

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

State of Ohio

Court of Appeals No. L-11-1021

Appellee

Trial Court No. CR0200102031

v.

Archie Wilder

DECISION AND JUDGMENT

Appellant

Decided: July 6, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that denied appellant's motion for new trial filed seven years after his conviction on

one count of aggravated murder. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The undisputed facts relevant to the issues on appeal are as follows. In June 2001, appellant was indicted on one count of aggravated murder in violation of R.C. 2903.01(A), accompanied by a gun specification pursuant to R.C. 2941.145 and a repeat violent offender specification pursuant to R.C. 2941.149, for the shooting death of Lamont Phillips. Appellant entered not-guilty pleas. A co-defendant, Nicholas Conner, was charged and tried in a separate case.

{¶ 3} Appellant proceeded to trial before a jury on August 6, 2001. The state presented evidence that on the night of February 3, 2001, appellant and co-defendant Conner were involved in a dispute with the victim and some of his friends. After the dispute, appellant stated that he was going home to get his gun. One witness testified that as appellant left the scene, he stated, “One of you is going to be dead by morning.” After appellant retrieved his gun, he and Conner drove around looking for Phillips. According to Conner’s trial testimony, when they spotted Phillips’ car, appellant told Conner to stop and got out of the car with his gun. Conner testified that he was turning the car around when he heard gunshots. Appellant then got back in the car and told Conner that he had killed Phillips. The state produced records from appellant’s cell phone company which indicated that appellant had made several calls from the area where the shooting occurred during the approximate time of the murder. The locations pinpointed in the cell phone records corresponded with Conner’s testimony regarding appellant’s movements that

evening. Although bullets and shell casings were recovered, appellant's gun was never found. There were no fingerprints on the bullets or shell casings.

{¶ 4} On August 8, 2001, appellant was found guilty of aggravated murder with a gun specification. The trial court sentenced appellant to life in prison with parole eligibility after 20 years for the aggravated murder conviction, to be served consecutively to the mandatory three-year sentence for the gun specification. In addition, the trial court determined that appellant was a repeat violent offender and accordingly ordered him to serve an additional ten years, consecutive to the other two sentences.

{¶ 5} Appellant appealed his conviction and sentence; both were affirmed by this court on March 7, 2003. *See State v. Wilder*, 6th Dist. No. L-01-1401, 2003-Ohio-1033.

{¶ 6} On December 12, 2008, appellant filed a pro se motion for new trial based on newly discovered evidence. In support of his motion, appellant submitted two affidavits. The first contained the statement of Tamara Dula, sister of co-defendant Conner. Dula stated that after appellant's conviction, she learned that appellant did not kill Phillips. She stated that Conner lied when he testified at appellant's trial in order to cover up his own involvement in the shooting. Dula further stated that one of her friends, Erin Reid, told her that Conner confessed to her that appellant did not murder Phillips. The second affidavit was that of Kenneth Carter, the victim's cousin, who stated that shortly after appellant's conviction, LaShonda Conner (Conner's wife) told him that Conner, not appellant, had killed Phillips and that Conner lied in court in order to get a deal from the prosecutor.

{¶ 7} In its response to appellant's motion, the state presented the following arguments: the motion was not timely pursuant to Crim.R. 33(B) since it was filed more than 120 days after the jury's verdict; appellant had failed to establish by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence in a timely fashion; because the affidavits submitted in support of his motion were from witnesses known to appellant before the trial, appellant cannot say that the events referred to in the affidavits were undiscoverable in the exercise of due diligence; the affidavits relied upon hearsay within hearsay which would be inadmissible at trial; the evidence offered in support of the motion merely impeaches or contradicts Conner's trial testimony, and there does not exist a strong probability that the evidence would change the result if a new trial were granted.

{¶ 8} Counsel was appointed for appellant and the trial court held several evidentiary hearings between October 30, 2009, and September 7, 2010. On December 22, 2010, the trial court denied appellant's motion after an exhaustive review of the trial record, the affidavits attached to appellant's motion and the testimony presented at the motion hearing. The trial court noted that appellant did not call Kevin Carter as a witness during the extended hearings on the motion. Appellant also chose not to call LaShonda Conner or any of the "numerous family members" whom Carter attested in his affidavit had "found things out" after the trial and who "knew" Conner, not appellant, shot Phillips. The trial court concluded that the evidence failed to support a finding that the state of Ohio failed to disclose exculpatory evidence in violation of *Brady*

v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 21 (1963). The trial court further found that the evidence did not support a finding that appellant's averments were newly discovered evidence or that the motion was filed within a reasonable time. Finally, the trial court found that the evidence with which appellant supported his motion did not disclose a strong probability that the result would have been different if a new trial were held.

{¶ 9} Appellant filed a timely appeal, asserting the following assignments of error:

I. Defendant Wilder's due process rights were violated by the State's failure to disclose exculpatory and material information.

II. The trial court abused its discretion in denying defendant's motion for a new trial.

III. The trial court erred in determining that Defendant's motion for a new trial was procedurally defective.

IV. Defendant's trial attorney was below the *Strickland v. Washington* standard.

{¶ 10} In support of his appeal, appellant essentially raises two separate claims. The first is that the state of Ohio failed to disclose exculpatory evidence revealed in a meeting witness Rodney Love claimed he had with the prosecution. Appellant asserts that by failing to reveal information about the meeting, the state violated *Brady v. Maryland, supra*. Second, appellant claims that the "newly discovered evidence" required the trial court to grant his motion.

{¶ 11} In his first assignment of error, appellant asserts that the state violated his rights by failing to disclose that witness Rodney Love met with the prosecution on June 28, 2001, and told prosecutors it was Conner, not appellant, who killed Phillips. Appellant argues that the state of Ohio therefore was aware, prior to trial, of the fact that co-defendant Nicholas Conner confessed that he, not appellant, shot Phillips and asserts that the state failed to disclose this information to the defense.

{¶ 12} At the hearing on appellant's motion for new trial, Love testified that the day after the shooting, Conner told him he had killed Phillips. When Love was asked whether he told anyone else about Conner's statement prior to appellant's trial, he responded that he had, and stated that he and his attorney, James Van Deilen, met with the two prosecutors on the case. "I think it was a black guy and a white guy," Love stated. Love was not positive about either of the prosecutor's names, but thought one might have been "Clark."

{¶ 13} The record reflects that state investigator Tom Ross attempted to verify the substance of the two affidavits by interviewing both Dula and Carter. According to Ross's testimony at the motion hearing as well as an affidavit offered by the state, Dula told him she was given the information contained in her undated affidavit by her friend Erin Reid, Conner's former girlfriend. Dula told Ross she had no direct knowledge of the facts stated in the affidavit. When Ross interviewed Reid, however, Reid said that she obtained the information regarding Conner's confession from Dula. The only information gleaned from Ross's 2009 interview with Carter was that Carter had not seen

Conner's mother, who was the source of the information in Carter's 2008 affidavit, in over five years.

{¶ 14} The trial court also heard testimony from Van Deilen, lead prosecutor Robert Clark, and Timothy Westrick, second-chair for the prosecution at appellant's trial. Van Deilen testified that his 2001 pocket calendar contained a reference to a meeting at the Lucas County Prosecutor's Office with assistant prosecutor Tim Braun and Rodney Love on June 28, 2001. At that time, Love was under house arrest due to pending federal criminal charges; therefore, Love sought and received permission from federal pretrial services to attend a meeting with Braun. Van Deilen further testified that he found nothing in his files to indicate that he had attended the meeting and added that it is his practice never to attend such meetings in order to avoid being compromised by any information discussed. He had no independent recollection of the subject matter of the intended meeting.

{¶ 15} Robert Clark testified that he had never met or spoken with Rodney Love. Specifically, Clark stated that a meeting between himself, another prosecutor, James Van Deilen, and Rodney Love during the pendency of appellant's case in 2001 "never occurred" and that he never had a conversation with Rodney Love about appellant's case. Clark acknowledged that if Love had told him about Conner's confession prior to the trial he would have considered the information to be potentially exculpatory and would have had a duty to disclose it to the defense.

{¶ 16} Timothy Westrick testified that he did not recall meeting with Love, Clark and Van Deilen with regard to a confession by Conner. Westrick testified that, had such a meeting occurred, he would have notified the defense of the potentially exculpatory evidence and would have taken steps to investigate the claim further.

{¶ 17} Following their testimony, both Clark and Westrick agreed to review the prosecutor's case file for any reference to a meeting between Love and the prosecutors in June 2001. Subsequently, Clark testified he had not found anything in the file to indicate that he met or did not meet with Love and Van Deilen on the date in question. Westrick also testified that he found nothing in the case file to confirm Love's contention that he met with the prosecutors about Conner's confession prior to appellant's trial.

{¶ 18} At the conclusion of the final day of hearings, the parties stipulated that Robin Lafferty, a supervisor with the U.S. Pretrial Services Office for Federal Court who was not available at that time, would have testified that her records indicated that in June 2001 Love was on a bond from federal court which consisted in part of electronic monitoring. The parties further stipulated that Lafferty would testify that on June 28, 2001, she gave Love permission to attend a meeting with the Lucas County Prosecutor's Office and Van Deilen, his attorney. The parties stipulated that Lafferty would testify that she was not privy to the subject matter of any conversation between Love and the prosecutors.

{¶ 19} We note that, although the claimed meeting between Love and the prosecutors prior to trial was the basis for appellant's motion, neither of the two affidavits

submitted in support of the motion for new trial contained statements regarding such a meeting.

{¶ 20} The United States Supreme Court has held that a state has a duty in all criminal cases to disclose all material exculpatory evidence; the failure to disclose such evidence results in a due process violation, thereby entitling the defendant to a new trial. *Brady v. Maryland, supra*. In order for evidence to be considered material, there must be “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.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶ 21} This court has thoroughly reviewed the record below, including the transcripts from the four days of hearings on appellant’s motion for new trial. First and foremost, pursuant to case law set forth above, the defendant must show that the state withheld exculpatory evidence. In the case before us, Rodney Love testified at the motion hearing that he attended a meeting with two prosecutors prior to appellant’s trial and told them about Conner’s confession. Love’s testimony is the extent of appellant’s evidence supporting his claim that Love participated in a meeting with the prosecution prior to trial. As summarized above, the two prosecutors on appellant’s case testified to the contrary, stating that they had no memory of such a meeting and further that there was no evidence in the case file that such a meeting with Love took place. In short, there is no credible evidence to support appellant’s claim that the state possessed and then

withheld evidence that Conner confessed to the shooting. Accordingly, we find that appellant's due process rights were not violated by a failure to disclose exculpatory and material evidence. Appellant's first assignment of error is not well-taken.

{¶ 22} Appellant's second and third assignments of error both essentially assert that the trial court erred by denying his motion for a new trial and will be considered together.

{¶ 23} The Ohio Supreme Court has held that a motion for new trial based on newly discovered evidence is only appropriate where the evidence:

(1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since trial; (3) is such as could not in the exercise of due diligence have been discovered before trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence. *State v. Davis*, 10th Dist. No. 03AP-1200, 2004-Ohio-6065, ¶ 7, citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), paragraph one of the syllabus, citing *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917).

{¶ 24} Further, a motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 25} As set forth in *Davis, supra*, in order for appellant’s motion to have been properly granted, the trial court would have to find that the “newly discovered evidence” was discovered after his trial. The record before us clearly reveals, however, that the alleged new evidence consisting of Conner’s confession to the killing was known to appellant and several other individuals within hours of the murder, which is confirmed by appellant’s own testimony at the motion hearing as summarized below.

{¶ 26} While appellant did not testify at his 2001 trial, he testified extensively at the motion hearing. Appellant’s testimony is essentially dispositive of his motion for new trial. According to his testimony at the hearing, appellant was sitting in Applebee’s, a local restaurant, with his brother, Conner’s mother and stepfather, appellant’s friend Sean Rowland, and Conner just hours after the shooting when Conner said in front of all present that he shot Phillips. Appellant stated: “His exact words were when he ran up on the car he thought that Kimmy and Lamont [Phillips] was in the car and he thought he had shot both of them and that’s what his exact words were.” In fact, appellant testified that he and Conner drove to a location specifically to find Phillips and some other individuals so that Conner could “go fight one of them one on one” because Phillips and the other individuals had jumped appellant and Conner earlier that night. Appellant testified that he never told the investigating detective that he believed Conner shot Phillips.

{¶ 27} Based on the foregoing, it is clear that appellant was aware from the day of the murder that Conner said he shot Phillips. Appellant chose not to share his knowledge with investigators. Further, appellant admitted that even though he had knowledge of Conner's statements since February 3, 2001, the information "never surfaced again" until sometime in 2008. Appellant stated that at one point he wrote to one of the detectives on his case but was told that the detective had retired, and added that the detective "had his mind made up from the get-go that it was me anyway, so anything I tried to write or say to anybody they didn't want to hear it because from day one everybody's mind was made up it was me."

{¶ 28} We therefore find that appellant has failed to establish that Conner's statement was "newly discovered" evidence. Further, if available or used at trial, any information regarding Conner's statement most likely would be used simply to impeach Conner's earlier testimony. We are unable to find that such testimony would create a strong probability that the result of a new trial would be different. Therefore, when viewed in light of the requirements for a new trial based on newly discovered evidence as set forth in *Davis, supra*, the trial court's denial of appellant's motion for new trial was proper. Appellant's second and third assignments of error are not well-taken.

{¶ 29} As his fourth assignment of error, appellant asserts that he was denied effective assistance of trial counsel because counsel failed to learn of Love's meeting with the prosecution.

{¶ 30} It is well-established that claims of ineffective assistance of counsel are reviewed under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove ineffective assistance of counsel, the appellant must show that the performance of trial counsel was defective and that, but for that defect, the trial outcome would have been different. *Id.* at 687.

{¶ 31} After careful review of the record, we find no evidence that appellant received ineffective assistance of counsel. We find no support for an argument that, but for the conduct of counsel, the outcome would have been different. Having found above that appellant failed to show that a meeting in fact occurred between Love and the prosecution, that Conner's alleged confession was not newly discovered evidence since the time of trial, and that appellant testified to hearing Conner state a few hours after the murder that he (Conner) shot Phillips, we accordingly find that appellant was not denied effective assistance of counsel. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 32} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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