

[Cite as *State v. Taylor*, 2002-Ohio-2742.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80271

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
MICHAEL N. TAYLOR	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	MAY 30, 2002
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Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. CR-290970
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Judgment:	AFFIRMED
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Date of Journalization:	MAY 30, 2002
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Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor KELLEY J. BARNETT, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	RICHARD D. VICKERS, Assistant WENDI DOTSON, Assistant State Public Defenders 8 East Long St., 11th Floor Columbus, Ohio 43266-0587
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JAMES J. SWEENEY, J.:

{¶1} Defendant-appellant Michael N. Taylor appeals from the judgment of the Common Pleas Court which denied his second petition for postconviction relief. For the following reasons, we affirm.

{¶2} After a jury trial, defendant was convicted of aggravated murder with a firearm specification, repeat murder and prior aggravated felony specifications. Defendant was sentenced to death.

{¶3} Defendant's conviction and sentence were affirmed by this Court in *State v. Taylor* (Nov. 9, 1995), Cuyahoga App. No. 65711. The Supreme Court of Ohio affirmed the same in *State v. Taylor* (1997), 78 Ohio St.3d 15. Defendant's original petition for postconviction relief was dismissed without hearing by the trial court on February 2, 1998. This Court affirmed that judgment in *State v. Taylor* (Nov. 18, 1999), Cuyahoga App. No. 75352.

{¶4} On March 30, 2001, defendant filed an amended second petition for postconviction relief. In his second petition for postconviction relief, defendant conceded that the petition did not meet the criteria of R.C. 2953.23. Consequently, he argued that R.C. 2953.23 is unconstitutional on its face and as applied to him. The petition then set forth seven claims for relief.

{¶5} In its opinion, the trial court concluded that R.C. 2953.23 is constitutional. Citing *Pennsylvania v. Finley* (1987),

481 U.S. 551, the trial court held that any limitations on the right to postconviction relief are constitutional. The trial court also cited *Slack v. McDaniel* (2000), 120 S.Ct. 1595, 1606 for the proposition that "the State remains free to impose proper procedural bars to restrict repeated returns to state court" for postconviction proceedings. With respect to the merits of defendant's seven claimed grounds for relief, the trial court declined to address them and dismissed the petition.

{¶6} Defendant timely filed his appeal assigning three assignments of error.

I.

{¶7} THE TRIAL COURT ERRED IN HOLDING
THAT THE UNITED STATES CONSTITUTION
DOES NOT APPLY TO STATE
POSTCONVICTION PROCEEDINGS.

{¶8} In his first assignment of error, defendant contends that the trial court erroneously held that the United States Constitution does not apply to postconviction proceedings. Specifically, defendant cites the following statement from the trial court's opinion: "Nowhere does it appear in any United States Supreme Court decision that states must follow the United States Constitution in developing and implementing postconviction remedies."

{¶9} We find no error in the trial court's statement. In reading the entire opinion, it is clear that the trial court was merely stating that the trial court need not follow the defendant's

interpretation of the federal constitution as applied to postconviction proceedings; that is, that petitions for postconviction relief must be unrestricted and unlimited.

{¶10} Defendant's first assignment of error is overruled.

II.

{¶11} THE TRIAL COURT ERRED WHEN IT FAILED TO DECLARE O.R.C. §2953.23(A)(2) CONSTITUTIONALLY INFIRM ON ITS FACE AND AS APPLIED TO APPELLANT TAYLOR.

{¶12} In his second assignment of error, defendant challenges the constitutionality of R.C. 2953.23(A)(2), Ohio's postconviction statute. Specifically, defendant claims that R.C. 2953.23(A)(2) violates the Supremacy Clause, the separation of powers doctrine, and the "due course of law" and "open courts" provisions of the Ohio Constitution. We disagree.

{¶13} Courts throughout this State have repeatedly found that R.C. 2953.23(A)(2) is constitutional and does not violate the Supremacy Clause, the Doctrine of Separation of Powers, the "due course of law" or "open courts" provisions of the Ohio Constitution. See *State v. Byrd* (2001), 145 Ohio App.3d 318; *State v. McGuire* (Apr. 23, 2001), Preble App. No. CA2000-10-011; *State v. Davie* (Dec. 2001), Trumbull App. No. 2000-T-0104. Nor do we find that R.C. 2953.23(A)(2) is unconstitutional as applied to defendant.

{¶14} Defendant's second assignment of error is overruled.

III.

{¶15} THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S SECOND POSTCONVICTION PETITION WHERE HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT AN EVIDENTIARY HEARING AND DISCOVERY.

{¶16} In his third assignment of error, defendant raises two issues for our review: first, he claims that the trial court erred in dismissing his second postconviction petition since he raised substantive grounds for relief. Second, he claims that the trial court erred when it failed to grant an evidentiary hearing and discovery.

{¶17} R.C. 2953.23, which deals only with either second, successive petitions or untimely petitions, provides that a trial court has no jurisdiction to entertain a successive postconviction petition unless it meets the following conditions: (1) the petitioner must show either that he was unavoidably prevented from discovering the facts upon which he relies in the petition, or that the United States Supreme Court has, since his last petition, recognized a new federal or state right that applies retroactively to the petition; and (2) the petitioner must show by clear and convincing evidence that a reasonable factfinder would not have found him guilty but for a constitutional error at trial. *State v. Byrd*, 145 Ohio App. 3d at 326.

{¶18} With regard to defendant's eight grounds for relief, we find that defendant was not unavoidably prevented from discovering the facts upon which he must rely in presenting these claims. R.C.

2953.23(A)(1). Each of his claims concern the effective assistance of counsel during the trial and mitigation and penalty phase of the trial. These are claims that should have been raised in direct appeal or in defendant's first petition for postconviction relief.

Defendant has not demonstrated how he was prevented from discovering these facts prior to this second petition. Accordingly, because the petition failed to meet the criteria set forth in R.C. 2953.23(A)(1), the trial court did not err in dismissing it.

{¶19} Next, since the trial court did not err in dismissing defendant's petition, we conclude that it was not an abuse of discretion to deny defendant's evidentiary hearing and discovery requests. Courts are not required to provide petitioners discovery in postconviction proceedings. *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159; *State v. Wiles* (1998), 126 Ohio App.3d 71, 79. Further, if the petition and the files and records show that the petitioner is not entitled to relief, the court may dismiss the petition without an evidentiary hearing. *State v. Byrd*, supra, at 329; *State v. Kapper* (1983), 5 Ohio St.3d 36, 38.

{¶20} Defendant's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, P.J., CONCURS
WITH SEPARATE CONCURRING OPINION (SEE
CONCURRING OPINION ATTACHED.
COLLEEN CONWAY COONEY, J., CONCURS
IN JUDGMENT ONLY.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

MICHAEL J. CORRIGAN, P.J., CONCURRING:

{¶21} I concur in all respects with the majority opinion, but write separately to point out that Taylor's Supremacy Clause argument has not only been rejected by two other appellate districts, see *State v. Davie* (Dec. 21, 2001), Trumbull App. No.

2000-T-0104 and the Twelfth District in *State v. McGuire* (Apr. 23, 2001), Preble App. No. CA2000-10-011, but Taylor's current counsel was also counsel of record in those cases yet failed to cite them as contrary authority to his position.

{¶22} Although the ethical obligation to disclose contrary legal authority only applies in the controlling jurisdiction, see DR7-106(B)(1), and these cases are from other appellate districts, I nonetheless would maintain that defense counsel should have called these cases to our attention, particularly since he was counsel of record in those cases and acknowledged at oral argument that he knew these cases were contrary to his position.