

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

State of Ohio

Court of Appeals No. L-12-1023

Appellee

Trial Court No. CR0200401915

v.

Gerald Robinson

DECISION AND JUDGMENT

Appellant

Decided: February 15, 2013

* * * * *

Richard M. Kerger, for appellant.

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

* * * * *

PIETRYKOWSKI, J.

{¶1} Defendant-appellant, Gerald Robinson, appeals the January 12, 2012
judgment of the Lucas County Court of Common Pleas which, following a hearing,

denied his petition for postconviction relief. Because we find that the trial court did not abuse its discretion, we affirm.

{¶2} On May 11, 2006, following a jury trial, defendant-appellant, Father Gerald Robinson, was convicted of the April 5, 1980 murder of Sister Margaret Ann Pahl. While the direct appeal in the matter was pending before this court, appellant filed a motion for postconviction relief. The parties agreed to stay the matter pending this court's decision.

{¶3} On July 11, 2008, we affirmed appellant's conviction. *See State v. Robinson*, 6th Dist. No. L-06-1182, 2008-Ohio-3498. Thereafter, on January 16, 2009, appellant filed an amended petition for postconviction relief. In his petition, appellant argued that he received ineffective assistance of trial counsel based on exculpatory evidence that was never presented to the jury, that the state of Ohio failed to disclose materially exculpatory evidence, and that the publicity in the case deprived appellant of a fair trial. The state opposed the petition and subsequently requested that the opposition be considered as either a motion to dismiss or a motion for summary judgment. Subsequently, the parties filed motions for summary judgment.

{¶4} During the course of the postconviction proceedings, the parties discovered several missing police reports that were misfiled by the Toledo Police Department. The reports contained witness statements, the most important of which were reports of an unknown black male in the vicinity of the chapel near the time of the murder. The parties filed additional briefing relative to the reports.

{¶5} On April 11, 2011, the trial court entered an opinion and judgment entry on the motions. The court found that, as to the ineffective assistance of counsel claim, the arguments regarding the alleged failure to pursue Father Swiatecki (deceased prior to trial), another priest who worked at Mercy Hospital, a security guard, or other unknown individuals, as the murderer was based on no new evidence, was speculative, and failed to demonstrate operative facts to advance his claims.

{¶6} The trial court further rejected arguments made that a knife found could have been the murder weapon and counsel was ineffective in failing to pursue this avenue. Further, a similar letter opener, missing its tip, was too speculative to demonstrate that the opener in this case was too flimsy to be the murder weapon.

{¶7} The court then noted that there was conflicting testimony presented at trial as to the time of the murder and whether the chapel doors were open or closed, so an affidavit stating that the doors were closed at 7:35 a.m. on the morning of the murder was cumulative. Further, as to trial counsels' failure to present good character evidence, the court found that the decision was tactical in nature and not an appropriate basis for postconviction relief. The court then denied a hearing on appellant's claim of ineffective assistance of counsel.

{¶8} Next, the trial court addressed the due process claims which were based on alleged previously undisclosed evidence including witness statements and crime reports. The court concluded that the evidence was cumulative and the lost or destroyed evidence

was argued at trial and used to appellant's advantage in challenging the quality of the investigation.

{¶9} Regarding the additional documents discovered during the postconviction proceedings, and the supplemental briefing relative thereto, the court concluded that appellant should be afforded additional time to develop his claims and that a hearing would be held.

{¶10} The court then addressed appellant's final contention that the publicity surrounding the trial denied him the right to a fair and impartial jury. The court found that appellant failed to present any evidence to support the claim and that the alleged "satanic" characterization of the crime was addressed on appeal. The court then granted a hearing on the due process claims relating to the undisclosed records and denied the remaining claims.

{¶11} At the May 20, 2011 hearing, the following evidence was presented. Appellant's trial attorney, Alan Konop, was questioned regarding undisclosed documents from individuals who purported to see a black male in his twenties around the time of the murder. Konop was also questioned about a criminal profiler's report which indicated that the suspect was likely to be non-white, in his twenties, possibly Spanish and extremely strong. Konop was asked about convicted serial killer Coral Eugene Watts who has been living in the Ann Arbor, Michigan area around the time of the murder. Konop acknowledged that information about the black males and Watts could have been helpful during trial.

{¶12} Konop was then cross-examined regarding similar eyewitness reports of a black male that were received during the initial discovery phase. Konop agreed that he was aware of reports involving a young black male on the second floor of the hospital as well as black males in other parts of the hospital. He acknowledged being apprised of Coral Eugene Watts in 30 or more pages of reports. Konop acknowledged that Watts' modus operandi was in many ways dissimilar to the murder of Sister Pahl. He agreed that there were some similarities such as strangling and stabbing.

{¶13} During redirect examination, Konop agreed that eight reports of a black male were more substantial than two reports that were disclosed and that, while they were aware that the state has used a profiler, they were not given the entire report.

{¶14} Next, Karen Raszka testified that in 1980 she was a nursing student at Mercy Hospital. She stated that on April 5, 1980, at 7:35 a.m., she walked by the chapel doors and that they were closed. Raszka stated that she found it odd because she had never seen the doors closed. Raszka admitted that she spoke with defense counsel prior to trial, though they did not call her to testify. The state requested that the testimony be stricken as beyond the scope of the hearing; the request was denied.

{¶15} Trial counsel, John Thebes, testified that he was not aware of six witness statements who said that they saw an unidentified black male in the hospital at the time of the murder. He agreed that the statements could have "potentially" been helpful. Thebes stated that he believed that serial killer, Coral Eugene Watts, had been incarcerated at the time of Sister Pahl's murder. Like Konop, Thebes was questioned about the profiler's

report which he did not see; he was also questioned about a statement from an Ann Arbor, Michigan, police officer who “felt” that Watts could have been in the Toledo area at the time of the murder.

{¶16} During cross-examination, Thebes acknowledged the evidence that the state presented at trial and admitted that the defense strategy was to not name a specific alternate suspect. Thebes agreed that the defense wanted the jury to believe that either Father Swiatecki or an unidentified individual committed the murder.

{¶17} Former Toledo Police Sergeant Steve Forrester testified that he investigated the cold case murder of Sister Pahl. Forrester reviewed the missing documents and indicated that they had been placed in the wrong location on the microfiche. Forrester stated that the additional information about an unknown black male was possibly something he would have followed up on. Forrester was also questioned about Coral Eugene Watts who he discarded as a suspect due to his dissimilar modus operandi which included killing younger victims.

{¶18} Sister Dorothy Marie Balabuch testified that in 1980 she did housekeeping for Father Swiatecki and that he was a woodcarver and had a large collection of knives. Sister Balabuch stated that Swiatecki had a temper. Sister Balabuch testified that she never worked at Mercy Hospital. Sister Balabuch admitted that she never saw Father Swiatecki’s knife collection. She agreed that she never read the 2009 affidavit prepared by lawyers that she signed.

{¶19} The state then called Thomas Staff, a Toledo Police homicide detective during the 1980 investigation. Staff was questioned regarding inquiries made about Coral Eugene Watts. Watts was questioned in Texas and indicated that he had not committed any murders in the Toledo area. The Texas detective was 90 percent certain that Watts was being truthful based upon prior dealings.

{¶20} Staff was cross-examined about whether, prior to his 2007 death, Watts refused to discuss any murders he committed in Michigan because he would not be offered immunity from prosecution. Staff agreed that Watts often stabbed his victims multiple times and strangled them. Staff further stated that Watts stalked his young victims and assaulted them outside.

{¶21} Post-hearing briefs were filed by the parties and on January 12, 2012, the court issued its findings of fact and conclusions of law. The court found that appellant's claims that the documents would support a theory that Coral Watts was the murderer failed to demonstrate the materiality of the undisclosed evidence. The court noted that Watts was a known, and ultimately rejected, suspect at the time of trial and that the new evidence failed to lend support to the claim. The males seen on the date of the murder had varying descriptions and defense counsel had received similar information during discovery. The court further noted that appellant, other than asserting that the evidence may have advanced the argument that Watts or some other black male committed the murder, appeared to use the evidence to further his argument that trial counsel was ineffective in failing to argue that some particular other individual was the murderer. The

court concluded that the argument went to ineffectiveness of counsel which was addressed by this court on appeal and rejected in the court's April 11, 2011 opinion and judgment entry. The court then denied the motion.

{¶22} Appellant then commenced the instant appeal and raises two assignments of error for our review:

1. The trial court committed error in failing to find that the investigation of defense counsel at trial was inadequate when they concluded without any investigation that a likely perpetrator was in jail at the time of the murder in this case.

2. The trial court erred in finding that the state did not violate its duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) by failing to provide numerous witness reports in its possession concerning an unknown male at the scene of the crime; by not conducting an investigation adequate to locate the existence of even more witness statements describing similar sightings of potential suspects which were not found until the post-conviction proceedings; and by failing to provide the report of the state's profiler who described the likely assailant as similar to if not identical with the suspect seen by eight witnesses.

{¶23} We first note that the standard of review on appeal from postconviction proceedings is whether the trial court abused its discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. A trial court abuses its discretion when

its judgment is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Further, res judicata does bar postconviction relief claims that were raised or could have been raised on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraphs eight and nine of the syllabus; *State v. Szeftcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus.

{¶24} In appellant's first assignment of error he argues that the trial court erred when it failed to find that trial counsel was ineffective by not pursuing Coral Watts as the killer based upon a mistaken belief that Watts was incarcerated on the date of the murder. Where a petitioner, represented by new counsel on appeal, alleges ineffective assistance of trial counsel, that petitioner is not entitled to postconviction relief unless he presents evidence dehors the record to show that trial counsel was ineffective. In other words, the petitioner must present evidence outside the record that could not have been raised on direct appeal of his conviction. *See State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus.

{¶25} Upon review we find that, as did the trial court, the majority of appellant's argument involves strategic trial decisions which do not form the basis for an ineffective assistance of counsel claim and which, because they could have been raised on direct appeal, are barred by res judicata. It is undisputed that defense counsel had several reports regarding Coral Watts and his activities in Ann Arbor around the time of Sister Pahl's murder. In support of his argument, appellant relies on the following statements by trial counsel, made at the postconviction hearing:

[Thebes] A: * * * I was informed through investigations that Mr. Watts was incarcerated, I believe, at the time of the homicide.

Q: On April 5, 1980, your understanding he was in jail?

A: He was in jail somewhere, I believe, or he was incapacitated in some way. That's what I was led to believe. That was from information I gleaned from the state.

{¶26} Attorney Thebes was further questioned about the decision not to pursue Watts as the possible murderer of Sister Pahl. Thebes agreed that Watts' modus operandi was not similar to the circumstances of the murder. Instead, Thebes and defense counsels' strategy was to focus on the poor quality of the 1980 murder investigation and to suggest to the jury that either Father Swiatecki or another unknown individual committed the murder.

{¶27} We note that the discovery relating to Watts that was provided to the defense prior to trial clearly indicated that he was not in jail or otherwise incapacitated at the time of the murder and that he had been arrested in 1982. Co-counsel, Alan Konop, testified at the postconviction hearing as to counsels' knowledge of Watts' activities but did not mention a belief that he was incarcerated.

{¶28} Reviewing the trial transcript and evidence admitted at trial as well as the discovery documents pertaining to Watts, we cannot say the trial counsel was ineffective in failing to specifically pursue the theory that Coral Watts was the murderer. The strategy of focusing on the alleged shoddy 1980 investigation while implying that either

Father Swiatecki or an unknown individual committed the murder was sound.

Appellant's first assignment of error is not well-taken.

{¶29} Appellant's second assignment of error contends that the 139 pages of documents that were misfiled by the Toledo Police Department and not produced until after trial violated his right to due process of law under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the United States Supreme Court 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, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The doctrine has been extended such that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the doctrine applies whether there has been a specific request, a general request, or, as here, no request by the defendant for exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶30} For purposes of a *Brady v. Maryland* analysis, evidence is "deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph five of the syllabus, following *United States v. Bagley*.

{¶31} In the present case, appellant specifically argues that reports of various witnesses regarding an unidentified black male in the vicinity of the crime scene, combined with the fact that Coral Watts was a black male, makes the failure to disclose material. Appellant further argues that the failure to disclose the full report of profiler Dr. Harry Stock was also material as it supported a potential perpetrator similar to Watts but not appellant.

{¶32} We have reviewed the previously undisclosed documents and reviewed again the entire trial transcript and evidence. After such review, we cannot say that the undisclosed evidence was material in the sense that the outcome of the trial would have been different. At the May 2011 hearing, attorney Konop testified that they had several reports regarding Coral Watts but rejected naming him as the likely murderer. We agree that Watts stabbed his victims multiple times and strangled them, similar to Sister Pahl's murder. There was also no evidence of a sexual or robbery motive. However, according to the discovery, Watts stalked young victims and murdered them outside. Counsel had sufficient information to consider and reject Watts as a suspect; such a decision was a matter of trial strategy.

{¶33} Further, regarding the undisclosed reports of the unidentified black male, some of the information was cumulative and while the other reports, as stated by counsel may have "possibly" been useful, in light of the evidence of appellant's guilt presented at trial, the reports were not material in the sense that they would have changed the outcome.

{¶34} Based on the foregoing, we find that appellant's right to due process of law was not violated by the misfiling of the documents. Appellant's second assignment of error is not well-taken.

{¶35} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
