[Cite as *State v. Babos*, 2013-Ohio-1256.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Eric Babos

Appellant

Court of Appeals Nos. L-11-1258
L-11-1259

Trial Court No. CR0200403699

DECISION AND JUDGMENT

Decided: March 29, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

David L. Doughten, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from judgments of the Lucas County Court of Common Pleas that denied the motion for leave to file a new trial motion and petition for postconviction relief of appellant Eric Babos. For the reasons set forth below, the judgments of the trial court are affirmed.

{¶ 2} The case underlying appellant's most recent motion and petition has a lengthy history in the trial court as well as before this court and will be set forth in this decision only to the extent relevant to this appeal. On August 5, 2005, appellant was found guilty of the murder of John Riebe pursuant to R.C. 2903.02 with a three-year firearm specification pursuant to R.C. 2929.141. On August 18, 2005, appellant filed a motion for a new trial. After a hearing, the trial court denied the motion and sentenced appellant to a life sentence with parole eligibility after 18 years.

{¶ 3} On March 21, 2006, appellant filed a second motion for new trial based on newly discovered evidence appellant claimed had been withheld by the prosecution. Following a second new trial hearing, the trial court denied the motion. Appellant filed a timely appeal and on May 18, 2007, this court affirmed the trial court's judgment. *State v. Babos*, 6th Dist. No. L-05-1394, 2007-Ohio-2393.

{¶ 4} Appellant then applied to this court for reopening of his direct appeal pursuant to App.R. 26(B). On August 30, 2007, this court denied appellant's application, finding that appellant had not shown he was denied effective assistance of appellate counsel.

{¶ 5} Appellant then filed a motion for relief from judgment which this court denied on February 15, 2008, finding that because some of appellant's 13 assignments of error had been previously considered by this court and the others could have or should have been raised on appeal, they were barred by res judicata. *State v. Babos*, 6th Dist. No. L-07-1213, 2008-Ohio-599.

{¶ 6} In 2010, appellant filed his third motion for new trial and the instant petition for postconviction relief. On September 14, 2011, the trial court denied both the motion and the petition. Appellant filed timely appeals, which this court sua sponte consolidated, and sets forth the following assignments of error:

First Assignment of Error:

The trial court abused its discretion by failing to grant Babos' motion for leave to file for a new trial.

Second Assignment of Error:

The failure to provide the defense with favorable evidence, including material necessary to impeach the state's ballistic expert, constituted a violation of *Brady v. Maryland* (1963), 373 U.S. 83.

Third Assignment of Error

The actions of defense counsel at trial deprived Babos of his right to the effective assistance of counsel.

Fourth Assignment of Error

The trial judge erred in failing to grant the appellant an evidentiary hearing as is required by R.C. 2953.21(E).

{¶ 7} As his first assignment of error, appellant sets forth several arguments in support of his claim that the trial court abused its discretion by denying his motion for leave to file a motion for new trial. Appellant's most recent motion before the trial court was based on claims of newly discovered evidence which appellant argued could

impeach the state's case against him as well as alleged misconduct by the prosecuting attorney in failing to turn over certain exculpatory evidence at trial.

{¶ 8} Crim.R. 33(B) states in relevant part that a new trial may be granted on motion of the defendant "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." A motion for a new trial shall be filed within 14 days after the verdict was rendered except for the cause of newly discovered evidence. Crim.R. 33(B) further states that a motion for a new trial based upon newly discovered evidence must be made within 120 days of the verdict unless the defendant shows by clear and convincing proof that he was unavoidably prevented from discovering the alleged new evidence upon which the motion relies within the deadline. Moreover, granting a motion for a new trial is an extraordinary measure which should be allowed only when the evidence presented weighs heavily against conviction. *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986). Absent an abuse of discretion, a decision to grant or deny a motion for a new trial on the basis of newly discovered evidence will not be disturbed. *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993). An abuse of discretion connotes more than a mere error in judgment; it implies that the trial court's ruling is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} Appellant asserts on appeal that he submitted newly discovered evidence in his motion for leave to file for a new trial. In support of his motion, appellant provided

the trial court with numerous affidavits which he believed bolstered his assertion that a new trial was warranted. On appeal, appellant focuses primarily on the affidavit of John Mark Klawitter, a witness whose allegedly favorable statement to police was not provided to the defense prior to trial, the affidavit of John Nixon, a ballistics expert who would have rebutted the state's assertion that appellant wore a shirt containing gunshot residue when he was interviewed by police, and the affidavit of Stephen J. Scharren, a voice expert who attested that the voice on a tape recording attributed to appellant at trial was not that of appellant.

{¶ 10} A new trial, based upon newly discovered evidence, will not be granted unless the new evidence discloses a strong probability that it will change the result if a new trial is granted, has been discovered since trial and could not in the exercise of due diligence have been discovered before the trial, is material to the issues, is not merely cumulative to former evidence, and does not merely impeach or contradict the former evidence. *Hawkins, supra*, at 350, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947).

{¶ 11} Appellant first argues that the state failed to disclose to the defense the substance of an alleged statement Klawitter provided to the police that an individual known as "J.R." had brandished a handgun in the decedent's home five days before the murder when appellant, Klawitter, the decedent and another man were all present. Appellant contends that Klawitter's statement to police implicated J.R. in the murder and

constitutes newly-discovered evidence. The statement made to the police is referenced in the Klawitter affidavit attached to appellant's motion for new trial.

{¶ 12} A reading of Klawitter's affidavit, however, calls into question appellant's assertion. In his affidavit, Klawitter averred that on December 15, 2004, appellant came to him and said he had just learned that Riebe had been shot and killed. According to Klawitter, "Eric and I discussed the events of the previous Friday at John's house, and in particular the arrival and threatening behavior of J.R." Klawitter and appellant decided that the police should be told of J.R.'s threatening behavior at Riebe's home shortly before the murder. Klawitter stated that he and appellant drove together to the Sylvania Township Police Department where they asked to speak with officers; they were separated and individually questioned about the matter. It is clear, therefore, that even before the trial, appellant was aware of the existence and possibly exculpatory nature of Klawitter's statements to the police, having discussed the matter with Klawitter himself. Appellant failed, however, to either obtain Klawitter's testimony at trial or exercise due diligence and raise the issue of the state's failure to disclose Klawitter's statements to police. Furthermore, after a careful review of the trial transcript, we find that Klawitter's affidavit simply reiterates information that was in evidence at trial regarding J.R. being at Riebe's house before the murder and allegedly brandishing a handgun. Klawitter's statements were not newly discovered evidence and were in fact merely cumulative to other evidence presented at trial.

{¶ 13} Appellant also claims that the state failed to disclose to the defense or to the jury that the findings of the state's gunshot residue ("GSR") experts at trial were "based upon faulty science" and that the GSR tests, if properly evaluated according to the "proper scientific standard," would actually be negative. Appellant supports this claim with the affidavit of John R. Nixon, a GSR expert first contacted by appellant's attorney in 2009, who agreed to review portions of the record and evidence relating to the use of firearms in this case. At that time, appellant's counsel was preparing to file another motion for new trial.

{¶ 14} In his affidavit, Nixon challenged comments made by the prosecutor during opening statement and stated that some of the prosecutor's comments conflicted with the trial testimony of one of the state's own GSR experts. According to appellant, Nixon's statements constituted newly discovered evidence. However, in an attempt to impeach the state's GSR evidence, Nixon presents theories that were available in 2004 and could have been presented at trial. Nixon states that the prosecutor offered inaccurate statements regarding testing for GSR, statements which conflicted with trial testimony. Appellant has not shown why he could not have had an expert impeach the prosecutor's statements or the testimony of the state's experts at trial. Nixon also challenges the state's witnesses for failing to provide test data in support of their testimony. Again, this criticism could have been brought out at trial. Further, appellant submitted articles containing similar criticisms in his postconviction relief petition filed in early 2007. Appellant has not shown why he could not have pursued and presented Nixon's expert

GSR evidence at his trial. The fact that Nixon disagrees with the findings of the state's GSR experts does not render the evidence "faulty," as appellant asserts; rather, the testimony regarding GSR testing was an issue of fact for the jury at trial. Finally, many of the statements in Nixon's affidavit were cumulative of evidence presented at trial and in appellant's 2007 petition for postconviction relief. *See State v. Babos*, 6th Dist. No. L-07-1213, 2008-Ohio-599 (affirming the trial court's dismissal of appellant's motion for relief from judgment based upon res judicata).

{¶ 15} Next, appellant claims newly-discovered evidence in the form of expert analysis of a voice heard in the background of a voice mail the decedent left when he called his ex-wife on the day of the murder. Appellant provides the affidavits of Stephen Scharren and Robert Leonard, two individuals who listened to the voicemail. The basis of appellant's argument is that a voice heard in the background when the decedent was on the phone was that of an African-American male and not that of appellant, a Caucasian male. Of course, this court realizes that the fact that an African-American male may have been present in the decedent's home shortly before the murder does not in any way constitute proof that appellant was not there as well, or that the African-American male committed the murder. Nevertheless, appellant argues in favor of his newly-acquired experts who, after listening to the voicemail with state-of-the-art equipment, believe that the voice of an African-American male can be heard. We note, however, that while Scharren states in his affidavit that "audio clarification *has long been a viable and important element* in the successful analysis of evidence for use in the court system,"

(emphasis added) he also avers that it was only "within the last year" that he was contacted by appellant's family for assistance. As with the other pieces of alleged newly discovered evidence, appellant has not shown why he, in the exercise of reasonable diligence, could not have pursued and presented this expert evidence at trial.

{¶ 16} Based on the foregoing, we find that appellant has failed to demonstrate by clear and convincing proof that he was unavoidably prevented from filing his third motion for a new trial or from discovering the alleged new evidence upon which his motion relies within the applicable deadlines as set forth in Crim.R. 33. We find that the alleged newly discovered and potentially exculpatory evidence offered in support of appellant's request for leave to file his third motion for new trial was either known to him at the time of his trial or, in the exercise of due diligence, could have been discovered and presented at trial. Finally, we find that none of the alleged newly discovered evidence would disclose a strong probability that it would change the outcome of a new trial if one were granted and would, in fact, simply be cumulative of other evidence disclosed to the defense or presented to the jury. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 17} Appellant's second assignment of error essentially revisits one of the arguments set forth under his first assignment of error in support of his motion for new trial, this time claiming with respect to the issue of gunshot residue found on his clothing that the state failed to provide the defense with favorable evidence which could have been used to impeach the state's ballistic expert. Appellant argues that the prosecution thereby

violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963), which 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 * * *."

{¶ 18} However, appellant has failed to specify what favorable evidence or information the state allegedly failed to disclose. The burden rests on the defendant to prove that the evidence in question was materially exculpatory. *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991). The record herein reflects that defense counsel was provided with the experts' reports, which he supplemented with a direct request for additional information from one of the experts and another request for more detailed analytical data from one of the laboratories the state used. Additionally, this claim could have been raised on direct appeal and therefore is barred by res judicata. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 19} In support of his third assignment of error, appellant asserts that he was denied effective assistance of trial counsel because counsel failed to fully investigate the background of the case. Specifically, appellant argues that trial counsel should have hired a GSR expert and a voice analyst and should have interviewed and called John Klawitter as a defense witness.

{¶ 20} As to the issue of a GSR expert, while the defense did not call one at trial, there is no evidence that the defense failed to hire one during initial investigation of the case. The decision whether to employ an expert usually resides within the discretion of defense trial counsel and is considered to be a "debatable trial tactic." *State v. Davis*, 6th

Dist. No. WD-07-031, 2008-Ohio-3574, ¶ 30. In this case, the record reflects that trial counsel cross-examined the state's GSR experts thoroughly; it is arguable that, in order to do that, defense counsel either consulted his own expert or researched the issue extensively. Clearly the decision to either not hire a GSR expert or not call one at trial was a "debatable trial tactic."

{¶ 21} As to voice analysis of the voicemail recording, appellant states that if counsel had hired a witness to examine the recording, the jury would have been presented with expert testimony that he was not with Riebe shortly before the murder. However, the voice of an African-American on the recording, if such had been the conclusion of a defense expert, would not have shown that appellant was not with Riebe; it simply would have shown that appellant's voice was not on the tape and nothing more.

{¶ 22} Appellant also argues that trial counsel should have interviewed and called John Klawitter, whose testimony would have solidified the case against another suspect (unnamed) and weakened the allegations against appellant. Appellant assumes, first, that if Klawitter had been available at the time of the trial, he would have provided testimony favorable to the defense. There is, of course, no way to know that. The record does reflect that Klawitter was interviewed by an investigator for the defense before trial. However, according to the affidavit of the investigator, as the trial date approached, Klawitter "made himself scarce." In light of Klawitter's apparent reluctance to cooperate, a decision by defense counsel not to try to track him down and subpoena him could be deemed a trial tactic.

{¶ 23} *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for judging ineffective assistance claims: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-688. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

{¶ 24} Applying the first prong of *Strickland*, we find that appellant has not shown that counsel's representation fell below an objective standard of reasonableness. Because appellant fails to satisfy the first prong as set forth above, no further review is warranted. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 25} In support of his fourth assignment of error, appellant asserts that the trial court erred by failing to grant an evidentiary hearing on his postconviction petition.

{¶ 26} There is no automatic right to an evidentiary hearing on a postconviction relief petition. *State v. Calhoun*, 86 Ohio St.3d 279, 283, 714 N.E.2d 905 (1999). A petition for postconviction relief may be dismissed without an evidentiary hearing when the record shows that the defendant is not entitled to relief and that he has not submitted evidentiary documents containing sufficient operative facts to demonstrate that valid substantive grounds for relief exist. *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983). As set forth above in our analysis of appellant's first, second and third

assignments of error, appellant's claims fail upon the merits and he is not entitled to relief. Therefore, the trial court was not required to hold an evidentiary hearing on the petition for postconviction relief and his fourth assignment of error is not well-taken.

{¶ 27} On consideration whereof, this court finds that the judgments of the Lucas County Court of Common Pleas denying appellant's motion for new trial and petition for postconviction relief are affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE