

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 12AP-412  
 : (C.P.C. No. 02CR-06-3117)  
 James T. Conway III, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on August 29, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Bieser, Greer & Landis, LLP*, and *James P. Fleisher, Marc S. Triplett*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, James T. Conway III ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his second petition for post-conviction relief brought pursuant to R.C. 2953.23.

**I. FACTS AND PROCEDURAL HISTORY**

{¶ 2} In September 2001, appellant killed Andrew Dotson with a pickax. The grand jury indicted appellant on one count of aggravated murder with three death penalty specifications. On September 23, 2003, the jury returned guilty verdicts on all counts and specifications in the indictment. Appellant waived his right to a jury trial with respect to the repeat violent offender specifications and he was convicted by the court. The jury subsequently recommended the death penalty. On October 8, 2003, the trial court

adopted the recommendation and sentenced appellant to death. The Supreme Court of Ohio affirmed the convictions in *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815 ("*Conway I*").

{¶ 3} On August 23, 2004, appellant first initiated post-conviction proceedings in state court. His petition alleged 20 separate constitutional violations. On May 2, 2005, the trial court entered a decision and judgment entry overruling all 20 claims and denied relief. We affirmed the decision of the trial court in *State v. Conway*, 10th Dist. No. 05AP-550, 2006-Ohio-6219 ("*Conway II*").<sup>1</sup>

{¶ 4} This appeal arises from appellant's second petition for post-conviction relief, filed November 2, 2011.<sup>2</sup> Plaintiff-appellee, the State of Ohio ("the State"), filed an answer to the petition and a motion to dismiss on December 10, 2011. Appellant filed a motion for appointment of counsel on January 6, 2012, a response to the motion to dismiss on January 20, 2012, and a motion for leave to conduct discovery on February 21, 2012.

{¶ 5} On February 24, 2012, the trial court granted the State's motion to dismiss without holding an evidentiary hearing. Appellant's motions were denied. Appellant timely appealed to this court from the decision of the trial court.

{¶ 6} In his latest petition, appellant claims that: (1) his original trial counsel had a conflict of interest, (2) the State suppressed material exculpatory evidence, (3) his original trial counsel was ineffective, (4) each of his subsequent trial counsel were ineffective in conducting their investigation of his case, and (5) the cumulative affect of such errors warrants relief.

## **II. ASSIGNMENTS OF ERROR**

{¶ 7} Appellant raises the following assignments of error:

[I.] The Trial Court Erred When It Denied Appellant's Motion For Leave To Conduct Discovery.

[II.] The Trial Court Erred When It Did Not Declare R.C. § 2953.21 And 2953.23(A)(2) Constitutionally Infirm On Their Face And As Applied To Appellant.

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<sup>1</sup> Discretionary appeal denied in *State v. Conway*, 114 Ohio St.3d 1425, 2007-Ohio-2904.

<sup>2</sup> Appellant's application for federal habeas corpus relief, filed June 1, 2008, remains pending in the United States Federal Court, Southern District, Eastern Division, case No. 3:07-CV-345.

[III.] The Trial Court Erred When Held That Appellant Had Not Met the Criteria Contained in R.C. § 2953.23(A).

[IV.] The Trial Court Erred When It Did Not Grant Appellant Relief on the First Ground for Relief; The State Suppressed Exculpatory, Material Evidence.

[V.] The Trial Court Erred When It Did Not Grant Appellant Relief on the Second Ground for Relief; The Attorney Who Initially Represented Appellant Suffered From A Conflict of Interest.

[VI.] The Trial Court Erred When It Did Not Grant Appellant Relief as to the Third Cause of Action; Attorney Cicero's Conflict Deprived Appellant of The Right to Effective Assistance of Counsel.

[VII.] The Trial Court Erred When It Did Not Grant Appellant Relief as to the Fourth Cause of Action; Trial Counsel Failed to Provide Appellant With Effective Assistance of Counsel.

[VIII.] The Trial Court Erred When It Did Not Grant Appellant Relief as to the Fifth Ground Relief; The Cumulative Impact of the Errors Identified in the First Through Fourth Grounds for Relief Denied Appellant a Fair Trial.

[IX.] The Trial Court Erred When It Overruled Appellant's Motion For Appointment Of Counsel.

### **III. STANDARD OF REVIEW**

{¶ 8} The appropriate standard for reviewing a trial court's decision to dismiss a petition for post-conviction relief, without an evidentiary hearing, involves a mixed question of law and fact. *State v. Tucker*, 10th Dist. No. 12AP-158, 2012-Ohio-3477, ¶ 9. This court must apply a manifest weight standard in reviewing trial court's findings on factual issues underlying the substantive grounds for relief, but we must review the trial court's legal conclusions de novo. *Id.*

{¶ 9} Similarly, "[w]hether a court of common pleas possesses subject-matter jurisdiction is a question of law, which appellate courts review de novo." *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013-Ohio-2742, ¶ 9.

## IV. ANALYSIS

### A. Subject-Matter Jurisdiction

{¶ 10} Inasmuch as appellant's third assignment of error speaks to the subject-matter jurisdiction of the trial court, we will consider it first. Pursuant to R.C. 2953.23(A), if a post-conviction relief petition is a second or successive petition for post-conviction relief, a common pleas court may not entertain the petition unless both of the following conditions are met:

(a) [T]he 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) 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.

R.C. 2953.23(A)(1)(a) and (b).

{¶ 11} If the conditions of R.C. 2953.23(A)(1) and (2) are not satisfied, a trial court lacks jurisdiction to entertain a second or successive petition for post-conviction relief. *State v. Brown*, 10th Dist. No. 08AP-747, 2009-Ohio-1805, citing *State v. Hanks*, 10th Dist. No. 98AP-70 (June 25, 1998).

{¶ 12} Appellant filed his second petition for post-conviction relief more than eight years after he filed his first petition and more than six years after the Supreme Court of Ohio affirmed his conviction. The trial court denied appellant's petition for post-conviction relief because it was his second petition for post-conviction relief and because appellant had not met either of the statutory criteria.

### B. R.C. 2953.23(A)(1)

{¶ 13} To evaluate appellant's claim that he "was unavoidably prevented" from discovering the facts upon which his second petition relies, we must review the facts underlying appellant's convictions. In our opinion in *Conway II* at ¶ 9, we noted that "[t]he facts of this case were extensively developed in the Supreme Court of Ohio's decision on direct appeal." Accordingly, we reproduced those facts as follows:

[T]he state in appellant's criminal trial relied principally on the testimony of an admitted co-participant in the kidnapping

and murder of Andrew Dotson, Mike Arthurs, a friend of appellant. The state also presented the testimony of a jailhouse informant, Ronald Trent, and the testimony of Dr. Patrick Fardal, the Chief Forensic Pathologist for the Franklin County Coroner's Office.

Arthurs testified that in September, 2001, appellant approached Arthurs and Shawn Nightingale, and asked if they would kill Andrew Dotson because Dotson was a witness to a previous incident in which appellant had shot and wounded another man. Arthurs and Nightingale agreed to do so, Arthurs testified, and on a manufactured pretext convinced Dotson to go to West Virginia, where they intended to kill him. They selected a rural wooded area to carry out the crime, but then got cold feet and did not carry through their scheme. The three drove back to Columbus, with Dotson taking some pills on the way and eventually passing out. On the drive home, Arthurs testified, he called appellant to state that they had been unable to kill Dotson.

Appellant met Arthurs, Nightingale, and the still-unconscious Dotson at a shopping center and they all drove to a rural cornfield. Appellant then ordered Arthurs to take Dotson out of the car and choke him. Arthurs testified that he pretended to strangle the unconscious Dotson by stepping on his throat, but that when he stopped doing so Dotson was still breathing. Arthurs and another man then dragged Dotson some distance into the cornfield, whereupon appellant took a pickax from the back of a vehicle and approached Dotson's inanimate body. Arthurs heard two dull thuds. Appellant then walked out of the cornfield and wiped blood off the pickax by sticking it in the ground. Appellant later told Arthurs that he had struck Dotson twice with the pickax in the chest and belly.

Ronald Trent, who shared a day room with appellant in the Franklin County jail, testified that after they had been in jail together for several weeks, appellant began describing the circumstances of the case and stated that he had killed Dotson because he was afraid that Dotson would tell the authorities about witnessing appellant shoot another man in a separate incident. Appellant then developed his exposition of the murder to Trent by describing the involvement of Shawn Nightingale and Mike Arthurs. These alleged statements by appellant substantially corroborated Arthurs' account of the murder but minimized appellant's participation in the actual killing. Trent was later given a wire in order to record his

further conversations with appellant. In these later conversations appellant continued to assert that Dotson was dead after Arthurs strangled him by standing on his neck, but that appellant had nonetheless hit Dotson twice in the chest with a pickax to be sure that Dotson was dead.

*Id.* at ¶ 9-12.

{¶ 14} Appellant claims that he discovered the factual support for the substantive claims raised in his latest petition only after the State responded to his discovery requests in the pending federal court action. More specifically, appellant contends that he discovered new evidence as a result of a records deposition of the Franklin County Sheriff and the Franklin County Prosecutor ("prosecutor"). The documents upon which appellant relies are attached as exhibits to his petition for post-conviction relief.

{¶ 15} The exhibits contain information gathered either by the Franklin County Sheriff's Office ("FCSO"), the prosecutor, or the Columbus Police Department ("CPD"). Some of the information contained in the exhibits pertains to crimes other than the one for which appellant was convicted. For example, exhibit Nos. 10, 11 and 12 refer respectively to a felonious assault upon Jesse James that occurred on April 14, 2001, a murder and assault that occurred at Dockside Dolls on January 19, 2002, or three homicides that occurred on January 20, 1991, at a home in Columbus.<sup>3</sup> The documents appellant claims the State wrongfully suppressed are exhibit Nos. 3-11.

{¶ 16} In the decision denying appellant's second petition, the trial court did not enter into a discussion whether appellant was unavoidable detained from discovering the facts upon which his second petition relies. Rather, the trial court found that appellant was simply seeking reconsideration of the unsuccessful arguments he made in his first petition for post-conviction relief.

{¶ 17} Appellant alleged herein that he was "unavoidably prevented" from discovering the facts contained in the exhibits attached to his petition, inasmuch as "he sought access to the documents in question and the state court denied his request." Appellant's brief, 16. In response, appellee does not assert either that the documents at issue were part of the record from appellant's criminal trial or that appellant possessed

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<sup>3</sup>Although appellant refers to exhibit No. 9 in his petition for post-conviction relief, the exhibit is not attached to the petition.

the documents at the time of trial. Rather, the State argues that appellant knew of the "facts" upon which he now relies even though appellant did not possess the particular documents he now attached to his second petition for post-conviction relief. In our opinion in *Conway II*, we noted that, appellant "assert[s] that various state and federal agencies failed to respond or comply with inquiries and request for information by counsel for appellant seeking documents and information to pursue the post-conviction petition." *Id.* at ¶ 22.

{¶ 18} Accordingly, giving appellant the benefit of the doubt, it does appear that, in the course of his criminal trial, appellant was unavoidably prevented from discovering certain documents upon which he now relies as support for his second petition. Accordingly, to the extent that the documents contain additional "facts," appellant's second petition for post-conviction relief arguably satisfies R.C. 2953.23(A)(1).

### **C. R.C. 2953.23(A)(2)**

{¶ 19} Turning to the second prong of R.C. 2953.23(A), appellant must show by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted. Absent such a showing, the trial court was without jurisdiction of his second petition for post-conviction relief. *Brown*.

#### **1. Disclosure of Privileged Information**

{¶ 20} Appellant contends that his original trial counsel, Christopher Cicero, disclosed certain information to the prosecutor and CPD that he had received from appellant in the course of his representation. Appellant alleges a violation of his Sixth Amendment right to counsel. This court previously considered and rejected this argument in *Conway II*:

Appellant's eighth cause of action asserts that his former attorney, Cicero, violated attorney-client privilege by disclosing allegedly privileged information to law enforcement officials pursuing the case. Cicero, however, represented appellant only in the early stages of the case. He was succeeded by a pair of attorneys who were themselves replaced by a further pair who actually tried the case for the defense. The evidentiary material submitted by appellant in

support of this petition does not establish how Cicero's alleged breach of attorney-client privilege specifically prejudiced his defense

*Id.* at ¶ 30.

{¶ 21} In his second petition for post-conviction relief, appellant relies upon the following recently discovered evidence: exhibit No. 6, which is a transcript of a June 12, 2002 interview of Cicero by FCSO officers Floyd and Scott; exhibit No. 7, which is a transcript of a May 29, 2002 interview of Cicero, conducted by prosecutor David DeVillers; and exhibit No. 8, which is a transcript of a telephone conversation between Cicero and DeVillers on an unspecified date. The subject matter discussed in these interviews is the murder of Andrew Dotson.

{¶ 22} Appellant claims that he would have moved the trial court to exclude evidence uncovered as a result of Cicero's unauthorized disclosure of privileged information, had he known that Cicero was cooperating with the investigation. Although the recently discovered interview transcripts reveal that Cicero was cooperating with investigators, this fact alone does not establish the existence of constitutional error in the context of his criminal trial. Indeed, as the Supreme Court observed in *Conway I*, and as this court stated in *Conway II*, the trial court removed Cicero as counsel for appellant at an early stage of the proceedings. Consequently, counsel's conflict of interest did not manifest itself in deficient performance at trial.

{¶ 23} Moreover, even with the benefit of the interview transcripts, appellant does not direct the court's attention to any specific information that was disclosed to investigators in violation of the attorney-client privilege, nor does he identify the specific evidence he would have sought to exclude from his trial. In short, even though the recently discovered interview transcripts establish that appellant's initial trial counsel may have violated attorney-client privilege by cooperating with investigators, appellant has not demonstrated by clear and convincing evidence that no reasonable fact finder could have found him guilty absent evidence uncovered as a result of Cicero's cooperation.

## 2. *Brady* Violation

{¶ 24} Appellant next contends the State violated his constitutional rights by suppressing the recently discovered evidence contained in exhibit Nos. 3-11.

{¶ 25} The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution imposes upon the state a duty to disclose to the accused evidence material to his guilt or innocence. *Brady v. Maryland*, 373 U.S. 87 (1963). The duty extends to "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 (1995). A *Brady* violation involves the post-trial discovery of information that was known to the prosecution, but unknown to the defense. *State v. Wickline*, 50 Ohio St.3d 114, 116 (1990), citing *United States v. Agurs*, 427 U.S. 97, 103 (1976).

{¶ 26} In *State v. Norman*, 10th Dist. No. 12AP-505, 2013-Ohio-1908, we stated:

" The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' " Rather, "[e]vidence is considered material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " \* \* \* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Accordingly, the rule in *Brady* is violated when the favorable evidence that was not disclosed by the prosecution "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

(Citations omitted.) *Id.* at ¶ 55.

{¶ 27} Pursuant to R.C. 2953.23(A)(2), appellant must provide clear and convincing proof that, but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offenses for which he was convicted. Thus, the issues with respect to his second petition are whether the new facts support a *Brady* violation and, if so, whether the petition establishes by clear and convincing evidence that, but for the *Brady* violation, the outcome of the trial would have been different.

{¶ 28} In *Conway II*, we rejected appellant's *Brady* argument stating:

Appellant's thirteenth and fourteenth causes of action assert that the prosecution withheld exculpatory evidence and solicited and presented perjured testimony. In the present proceedings, however, appellant presented no documentary evidence to support these claims. As such, the trial court did not err in declining to grant relief on this claim.

*Id.* at ¶ 33.

#### **a. Ronald Trent**

{¶ 29} In his latest petition for post-conviction relief, appellant contends that exhibit No. 11 provides the necessary evidentiary support for his claim of a *Brady* violation regarding Ronald Trent.<sup>4</sup> Exhibit No. 11 is a CPD "Progress of Investigation" relating to Trent and a murder or murders that were committed on January 20, 1991.<sup>5</sup>

{¶ 30} The *Brady* rule controls both exculpatory and impeachment evidence. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738. Appellant argues that had the State not suppressed exhibit No. 11, defense counsel could have impeached Trent's credibility by exposing his history as an informant. According to appellant, the jury in his criminal trial would have disbelieved Trent's testimony if they had been aware of his history. The court disagrees.

{¶ 31} Exhibit No. 11 refers to a crime or crimes that occurred ten years prior to the offense for which appellant was convicted. In 1991, Trent told CPD that, while he and Robert Damron were housed together at the Southeast Correctional Institution, Damron confessed his involvement in a murder. Although Trent gave this information to police, Damron was never prosecuted for the offense. Appellant contends that exhibit No. 11, shows that Trent has a penchant for providing false information to police.

{¶ 32} Even though exhibit No. 11 shows that Trent provided information to CPD on one other occasion, ten years before the Dotson murder, the document reveals

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<sup>4</sup> In *Conway II*, appellant argued that the trial court in his criminal case violated his constitutional rights by failing to suppress Trent's testimony. We rejected his argument stating: "Appellant's seventh cause of action asserts that any jailhouse statements made to the informant, Trent, should have been suppressed by the trial court. This, again, was a matter of record and is barred by *res judicata* in this post-conviction petition proceeding." *Id.* at ¶ 29.

<sup>5</sup> The other "recently discovered" documents relating to Trent include: exhibit No. 3, which is the FCSO report of the incident of April 14, 2001; exhibit No. 5, which is the FCSO Identification Bureau Master History Sheet for Ronald Ray Trent; and exhibit No. 12, which is a CPD "Progress of Investigation" pertaining to a murder and assault that occurred at Dockside Dolls in Columbus, Ohio on January 19, 2002.

nothing about the reason Damron was not prosecuted. Moreover, in addition to Trent's testimony regarding appellant's confession, the jury heard the tape-recorded statements about the Dotson murder that appellant made to Trent while the two were housed together in the Franklin County jail. *See Conway II*. Thus, appellant's own recorded statements corroborated Trent's testimony.

{¶ 33} In short, even if there was a *Brady* violation, appellant's second petition for post-conviction relief does not support a finding, by clear and convincing evidence, that the constitutional error deprived him of a fair trial.

#### **b. Christopher Cicero**

{¶ 34} Appellant claims that the State's suppression of evidence regarding Cicero's alleged involvement in the plot to kill Dotson deprived him of a fair trial. The State argues that the non-disclosure did not violate appellant's constitutional rights inasmuch as the evidence was not exculpatory. The court agrees.

{¶ 35} Appellant does not point to any particular exculpatory evidence contained in the transcribed interviews with Cicero, Trent, and Shawn Nightingale. The court notes that the statements made in the interview transcripts are disjointed and difficult to follow. Nevertheless, our review of the transcripts reveals no facts which would serve to exculpate appellant from the offenses for which he was convicted.

{¶ 36} Appellant argues, however, that the transcripts would have been valuable to the defense in the penalty phase of the trial inasmuch as appellant's motivation for killing Dotson was the factual predicate for his conviction on two of the three death penalty specifications.<sup>6</sup> According to appellant, the recently discovered evidence establishes that Cicero was the "mastermind" of the plot to kill Dotson. Our review of the transcripts does not support appellant's characterization. Moreover, as the State notes, given the circumstances surrounding this offense, appellant's involvement in a conspiracy to kill Dotson combined with his subsequent commission of the murder is sufficient to establish appellant's guilt of the two specifications.

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<sup>6</sup> Specification one charged that the aggravated murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense. R.C. 2929.04(A)(3). Specification three charged that the aggravated murder was committed to prevent the victim from testifying in a criminal proceeding. R.C. 2929.04(A)(8).

{¶ 37} In short, appellant's second petition does not demonstrate a *Brady* violation with respect to the Cicero evidence.

### **c. Jesse James Shooting**

{¶ 38} In his second petition for post-conviction relief, appellant claims that the recently discovered evidence rebuts the State's argument that appellant was the trigger man in the Jesse James shooting. Appellant's involvement in the shooting of James was relevant when offered as proof of appellant's motive for killing Dotson and his guilt on two of the three death penalty specifications. According to appellant, if the jury questioned whether appellant was involved in the James shooting they would have questioned appellant's motive for killing Dotson.

{¶ 39} Although appellant argues that exhibit No. 3, the CPD police report, evidences James' identification of Dotson as the person who shot him, the court finds that James' statement as recorded in exhibit No. 3 is ambiguous in this regard. Based upon exhibit No. 3, the shooter could be either appellant or Dotson; both are implicated by James' statement.

{¶ 40} In exhibit No. 4, which is a September 17, 2001 document entitled "Progress of Investigation," James reported that he was unable to identify the man who shot him but that the man was six-feet tall, with black hair. Appellant is five feet eight inches tall with brown hair. James did identify appellant as the person who arranged a fight between himself and Dotson. He also related that there were four individuals in the group he approached just prior to the shooting, and that the group contained both Dotson and a "fat white guy." There is no dispute that appellant was both caucasian and overweight at the time of the incident. Exhibit No. 4 also contains James' statement that a friend told him that she had heard that Dotson was the man who shot him.

{¶ 41} Appellant argues that, had the State not suppressed exhibit Nos. 3 and 4, his defense counsel could have used the exhibits to impeach witnesses who testified that appellant was the man who shot James. At appellant's criminal trial, James did not identify his shooter. Rather, he stated that, "a big fat white guy" was one of the four men in the group and that two of those men had guns. The testimony that appellant was James' shooter came from Trent.

{¶ 42} The court does not believe that exhibit Nos. 3 or 4 would be probative of Trent's credibility given the fact that Trent simply reported what appellant had told him about James' shooting. And, as stated above, the ambiguity of exhibit No. 3 limits the probative value of the evidence when offered for purposes of impeachment.

{¶ 43} In the final analysis, there was no *Brady* violation associated with the recently discovered evidence. As we noted in *Conway II*, and as is evident from the Supreme Court's opinion in *Conway I*, the trial testimony of Mike Arthurs was the most compelling evidence of appellant's guilt. Nothing appellant has presented in his second petition for post-conviction relief mitigates the impact of Arthurs' testimony. Arthurs' testimony, if believed, combined with appellant's admissions in the tape-recorded conversation with Trent and the physical evidence regarding the manner of death, provides overwhelming evidence of appellant's guilt of the offenses for which he was convicted.

### **3. Ineffective Assistance of Counsel**

#### **a. Appellant's Defense Counsel**

{¶ 44} In its opinion in *Conway I*, the Supreme Court set out the test for ineffective assistance as follows:

Reversal of a conviction or sentence based upon ineffective assistance of counsel requires satisfying the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* requires that the defendant show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

*Id.* at ¶ 95.

{¶ 45} Appellant contends that the recently discovered information tends to establish the ineffectiveness of appellant's defense counsel, inasmuch as counsel failed

to investigate Trent's history as an informant; failed to expose the inconsistency in James' identification testimony; and failed to adequately explore Cicero's involvement with law enforcement. In other words, appellant faults his defense counsel for not discovering the evidentiary materials upon which his second petition for post-conviction relief now relies.

{¶ 46} The incongruity of appellant's argument is not lost on the court. If appellant was unavoidably prevented from discovering the facts upon which his second petition relies, how can appellant fault his defense counsel for failing to discover those facts prior to trial. For this reason, the trial court did not have jurisdiction of appellant's claim of ineffective assistance of defense counsel as set forth in his second petition for post-conviction relief.<sup>7</sup>

#### **b. Christopher Cicero**

{¶ 47} Appellant's claim of ineffective assistance of counsel as it relates to Cicero has three distinct branches. The first is that Cicero's performance in his case was deficient inasmuch as he represented other individuals whose interests conflicted with those of appellant. Specifically, Cicero allegedly represented Nightingale and Calvin Horton, both of whom were suspects in the Dotson case. Appellant also claims that Cicero represented several suspects in the Dockside Dolls case.

{¶ 48} As a general rule, the Sixth Amendment right to counsel arises only after the prosecution commences. *See Texas v. Cobb*, 532 U.S. 162 (2001). Appellant presented no evidence that Cicero represented any other suspect or witness in the case after the charges were filed. Moreover, the trial court removed Cicero as appellant's counsel approximately two months after charges were filed and more than one year prior to appellant's trial. Accordingly, appellant's argument is without merit.

{¶ 49} The second branch speaks to the conflict of interest arising from Cicero's cooperation with investigators prior to the time the prosecutor brought charges against

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<sup>7</sup> In *Conway II*, we reviewed and rejected appellant's ineffective assistance of counsel claim as follows: "Appellant's fifteenth and eighteenth causes of action present a series of reasons for which trial counsel failed to provide the constitutionally guaranteed effective assistance of counsel at trial. Almost all these alleged deficiencies by trial counsel were fully addressed by the Supreme Court of Ohio on direct appeal, *Conway I*, at ¶ 95 through 115, and are thus res judicata in this case." *Id.* at ¶ 34.

appellant. As noted above, the trial court removed Cicero as counsel for appellant at an early stage in the proceedings. Consequently, to the extent that Cicero's performance was ethically deficient, the trial court limited the prejudicial affect.

{¶ 50} The third branch arises from Cicero's status as a suspect in the Dotson murder. For a lawyer's conflict of interest to reach the level of ineffective assistance contemplated by *Strickland v. Washington*, 466 U.S. 668 (1984), the conflict must have adversely affected counsel's performance. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). Appellant did not present any evidence of deficient performance by Cicero in the two months he was involved in the case as appellant's counsel. Consequently, the trial court did not have jurisdiction of the claim of ineffective assistance in the context of a second petition for post-conviction relief. See R.C. 2953.23(A)(1).

{¶ 51} In short, the recently discovered evidence upon which appellant now relies provides no additional support for his claims of ineffective assistance of counsel. Accordingly, appellant has not shown, by clear and convincing evidence, that the outcome of his trial would have been different had a conflict of interest never existed. Appellant's third assignment of error is overruled.

#### **4. Cumulative Error**

{¶ 52} The Supreme Court of Ohio has adopted the doctrine of cumulative error in reviewing criminal convictions. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 48. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64 (1995).

{¶ 53} As is evident from our opinion in *Conway II*, appellant's latest petition repackages many of the issues he raised in his first petition. See *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321. In many respects, the only difference between his first petition and his second is that he has presented new, recently discovered evidence in support of his claims.

{¶ 54} Nevertheless, appellant argues that the cumulative effect of the constitutional errors alleged in his second petition for post-conviction relief provide

clear and convincing proof that he was denied a fair trial. However, the court has reviewed appellant's newly discovered evidence and we find little additional support for the claims set forth in the second petition

{¶ 55} Appellant's second petition for post-conviction relief simply does not contain sufficient proof that constitutional errors were committed in connection with his criminal trial and conviction. Consequently, appellant's claim of cumulative error is without merit and appellant's eighth assignment of error is overruled.

### **5. Conclusion**

{¶ 56} Having determined that appellant's second petition for post-conviction relief does not show, by clear and convincing evidence, that constitutional errors affected the outcome of his trial, we hold that the trial court did not have jurisdiction to entertain petition. Accordingly, the trial court did not err in denying appellant's second petition for post-conviction relief without holding an evidentiary hearing.

{¶ 57} For the foregoing reasons, appellant's fourth, fifth, sixth, and seventh assignments of error is overruled.

## **V. CONSTITUTIONALITY OF R.C. 2953.23(A)**

{¶ 58} In appellant's second assignment of error, appellant argues that R.C. 2953.23(A) is unconstitutional both on its face and as applied to him. The court disagrees.

{¶ 59} Appellant's constitutional challenge to the statute focuses primarily on the language in R.C. 2953.23, which permits the court of common pleas to consider second or successive petitions only if "[t]he 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." R.C. 2953.23(A)(2)(b). Appellant contends that this provision violates the following constitutional provisions: the Supremacy Clauses of the U.S. and the Ohio Constitutions; the federal and state Separation of Powers Doctrines; and Due Process of Law, under both the U.S. Constitution and Article I, Section 16 of the Ohio Constitution.

{¶ 60} Before a legislative enactment may be declared unconstitutional, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *See State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128

(1955); *State v. Thompkins*, 75 Ohio St.3d 558, 560 (1996). In *State v. McGuire*, 12th Dist. No. CA2000-10-011 (April 23, 2001), the court of appeals rejected constitutional challenges to R.C. 2953.23(A) based upon the Supremacy Clause, the Separation of Powers Doctrine, Due Process of Law, and the "due course of law" provision of Article I, Section 16 of the Ohio Constitution.

{¶ 61} Although appellant urges us to reject *McGuire* and hold that the statute is unconstitutional, we note that a number of other appellate districts have adopted the reasoning in *McGuire*, and upheld the statute in the face of similar constitutional challenges. See, e.g., *State v. Johnson*, 5th Dist. No. 12 CA 19, 2013-Ohio-1398; *State v. Franklin*, 2d Dist. No. 20716, 2005-Ohio-1361; *State v. Taylor*, 8th Dist. No. 80271, 2002-Ohio-2742, ¶ 13 (Clear and convincing standard does not violate open courts provision.); *State v. Davie*, 11th Dist. No. 2000-T-0104 (Dec. 21, 2001); *State v. Bies*, 1st Dist. No. C-020306, 2003-Ohio-442; *State v. Byrd*, 145 Ohio App.3d 318 (1st Dist.2001).

{¶ 62} Based upon the sound reasoning expressed in *McGuire*, we hold that R.C. 2953.23(A)(2) is a valid exercise of legislative authority and that the provisions of the statute do not violate either the Supremacy Clauses of the U.S. Constitution and Ohio Constitution, the Separation of Powers Doctrine, or the "due course of law" and "open courts" provision of Article I, Section 16 of the Ohio Constitution.

{¶ 63} With regard to appellant's claim that R.C. 2953.23(A)(2) is unconstitutional as applied to him, we find that the General Assembly imposed a "clear and convincing" standard in order to balance the State's need for final judgment against a petitioner's right to challenge his conviction on the basis of constitutional violations. See *McGuire*. Indeed, this court has rejected a claim that Ohio's post-conviction relief statute does not afford an adequate corrective process. See *Hessler* at ¶ 73. Accordingly, we hold that the statute is not unconstitutional as applied to appellant.

{¶ 64} Appellant also challenges the statute on the basis that the use of the phrase "may not entertain" in R.C. 2953.23(A), evidences an intent on the part of the General Assembly that the jurisdictional requirements of R.C. 2953.23(A)(1) and (2) are permissive not mandatory. Although "may" generally implies discretion to do an act, there is no meaningful difference between "may not" and "shall not" as it is used in R.C. 2953.23(A). See *Johnson*. Accordingly, appellant's argument is without merit.

{¶ 65} For the foregoing reasons, appellant's second assignment of error is overruled.

## VI. APPELLANT'S RIGHT TO DISCOVERY

{¶ 66} In appellant's first assignment of error, appellant argues that the trial court erred by not providing him with an opportunity to conduct discovery in connection with his second petition for post-conviction relief. The court disagrees.

{¶ 67} "A postconviction relief proceeding is a collateral civil attack on a judgment and is not imbued with the same federal constitutional protections as are all of the criminal proceedings which precede it." *State v. Lott*, 8th Dist. No. 79790, 2002-Ohio-2752. The rule in Ohio is that a convicted criminal defendant has no right to additional or new discovery during post-conviction relief proceedings. *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, citing *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159 (1999). The civil rules governing discovery likewise do not apply in a post-conviction relief proceeding. *Id.* at ¶ 22.

{¶ 68} As noted above, appellant's second petition did not provided sufficient evidentiary support to satisfy the requirements of R.C. 2953.23(A)(2). Accordingly, the trial court did not err when it denied his petition without first providing appellant with an opportunity to conduct discovery. *See Conway II*.

{¶ 69} Accordingly, appellant's first assignment of error is overruled.

## VII. RIGHT TO COUNSEL

{¶ 70} In appellant's ninth and final assignment of error, appellant contends that the trial court erred by denying his motion for appointment of counsel in aid of his second petition for post-conviction relief.

{¶ 71} R.C. 2953.21(I)(1) addresses the appointment of counsel in relevant part as follows:

If a person sentenced to death intends to file **a petition under this section**, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel

(Emphasis added.)

{¶ 72} As the State correctly observes, the mandatory appointment of counsel applies only to a petitioner who files a petition under Section 2953.21 of the Ohio Revised Code. In other words, appointment of counsel is required only in the case of a timely-filed first petition for post-conviction relief. If the General Assembly had intended second or successive petitioners to have the same right to counsel, it would have included a reference to R.C. 2953.23 in division (I), or employed the language "under this chapter," instead of "under this section."

{¶ 73} Accordingly, appellant's ninth assignment of error is overruled.

### **VIII. DISPOSITION**

{¶ 74} Having overruled each of appellant's nine assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK and BROWN, JJ., concur.

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