 17, 2014, and Jackson replied to the state's response on April 4, 2014. On that date, Jackson filed a motion for

judgment on the pleadings. By Judgment Entry filed November 14, 2014, the trial court overruled Jackson's motion for new trial and petition for post-conviction relief.

Assignments of Error

{¶6} Jackson raises two assignments of error,

{¶7} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL.

{¶8} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT AN EVIDENTIARY HEARING ON DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL."

Analysis

{¶9} Jackson's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶10} Jackson's motion for a new trial is based upon his argument that the prosecutor presented false testimony and his trial counsel was ineffective for not investigating and calling appropriate expert witnesses to impeach or discredit Officer Clapp's trial testimony.

{¶11} Officer Clapp field-tested the substances recovered and in his opinion, the substance tested was cocaine. (1T. at 251). Officer Clapp further testified,

Q. Defendant's Exhibit B, the complaint for thirteen grams of cocaine, that's a mistake, isn't it?

A Yes.

Q. It's not accurate, is it?

A. It is not.

Q. We know from the crime lab who does scientific conclusive testing that he wasn't in possession of cocaine, it was heroin, right?

A Yes.

* * *

Q. That's wrong, that's a mistake, that complaint is inaccurate, right?

A Yes.

Q. You are basing that on the field test?

A Correct.

Q. You get a positive on the field test, it tells you it's a narcotic, you look at an off-white substance in chunky form and you assume that it's probably crack cocaine like you've seen a thousand other times?

A Correct.

Q. It turns out it's not, it's heroin?

A Correct.

Q. What do you do when you find out it's heroin and not cocaine?

A We let your office know.

* * *

Q. Now, not to take away from that, we did jump to conclusions there, didn't we?

A Yes.

Q. We jumped the gun, we thought we had cocaine, you filed the complaint, I shouldn't say we, you guys thought you had cocaine, filed the complaint, reasonably so because you did a field test on an off-white substance that oftentimes turns out to be crack cocaine?

A Correct.

* * *

Q. All right. Tell these folks which they should place more reliance upon, Mr. Tambasco's scientific test or your unscientific field test?

A The test done by our analyst.

Q. We don't claim to be perfect, do we?

A No, sir.

Q. We make mistakes?

A Yes, sir.

Q. But we always fix them, too, don't we?

A Yes, sir.

Q. Nobody is saying that he was in possession of thirteen grams of cocaine anymore, are they?

A I don't understand.

Q. We're not charging him with that now, are we?

A. No, we're not.

1T. at 255-259.

{¶12} Jackson submitted a sworn affidavit from Chief Chemist Roger Pryor of Micro-Chem Laboratories, LLC, which states that police officers can perform color tests

in the field with chemical reagents that will produce a blue color for cocaine and purple for heroin. He concludes his letter by stating that this presumptive field test is enough to bind a defendant through a preliminary hearing. Jackson in his own affidavit then concludes that the substance found by Officer Clapp was cocaine and not heroin and that the initial field test results were correct. Jackson argues that the letter of Mr. Pryor shows the drug field test can determine if the substance was heroin or cocaine and that, in fact, according to Mr. Pryor, Richard Clapp committed perjury. Jackson contends that the letter of Mr. Pryor shows both prosecutorial misconduct for using false testimony and ineffective assistance of trial counsel for not investigating and calling an appropriate expert witness to impeach/discredit Mr. Clapp.

Post-conviction relief

{¶13} A petition for post-conviction relief is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. Although designed to address claimed constitutional violations, the post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905(1999); *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67(1994). A petition for post-conviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819(1980). *State v. Lewis,* 5th Dist. Stark No. 2007CA00358, 2008-Ohio-3113 at ¶8.

{¶14} Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief, shall be filed no later than one hundred eighty 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 or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Supreme Court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal. In the case at bar, the transcript in Jackson's direct appeal was filed May 29, 2012. Jackson's motion was filed March 11, 2014, some 652 days after the filing of the transcript.

{¶15} Because Jackson's petition was untimely filed, the trial court was required to entertain the petition only if Jackson could meet the requirements of R.C. 2953.23(A). This statute provides, in pertinent part:

> [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 both of the following apply:
>
> (1) Either of the following applies:
>
> (a) 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.
>
> (b) 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.

(2) 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.

Motion for New trial

{¶16} Crim.R. 33 governs new trials. Subsections (A)(6) and (B) state the following:

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

* * *

> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶17} The Ohio Supreme Court has set forth the following requirements concerning motions for a new trial based upon newly discovered evidence:

> To warrant the granting of a motion for a new trial on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result of a new trial if granted; (2) has been discovered since the trial; (3) is such as could not in the exercise of due diligence have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370(1947), *syllabus. Accord*, *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227(1993), *syllabus; State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶85.

{¶18} The decision whether to grant a new trial on grounds of newly discovered evidence falls within the sound discretion of the trial court. *State v. Hawkins*, 66 Ohio

St.3d at 350, 612 N.E.2d 1227. We cannot reverse unless there has been a gross abuse of that discretion, and whether that discretion has been abused must be disclosed from the entire record. *State v. Petro,* 148 Ohio St. at 507- 508, 76 N.E.2d 370, *quoting State v. Lopa*, 96 Ohio St. 410, 411, 117 N.E. 319(1917).

{¶19} Crim.R. 33(B) provides that if a defendant fails to file a motion for a new trial within 120 days of the jury's verdict, he or she must seek leave from the trial court to file a delayed motion. To obtain leave, the defendant must show by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days. *State v. Lordi*, 149 Ohio App.3d 627, 2002–Ohio–5517, 778 N.E.2d 605, ¶ 26–27. Clear and convincing proof is that which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *In re Adoption of Holcomb,* 18 Ohio St .3d 361, 368, 481 N.E.2d 613(1985); *Lordi, supra*, at ¶ 26.

{¶20} Thus, the central inquiry in either Jackson's motion for a new trial or his petition for post-conviction relief is whether Pryor's affidavit discloses newly discovered evidence that Jackson was unavoidably prevented from obtaining.

{¶21} The "phrases 'unavoidably prevented' and 'clear and convincing proof' do not allow one to claim that evidence was undiscoverable simply because affidavits were not obtained sooner." *State v. Williams,* 12th Dist. Butler No. CA2003–01–001, 2003–Ohio–5873, ¶ 21.

{¶22} Pryor's affidavit states,

> Accra Micro-Chem Laboratories was asked to describe, how law enforcement is able to identify drugs out in the field. This letter addresses that question.
>
> Police Officers in the field perform screening test [sic.] also called color test. These test [sic.] are used to *tentatively identify* possible components of mixtures. With color spot test, an unknown drug is combined with chemical reagents, which produce a color change. For example, the color test for cocaine is Cobalt Thiocyanate. Addition of cocaine to this chemical will produce a rapid blue color change. Another example of a color spot test is the Marquis Test, which will produce a purple color with the addition of Heroin.
>
> These know test chemicals, called reagents, are contained in small plastic capsules that are carried into the field. Each of these capsules is comprised of one or more chemical reagents based on the National Institute of Justice Standard 0604.01. The unknown drug is added to the capsule, when a predictable color or series of colors occur within the testing sequence, a presumptive positive may be presumed. *This presumptive field test is sufficient to bind the accused through a preliminary hearing.*
>
> Emphasis added.

{¶23} R.C. 2953.21 does not expressly mandate a hearing for every post-conviction relief petition; therefore, a hearing is not automatically required. In determining whether a hearing is required, the Ohio Supreme Court in *State v. Jackson*,

64 Ohio St.2d 107, 413 N.E.2d 819(1980) stated the pivotal concern is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case.

{¶24} In the case at bar, there is no evidence that Jackson could not have discovered this evidence before the trial or within 120 days of the jury's verdict. Moreover, Pryor in his affidavit does not comment on the chemicals or reagents used by Officer Clapper in Jackson's case. Further Pryor's affidavit corroborates the tentative nature of the field tests. Jackson does not challenge the Mansfield Police Forensic Science Laboratory Drug Analysis Report. This report contained the analysis of both the marijuana and heroin found in the black backpack. It was signed by Anthony Tambasco. *See, Jackson, I*, 2012-Ohio-5548, ¶56. We find nothing in the documents Jackson attached to his motions that would justify a new trial, even if the documents were taken at face value.

{¶25} As such, Jackson has failed to meet his burden under R.C. 2953.23(A)(1) to file an untimely petition for post-conviction relief and the trial court therefore lacked jurisdiction to entertain the petition. *See State v. Downey,* 5th Dist. Stark No. 2013CA00157, 2013-Ohio-4693, ¶25; *State v. Kelly*, 6th Dist. Lucas No. L–05–1237, 2006–Ohio–1399, ¶12; *State v. Smith*, 9th Dist. Lorain No. 05CA008772, 2006-Ohio-2045, ¶9; *State v. Luther*, 9th Dist. Lorain No. 05CA008770, 2006–Ohio–2280, ¶13.

{¶26} We find that the trial court's denial is proper because the court was not statutorily authorized to entertain the petition because of its untimeliness.

{¶27} Following a review of the record, we conclude that the trial court did not abuse its discretion in overruling Jackson's motion for a new trial, as there is not a

strong probability that the proffered testimony of Pryor would change the outcome of a trial.

{¶28} Based on the foregoing, we find that the trial court did not abuse its discretion in denying Jackson's motion for a new trial because Jackson did not meet the criteria set forth in *Petro, supra* to warrant the granting on a motion for a new trial on the ground of newly discovered evidence. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶29} Accordingly, the trial court did not err in denying Jackson's motion for a new trial claiming newly discovered evidence and his petition for post-conviction relief. Further, the trial court did not err in failing to conduct a hearing on Jackson's motions.

{¶30} Jackson's first and second assignments of error are overruled.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is sustained.

By: Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur