[Cite as *State v. Broom*, 2009-Ohio-3731.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91297

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROMELL BROOM

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-196643

BEFORE: Stewart, J., McMonagle, P.J., and Boyle, J.

RELEASED: July 30, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

S. Adele Shank
Law Office of S. Adele Shank
3380 Tremont Road
Second Floor
Columbus, OH 43201-2112

Timothy F. Sweeney
Law Office of Timothy Farrell Sweeney
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Matthew E. Meyer
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Romell Broom, appeals from the dismissal of his second petition for postconviction relief. Broom, who was sentenced to death for his 1985 conviction for aggravated murder and kidnapping, brought the second petition claiming that police statements he obtained in 1994 by way of a public records request contained exculpatory evidence that had not been provided to him at the time of trial in violation of *Brady v. Maryland* (1963), 373 U.S. 83.[1] The state sought dismissal of the petition on grounds that it had not been timely filed, arguing that Broom could have raised the *Brady* claim in his first petition for postconviction relief. Broom maintained that he was unavoidably prevented from using the public records by virtue of the sixth paragraph of the syllabus to *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, in which the supreme court held that "[a] defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for postconviction relief."

---

[1]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 court rejected that view and dismissed the petition as not being timely filed. Broom appeals.

I

{¶ 2} In 1985, the grand jury returned an eight-count indictment charging Broom with aggravated murder, rape, kidnapping, and felonious assault. The indictment contained two felony murder specifications and an aggravated felony specification. Trial evidence showed that the 14-year-old victim, Tryna Middleton, and her two friends, Tammy Sims and Bonita Callier, were walking home from a high school football game. They saw a car parked with its headlights off, in an unusual location on the street. Thinking this suspicious, they walked away from it and chose a different route home. As they continued walking, a car without headlights on came toward them and stopped. The driver exited the car and ran past the girls to some bushes a few houses away. When the girls approached the stopped car, they heard footsteps and saw Broom running toward them with his arms outstretched. He grabbed at Sims and Callier, but they were able to avoid his grasp. Broom then struggled with Middleton, pulled out a knife and said, "come here, bitch." He pulled her into the car and drove away. Sims and Callier ran to a nearby house where they called the police. They described the car as a gold Ford Granada. Middleton's body was found in a parking lot a few hours later. She had been stabbed in the chest and abdomen. The coroner found semen in her vagina and rectum.

{¶ 3} The police had no immediate leads until they became aware of two other incidents in the same area involving young girls. In one incident, a motorist stopped a young girl who was walking home by producing a knife and ordering her into his car. He called her a "bitch" and wrestled with her, but neighbors who heard her struggle intervened and the assailant drove off. In the second incident, a car followed a young girl. The driver exited the car and grabbed the girl from behind and forced her into the car. As the girl fought her assailant, her mother ran out and grabbed the car door. The girl escaped from the car and witnesses provided the police with the license number of the car. The police traced the car to Broom's father. Broom admitted he was driving the car, and the girl and her mother later identified Broom as the assailant.

{¶ 4} Sims and Callier identified Broom from a lineup. The police then learned that Broom had been driving his girlfriend's car at the time of the Middleton murder. That car matched the description of the car seen by Sims and Callier. The police also found that the semen recovered from Middleton belonged to a person with type B blood, that Broom had type B blood, and that only 12 percent of the population has type B blood.

{¶ 5} A jury found Broom guilty of all charges and recommended a death sentence. The court concurred with the sentencing recommendation. We affirmed Broom's conviction and death sentence in *State v. Broom* (July 23,

1987), Cuyahoga App. No. 51237. The supreme court likewise affirmed on direct appeal. See *State v. Broom* (1988), 40 Ohio St.3d 277.

{¶ 6} In February 1990, Broom filed his first petition for postconviction relief. The state sought dismissal of all the claims for relief. Broom opposed the state's motion and at the same time asked the court to stay the matter for resolution of his outstanding motions for the production of law enforcement investigation documents. The then-applicable law was set forth in the syllabus to *State ex rel. Clark v. Toledo* (1990), 54 Ohio St.3d 55, which stated: "A criminal defendant who has exhausted the direct appeals of his conviction may avail himself of R.C. 149.43[2] to support his petition for post-conviction relief." Broom had made a public records request to the East Cleveland Police Department and other law enforcement agencies for documents relating to the underlying police investigation and requested the stay so that he would have a "full and fair opportunity to present to this Court all of the State and Federal Constitutional grounds for granting him post-conviction relief."

{¶ 7} Broom obtained some records from the East Cleveland Police Department during 1993-1994, including the alleged *Brady* material at issue in this appeal. On September 7, 1994, the Ohio Supreme Court overruled *Clark*,

---

[2]R.C. 149.43 is commonly known as the "Public Records Act" and defines what constitutes a public record, who is entitled to access to public records, what records are to be made available for access, the manner in which records are to be disclosed, and certain exemptions to disclosure.

holding in *Steckman* that "[a] defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for postconviction relief."[3] Broom admittedly did not amend his petition or file a second petition to include the *Brady* material, even though he had been in possession of that material for a "few months" prior to the release of *Steckman*.

{¶ 8} The court did not rule on the stay request, but nonetheless waited until October 1996 before denying the petition for postconviction relief. We affirmed the denial of postconviction relief in *State v. Broom* (May 7, 1998), Cuyahoga App. No. 72581, finding that Broom's claims were barred by principles of res judicata because they were either raised, or could have been raised, on direct appeal.

{¶ 9} In June 1999, Broom petitioned the United States District Court, Northern District of Ohio, for a writ of habeas corpus. As relevant to this appeal, his sixth claim for relief raised a *Brady* issue based on the material he obtained in 1993-1994 from the East Cleveland Police Department. Broom argued that the state withheld exculpatory evidence by failing to disclose that

---

[3]The supreme court stated that a primary basis for its decision was that "in order to avoid the results of Crim.R. 16, some defendants (more and more we find) are resorting to the use of R.C. 149.43 to, we believe, obtain information to which they are not entitled under Crim.R. 16 *and* (and we emphasize) to bring about interminable delay in their criminal prosecutions." *Steckman*, 70 Ohio St.3d at 428. (Emphasis sic.) See, also, *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶9.

Middleton, Sims, and Callier had been under the influence of drugs on the night of the murder, that the three girls had a "habit" of taking rides with strange men, and that the person who allowed Sims and Callier to call the police after Middleton's abduction did not initially believe them.

{¶ 10} The district court denied the writ in August 2002. Noting that Broom did not raise his *Brady* claim in the state courts even though he had been in possession of the alleged exculpatory material for eight years, the district court found that Broom had intentionally bypassed the state courts and could not satisfy the "cause and prejudice" or "miscarriage of justice" prongs of *Coleman v. Thompson* (1991), 501 U.S. 722, 750;[4] thus, procedurally defaulting on the *Brady* claim.[5] See *Broom v. Mitchell* (Aug. 2, 2002), N.D.Ohio No. 1:99 CV 0030, unreported at 41-46.

{¶ 11} The United States Court of Appeals for the Sixth Circuit affirmed the district court's refusal to grant habeas relief on grounds that Broom had

---

[4]In *Coleman*, the United States Supreme Court held: "In all cases in which a state prisoner has defaulted his federal claims in a state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Id. at 750.

[5]As an "alternative" holding, the district court considered Broom's *Brady* claims and found them meritorious in part. Although finding it a "close question as to whether a *Brady* violation occurred," the court found it likely that knowledge of the East Cleveland Police Department records should be imputed to the prosecution. As to the "materiality" prong of the *Brady* analysis, the district court again found it a "close question" but chose not to resolve it given "Broom's procedural default and his failure

procedurally defaulted his sixth claim for relief by failing to present his *Brady* arguments to the state courts when he first obtained the allegedly exculpatory material. See *Broom v. Mitchell* (C.A.6, 2006), 441 F.3d 392, 401-404. The Sixth Circuit went on to find that Broom did not avoid procedural default by showing that there was cause and prejudice as a result of the alleged violation of law, and specifically rejected Broom's argument that the release of *Steckman* prohibited him from using the records he obtained from the East Cleveland Police Department. The Sixth Circuit noted that while the Ohio Court of Appeals, Second District, had ruled in *State v. Walker* (1995), 102 Ohio App.3d 625, that *Steckman* prevented a postconviction relief petitioner from using any material obtained in public records request, the question was far from settled in the Ohio courts and "there was a reasonably available 'legal basis' for Broom either to file another petition for postconviction relief or to amend the petition that he had already filed." *Broom*, 441 F.3d at 404. The Sixth Circuit concluded that "the *Steckman* decision does not constitute cause for Broom's procedural default of his *Brady* claim." Id.

{¶ 12} Broom then filed his second petition for postconviction relief, raising his *Brady* claim for the first time in the state courts. The state filed a motion to dismiss the claim as being untimely because Broom failed to justify the successor petition for postconviction relief with a showing that he had been unavoidably

---

to develop the evidentiary record * * *."

prevented from discovering the facts of the *Brady* claim. Broom once again argued that he had been unavoidably delayed in filing the succesor petition because *Steckman* prohibited him from raising the East Cleveland Police Department records in his first petition.

{¶ 13} In findings of fact and conclusions of law, the court found that the records might have been newly discovered in 1994, but they were not newly discovered when Broom filed his successor petition in 2007. Citing to the Sixth Circuit's decision in *Broom v. Mitchell*, the court held that *Steckman* "did not act to bar Broom from filing a petition for post conviction relief in 1994." The court concluded that it lacked jurisdiction to hear the successor petition because Broom failed to meet the time requirements for filing that petition.

II

{¶ 14} Broom first argues that the court erred by finding that his failure to raise his *Brady* claim prior to the dismissal of his first petition for postconviction relief demonstrated that he had not shown he was unavoidably prevented from previously filing the claim. He maintains that he was unavoidably prevented from raising his claims at an earlier point in time because *Steckman* barred the use of any material obtained by way of a public records request – even if that material had been obtained before *Steckman's* release.

A

{¶ 15} R.C. 2953.21(A)(1) permits a person convicted of a criminal offense and who claims that there was a denial or infringement of the person's rights under either the Ohio Constitution or the United States Constitution to file a petition asking the court to vacate or set aside the judgment. When a defendant files a second or successor petition for postconviction relief, the court may not entertain the petition unless (1) the petitioner shows unavoidable prevention from the discovery of the facts that the petitioner relies upon in the claim for relief and (2) the petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty. See R.C. 2953.23(A)(1). These requirements are written in the conjunctive, so the petitioner must meet both requirements. *State v. Turner*, Franklin App. No. 06AP-876, 2007-Ohio-1468, ¶18. If the petition fails to establish both requirements under R.C. 2953.23(A)(1), the court has no jurisdiction to consider the petition. *State v. Hutton*, Cuyahoga App. No. 80763, 2007-Ohio-5443, ¶23.

{¶ 16} The petition at issue in this appeal is a successor petition for postconviction relief, so it could only be timely if Broom first showed that he had been unavoidably prevented from making his *Brady* claim. The Sixth Circuit rejected Broom's claim that *Steckman* barred his use of the alleged *Brady* material because Broom possessed the material prior to *Steckman's* release and it was unclear to the Sixth Circuit that S*teckman* would have been applied by

the state court to bar the use of that material obtained pre-*Steckman* to a post-*Steckman* petition. The trial court, relying on the Sixth Circuit's opinion, agreed that "*Steckman* does not bar the use of records in the petitioner's possession prior to the *Steckman* decision."

B

{¶ 17} To meet the requirements for filing a successor petition, Broom had to first show that he was "unavoidably prevented" from discovery of the facts that he relied on in his petition. R.C. 2953.23(A)(1) does not define the term "unavoidable," so we apply its common meaning as something "inevitable." Cf. *Uncapher v. Baltimore & Ohio R.R. Co.* (1933), 127 Ohio St. 351, 358 (noting an "unavoidable" accident is one that is "inevitable."). There is no dispute that Broom obtained the evidence supporting his *Brady* claim by way of a public records request. There is likewise no dispute that Broom obtained that material only a few months before the supreme court released *Steckman*.[6]

{¶ 18} We find, however, that Broom sufficiently showed that *Steckman* unavoidably prevented him from filing a successor petition supported by material obtained from public records received pre-*Steckman*. In doing so, we

---

[6]The Sixth Circuit stated, "[a]t the evidentiary hearing held at the district court, Broom's trial counsel Richard Vickers ('Vickers') testified that the [East Cleveland Police Department] reports were received in 1993-1994. XVIII J.A. at 8148 (Evidentiary Hr'g Tr. at 23) (Vickers Test). At oral argument in this court, Broom's attorney stated that Vickers only had these records for a 'few months' before *Steckman* was decided in September 1994." *Broom v. Mitchell*, 441 F.3d at fn.12.

disagree with the conclusions reached by the Sixth Circuit and the trial court that the law was "unsettled" enough that Broom should have filed his successor petition in 1994 when he received the public records. The law relating to the use of public records in postconviction petitions would not have led any reasonable petitioner to believe that a petition using pre-*Steckman* public records would have been viable post-*Steckman*.

{¶ 19} To determine whether the law was "unsettled," it is necessary to examine the law as it existed pre-*Steckman*. Broom obtained the public records pursuant to *State ex rel. Clark v. Toledo*, the syllabus of which stated: "A criminal defendant who has exhausted the direct appeals of his conviction may avail himself of R.C. 149.43 to support his petition for post-conviction relief." Moreover, the postconviction relief statute did not at the time bar successor petitions for postconviction relief, and placed no time limitations on when a successor petition could be filed. So when Broom received the 165 pages of records from the East Cleveland Police Department, he could use them to support a petition for postconviction relief and there were no limits as to when he had to file a successor petition.

{¶ 20} Reversing *State ex rel. Clark v. Toledo*, a decision that was only four-years-old, the supreme court explained that its holding in *Steckman* "may seem harsh," but that:

{¶ 21} "We still are faced with the situation in which a defendant might be granted a new trial, on his or her petition for postconviction relief. Since the possibility of retrial remains, the defendant, who has obtained records during postconviction proceedings, would have on retrial more information than she or he would be entitled to possess if limited to discovery pursuant to Crim.R. 16. This, of course, could present (at best) an anomalous result." *Steckman*, 70 Ohio St.3d at 432.

{¶ 22} *Steckman's* release constituted a sea-change in the public records law. It was said that this change made it "apparent that *Steckman* was aimed – at least in part – at limiting capital post-conviction petitioners' ability to pursue post-conviction relief." Wilhelm and Culshaw, Ohio's Death Penalty Statute: The Good, the Bad and the Ugly (2002), 63 Ohio St.L.J. 549, 646. Given *Steckman's* abrupt departure from *State ex rel. Clark v. Toledo* and the supreme court's stated purpose to avoid the anomaly of a retrial based on more information than would have been available through normal pretrial discovery under Crim.R. 16, it would have been reasonable to conclude that a petition for postconviction relief could not be supported with public records obtained pre-*Steckman*.

{¶ 23} Our conclusion is reinforced by decisions issued shortly after *Steckman*. As the Sixth Circuit noted, the Second Appellate District directly addressed this question in *Walker* and *State v. Storer* (Nov. 4, 1994), Clark App.

No. 94-CA-07. Both cases found that *Steckman* not only prohibited the use of R.C. 149.43 for obtaining materials for use in support of a petition for postconviction relief, "but also that materials obtained through the Public Records Act cannot be used in support of a petition." *Walker* at 626. Had Broom filed a successor petition with the material obtained from the public records request, he would certainly have run afoul of *Steckman*, at least as interpreted as of 1995 by the Second District Court of Appeals – the only appellate district to have considered the issue. And in 1995 the General Assembly amended R.C. 2953.23(A)(1) to impose a time limitation on successor petitions for postconviction relief. As of the date of that amendment, all the existing precedent suggested that *Steckman* barred the use of any public records in support of a petition for postconviction relief. So Broom's decision on whether to file a successor petition for postconviction had been made for him – it would have been pointless for him to file a successor petition as situated, thus validating his decision to seek federal habeas relief.

{¶ 24} The Sixth Circuit relied on this court's decision in *State v. Apanovitch* (1995), 107 Ohio App.3d 82, for "the general proposition that *Steckman* may not bar the use of records already in the petitioner's possession." *Broom v. Mitchell*, 441 F.3d at 403.

{¶ 25} Apanovitch received certain records by way of a public records request and filed a petition for postconviction relief on the basis of those records.

He then sought additional discovery of "files held by the prosecuting attorney, depositions of the two prosecutors who tried Apanovitch, depositions of homicide detectives, depositions of personnel employed by the county coroner, and records held by the coroner." Id. at 97. The trial court denied the request and we affirmed that denial on the basis of res judicata, noting that "Apanovitch's 'discovery' request asked for the same items that were the subject of the public records litigation. That issue has been litigated to finality and cannot be reopened." Id. We then stated:

{¶ 26} "We are aware the supreme court has recently stated, '[a] defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for postconviction relief.' *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83, paragraph six of the syllabus. At least one court, in response to this syllabus, has stated:

{¶ 27} "'We take that to mean not only that the Public Records Act, R.C. 149.43, cannot be employed to obtain material for use in support of a petition for postconviction relief, but also that materials obtained through the Public Records Act cannot be used in support of a petition.' See *State v. Walker,* 102 Ohio App.3d 625, 657 N.E.2d 798.

{¶ 28} "We have no occasion to consider the import of these decisions, since the successor petition for postconviction relief predated *Steckman,* and

then-applicable law permitted the use of the Public Records Act. The third assignment of error is overruled." Id. at 97-98.

{¶ 29} These remarks were dicta and should not have been viewed as an authoritative application of *Steckman*. It was not until 2003 – some nine years after *Steckman* – and our decision in *State v. Larkins*, Cuyahoga App. No. 82325, 2003-Ohio-5928, that we gave any indication that the law set forth in *Steckman* might be "unsettled." We held that Larkins, whose public records request had earlier been denied,[7] could support a motion for a new trial with public records that were lawfully obtained by a third party. We agreed with the trial court's finding that "'neither *Steckman*, nor its companion cases, provide an 'exclusionary rule' for information obtained by lawful request – even if, as the State contends, it was not required to provide same under the law." Id. at ¶17.

{¶ 30} At best, the law in this appellate district became "unsettled" in 2003. By that time, Broom had initiated federal habeas proceedings on the reasonable belief that state relief had been foreclosed, raising the same issue that he advances here. Having first raised the issue in the federal courts, he was entitled to litigate that matter to finality without concurrently filing a state-court claim. Once Broom fully exhausted federal habeas relief, he immediately filed the state-court claim at issue here.

---

[7]Larkins's public records litigation was decided as part of the *Steckman* decision.

{¶ 31} Deciding this case as we have, we are keenly aware that any decision to the contrary would base a procedural default in a capital case upon a very tenuous application of the law. And it must be noted that the factual circumstances of this case are unusual too, given that Broom is seeking to use information gathered from public records in 1994 to support his petition. With *Steckman* having barred the use of public records to support a petition for postconviction relief since 1994, there is no reason for us to think that our decision will open the floodgates of litigation.

{¶ 32} We therefore find that Broom showed that he had been unavoidably prevented from filing his successor petition for postconviction relief under R.C. 2953.23(A)(1)(a).

C

{¶ 33} The remaining question in this case is whether Broom satisfied the second element of R.C. 2953.23(A)(1)(a) – that he showed by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of murder.

{¶ 34} Acknowledging that Broom's failure to show that he had been unavoidably prevented from filing his petition justified denying the petition, the court went on to address the second element as an alternative holding:

{¶ 35} "Although several records in question may have been relevant at trial, this court finds that Petitioner has failed to overcome his burden of

showing by clear and convincing evidence that no reasonable factfinder would have found Broom guilty of aggravated murder or that no reasonable factfinder would have found Broom eligible for the death sentence. O.R.C. §2953.23(A)(1)(b) has not been satisfied and thus the petition should be denied."

{¶ 36} With no discussion of the facts underlying the petition for postconviction relief, the court gave us no basis on which to review Broom's *Brady* claim. While the court's holding under R.C. 2953.23(A)(1)(a) obviated the necessity for an extended discussion of the R.C. 2953.23(A)(1)(b) element for a successor petition for postconviction relief, the court must now consider the evidence offered in support of the petition. We therefore remand to the trial court with instructions to address the specific factual claims raised by Broom under R.C. 2953.23(A)(1)(b).

{¶ 37} This cause is reversed and remanded for proceedings consistent with this opinion.

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

It is ordered that a special mandate be sent to the Cuyahoga County 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.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
MARY J. BOYLE, J., CONCUR