

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-T-0073
DWAYNE A. STOUTAMIRE,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 CR 148.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Dwayne A. Stoutamire, pro se, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Dwayne A. Stoutamire appeals from the judgment of the Trumbull County Court of Common Pleas dismissing his untimely second petition for postconviction relief.

{¶2} Having failed to allege or submit any newly discovered evidence de hors the record creating a constitutional error and, further, having failed to demonstrate that but for that error, he would have been acquitted, we determine the trial court properly

dismissed Mr. Stoutamire's untimely successive petition for postconviction relief. Thus, we affirm.

{¶3} Substantive and Procedural History

{¶4} As we recently reviewed in Mr. Stoutamire's first petition for postconviction relief, *State v. Stoutamire*, 11th Dist. No. 2008-T-0108, 2009-Ohio-6228 ("*Stoutamire II*"), Mr. Stoutamire was originally convicted of felonious assault, with a firearm specification, a second degree felony in violation of R.C. 2903.11(A)(2)&(D) and R.C. 2941.145; abduction with a firearm specification, a third degree felony in violation of R.C. 2905.02(A)(1)&(B) and R.C. 2941.145; aggravated robbery with a firearm specification, a first degree felony in violation of R.C. 2911.02(A)(1)&(C) and R.C. 2941.145; and two counts of having weapons under disability, third degree felonies in violation of R.C. 2923.13(A)(3)&(B).

{¶5} His conviction stems from two separate incidents that occurred on January 9 and February 19, 2007. The first concerned a shooting, and the second, a domestic dispute. The domestic dispute between Mr. Stoutamire and Ms. Jessica Gordon, the only witness to testify to both incidents, produced a lead in the shooting investigation, eventually leading to Mr. Stoutamire's arrest and conviction for both incidents.¹

{¶6} In his first petition for postconviction relief, which was timely filed, Mr. Stoutamire alleged newly discovered evidence de hors the record, which did not exist at the time of trial. Specifically, he discovered that four of the 28 witnesses presented against him at trial had a criminal history. He asserted that three of these histories should have been used for impeachment purposes during trial. Thus, because of his

1. The underlying facts of both incidents were addressed in Mr. Stoutamire's direct appeal, *State v. Stoutamire*, 11th Dist. No. 2007-T-0089, 2008-Ohio-2916 ("*Stoutamire I*"), discretionary appeal not allowed by *State v. Stoutamire*, 119 Ohio St.3d 1505, 2008-Ohio-5467.

counsel's error in failing to discover and use these histories to impeach the state's witnesses, his counsel was ineffective.

{¶7} On his first claim, we determined that “[i]n light of the overwhelming evidence presented against Petitioner, the Court agrees that there is no reasonable probability that such cross-examination [of the witness’ criminal convictions] would undermine confidence in the outcome” of his trial. *Stoutamire II* at ¶45. Not only did we determine no evidence was withheld, but we also noted that no constitutional violation occurs if the evidence that was allegedly withheld is merely cumulative to evidence presented at trial. *Id.* at ¶46.

{¶8} We also determined his ineffective assistance of counsel claim was without merit because Mr. Stoutamire failed to demonstrate that the outcome of the trial would have been different if defense counsel had discovered the witnesses’ criminal histories. Indeed, defense counsel stated in his affidavits that although the evidence was “material,” he was not “sure” if he would have used the convictions in his cross-examinations in any case. Thus, even with the benefit of hindsight, defense counsel could not affirmatively state he would have used this evidence to impeach the witnesses. Having failed to allege any substantive grounds that would warrant an evidentiary hearing, we affirmed the trial court’s award of summary judgment to the state.

{¶9} While his appeal of his first petition was pending in *Stoutamire II*, Mr. Stoutamire filed a successive, second, petition for postconviction relief. The trial court dismissed the petition because it was untimely as Mr. Stoutamire failed to meet the requirements of R.C. 2953.23.

{¶10} Mr. Stoutamire now raises one assignment of error for our review:

{¶11} “The trial court erred by not ruling on the merits of this post-conviction petition when a [sic] petitioner meets the exceptions of R.C. 2953.23 thus violating my Fourteenth Amendment Rights of the United States and the Ohio Constitution Article 1, Sections 10 and 16 due process and access to the Courts.”

{¶12} Untimely Petition

{¶13} In his sole assignment of error, Mr. Stoutamire argues the trial court erred in dismissing his untimely second petition for postconviction relief. Mr. Stoutamire argues he was unavoidably prevented from discovering a videotaped interview of the central witness, Ms. Gordon, that occurred with his counsel. He also alleges that Ms. Gordon averred in an affidavit that the state forced her to testify and lie on the stand.

{¶14} Nothing, however, of evidentiary quality was submitted by Mr. Stoutamire. Attached to his petition was a hand-typed transcript by Mr. Stoutamire of the videotape, a statement allegedly given by Ms. Brown, which is simply a handwritten statement attesting that she lied on the stand, as well as police records. Neither the actual videotape or a certified transcript of the tape, nor a verified affidavit from Ms. Brown was submitted. Furthermore, Mr. Stoutatmire acknowledges he had both items in his possession at the time he filed his first, timely petition. Thus, we agree with the trial court that Mr. Stoutamire does not meet the jurisdictional requirements of R.C. 2953.23, which would entitle him to a hearing on this successive petition.

{¶15} “The decision to entertain a second or successive petition for postconviction relief and motion for a new trial rests in the sound discretion of the trial court. See *State v. Hayden*, 2d Dist. No. 21764, 2007-Ohio-5572, ¶12. A trial court’s

decision dismissing a successive petition for postconviction relief will not be disturbed on appeal save a clear showing of an abuse of discretion. *State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394, ¶34. ‘An abuse of discretion implies more than an error of law or judgment; rather, it indicates the court’s attitude was unreasonable, arbitrary, or unconscionable.’ *Id.*, citing *Hayden* at ¶12.” *State v. Shrock*, 11th Dist. No. 2007-L-191, 2008-Ohio-3745, ¶18.

{¶16} As is pertinent to this petition, pursuant to R.C. 2953.23:

{¶17} “(A) *** [A] court may not entertain *** a second or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

{¶18} “(1) Both of the following apply:

{¶19} “(a) *** the 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 ***.

{¶20} “(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 ***.”

{¶21} Quite simply, Mr. Stoutamire has failed to demonstrate he was “unavoidably prevented” from discovering new evidence de hors the record that would have resulted in acquittal. The videotape and the affidavit of these items were allegedly in his counsel’s possession at the time of trial. Most fundamentally, he failed to submit either of these two pieces of evidence with his petition. The “transcript” and “affidavit” submitted are of such questionable evidentiary quality, they cannot even be considered.

{¶22} The petitioner bears the burden of supporting his claim with evidentiary materials. See *State v. Murphy, Jr.*, 5th Dist. No. 02 CA 13, 2003-Ohio-128, ¶7. See, also, *State v. Jackson* (1980), 64 Ohio St.2d 107. “The allegation of operative facts must be of such evidentiary quality as affidavits, depositions, answers to interrogatories, written admissions, written stipulations, or other sworn testimony. Unsworn allegations of operative facts *** are not sufficient.” *State v. Fuller* (July 13, 2000), 8th Dist. No. 76448, 2000 Ohio App. LEXIS 3156.

{¶23} “Furthermore, “[p]ursuant to the doctrine of res judicata, “a defendant who was represented by counsel may not raise an issue in a petition for postconviction relief if he or she raised or could have raised the issue at trial or on direct appeal.” *State v. Lesure*, 11th Dist. No. 2006-L-139, 2007-Ohio-4381, ¶22, citing *State v. Reynolds*, 79 Ohio St.3d 158, 161. To avoid the application of res judicata, the evidence supporting appellant’s claim must assert competent, relevant and material evidence outside the trial court’s record, and it must not be evidence that existed or was available for use at the time of trial. Id. citing *State v. Adams*, 11th Dist. No. 2003-T-0064, 2005-Ohio-348, ¶39.” *Shrock* at ¶21.

{¶24} Quite simply, Mr. Stoutamire has failed to meet either prong of R.C. 2953.23(A)(1) and (2). He alleges his defense counsel did not turn over his case file until shortly before he filed his first petition for postconviction relief, but if that were the case, then he fails to inform us why these pieces of evidence were not included in his first petition. Moreover, the evidence he did submit is of such questionable evidentiary quality it simply cannot be considered. He alleges an unidentified medical malady is

responsible for the untimely filing of his second petition, yet he managed to timely file the first petition when these pieces of evidence were in his possession.

{¶25} Besides Mr. Stoutamire's bare assertions, he has failed to demonstrate by clear and convincing evidence, or even a scintilla of authentic evidence, that a constitutional error occurred due to newly discovered evidence and that but for this error, he would have been acquitted.

{¶26} Accordingly, we agree with the trial court that Mr. Stoutamire has failed to allege, pursuant to R.C. 2953.23, any grounds that would warrant relief on this second postconviction petition.

{¶27} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶28} I respectfully dissent with the majority's decision to affirm the judgment of the trial court with respect to appellant's petition for postconviction relief based on my dissenting opinion in *State v. Stoutamire*, 11th Dist. No. 2008-T-0108, 2009-Ohio-6228, at ¶64-67. As I believe appellant deserves a hearing, I would reverse and remand.