

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

FILED
COURT OF COMMON PLEAS

APR 24 2007

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 95 CR 220

-v-

JUDGE ENLOW

TYRONE LEE NOLING

JUDGMENT ENTRY

Defendant

The ruling dismissing defendant's motion for relief from judgment, motion for new trial and successive post conviction relief renders the defendant's motion for expert testimony and for discovery moot.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion to appoint an expert and motion for additional discovery are hereby rendered moot.

IT IS SO ORDERED.



JOHN A. ENLOW, JUDGE

cc:

Portage County Prosecutor's Office
Attn: Pamela Holder, Staff Attorney

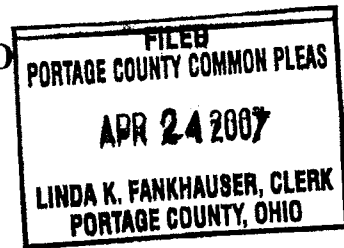
Ohio Public Defender's Office
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Cleveland, OH 44113

Dennis Lager, Portage County Public Defender

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO



STATE OF OHIO

Plaintiff

CASE NO. 95 CR 0220

-v-

JUDGE ENLOW

TYRONE NOLING

JUDGMENT ENTRY

Defendant

Tyrone Noling in a jury trial was convicted of two counts of aggravated murder, accompanying death penalty specification, two counts of aggravated robbery, and aggravated burglary. Noling's conviction and death sentence was affirmed on direct appeal both by the Ohio Supreme Court and the Supreme Court of the United States. On July 23rd, 1997, Tyrone Noling filed a petition for post conviction relief in this Court. This Court granted summary judgment on the petition which was affirmed in the 11th District Court of Appeals and in the Ohio Supreme Court.

Tyrone Noling has since instituted a federal habeas corpus action in the Northern District of Ohio, United States District Court.

In September of 2003 Scene Magazine published an article about Tyrone Noling entitled "The Unlikely Triggerman." In the summer of 2006 the Cleveland Plain Dealer published an article similar to the Cleveland Scene Magazine article concerning Tyrone

Noling. In those articles some evidence was obtained by public records requests. As a result of those two articles Noling has filed a 60 (B) motion claiming violations of Ohio Civil Rule 60 (B) (2) and (3), has filed a motion for leave to file a motion for a new trial alleging newly discovered evidence, and finally a petition for successive post conviction relief based on newly discovered evidence.

The Court would rule that the 60 (B) motion is an improper remedy for relief in that Criminal Rule 60 (B) states: "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment ..." Clearly it is more than one year after the summary judgment order in the post conviction relief filed by Tyrone Noling.

The standard for granting a new trial in a criminal case based on newly discovered evidence was defined in *State v. Petro* (1947), 148 Ohio St. 505. The syllabus stated is "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the 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.***"

The standard of review in a successive post conviction relief is set forth in Revised Code 2953.23(A)(1) and (2), states basically that "a court may not entertain *** a second petition or successive petitions" unless either of the following applies:

Noling. In those articles some evidence was obtained by public records requests. As a result of those two articles Noling has filed a 60 (B) motion claiming violations of Ohio Civil Rule 60 (B) (2) and (3), has filed a motion for leave to file a motion for a new trial alleging newly discovered evidence, and finally a petition for successive post conviction relief based on newly discovered evidence.

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The standard of review in a successive post conviction relief is set forth in Revised Code 2953.23(A)(1) and (2), states basically that "a court may not entertain *** a second petition or successive petitions" unless either of the following applies:

(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; and

(A)(2), which also says, "[t]he petitioner shows by clear and convincing evidence, that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence."

Trial Courts have greater leeway when addressing successive post conviction relief petitions. See *State ex rel. Workman v. McGrath* (1988), 40 Ohio St.3d 91, *State v. Apanovitch* (1995), 107 Ohio App.3d 82.

Petitioners allege 22 different factual situations which can be lumped into different categories, to wit: Inconsistent statements by witnesses and recorded grand jury testimony, alternative suspect evidence, inconsistent statements, prosecutorial misconduct, letters from a psychologist as to the credibility of a witness, and a search of a car. The Court examined each one of the factual arguments and the attached evidence and finds that the new evidence presented does not meet the standards for granting a new trial or a successive post conviction relief petition.

The Court further finds that many of these issues were addressed in the previous post conviction relief (See Exhibit A) or should have been addressed in the direct appeal. The Court further finds that the Federal District Court refused to stay the Federal Habeas Corpus proceedings (See attached Exhibit B).

The Court further finds in examining the pleadings that the defendant did not have any evidence in Number 8.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for relief from judgment pursuant to 60 (B), that the motion to grant a new trial, and the successive petition for post conviction relief be and are hereby dismissed.



JOHN A. ENLOW, JUDGE

CC:
Portage County Prosecutor's Office
Attn: Pam Holder, Staff Attorney

Ohio Public Defender's Office
Attn: Kelly L. Culshaw, Esq.
8 East Long Street, 11th Floor
Columbus, OH 43215

APR 09 1998

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

DELORES REED, Clerk
PORTAGE COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

v.

TYRONE LEE NOLING,

Defendant.

CASE NO. 95 CR 0220

JUDGE JOHN A. ENLOW

DECISION AND JUDGMENT ENTRY

This matter is before the Court on defendant's petition for post-conviction relief under Revised Code 2953.21 in a motion to vacate or set aside the conviction and sentence on grounds that the judgment is voidable as a result of the denial of rights guaranteed under the Ohio and United States Constitutions.

This Court concludes there are no substantive grounds for such relief.

FINDINGS OF FACT

A review of the pleadings, affidavits, record, and factual hearing revealed the following facts: On August 18th, 1995, Petitioner was charged with a five-count indictment for the April 5, 1990 deaths of Bearnhardt and Cora Hartig. This indictment contained two counts of aggravated murder, each count containing death penalty specifications as well as firearm specifications; two counts of aggravated robbery; and one count of aggravated burglary, also containing firearm specifications.

The defendant was represented by Attorneys Peter Cahoon and George Keith. The State was represented by Attorneys Eugene Muldowney and Francis Ricciardi.

In November of 1995 Petitioner's counsel filed numerous motions including a motion in limine to limit evidence of alleged similar acts, and a motion to suppress statements. An evidentiary hearing was held in December, and at the conclusion of that hearing this Court ruled that testimony concerning statements made by the Petitioner were admissible, and that the evidence of allegedly similar acts was admissible.

On January 8th, 1996 the trial began. Voir dire was conducted by the Court and counsel, and a jury was selected. The State of Ohio presented evidence of co-defendants Gary St. Clair, Butch Wolcott, and Joseph Dalesandro. Gary St. Clair had already pled guilty to the murders of Bearnhardt and Cora Hartig and was given a life sentence. Gary St. Clair recanted his previous statement, indicating he had nothing to do with the aggravated murder and aggravated robbery.

The prosecuting attorney then cross examined him on a previous statement where he indicated that he was in the house and heard the defendant commit the murder of both parties.

Testimony of Butch Wolcott, who was given immunity to testify, indicated he was in the car when they went up to rob the old people in Atwater. He further testified that he heard gun shots and a lady scream, and that he saw smoke coming from the gun when Petitioner entered the vehicle. Wolcott also testified as to other robberies of old people committed by the Petitioner.

The State also presented testimony from Jill Hall indicating that Butch Wolcott came to her house, and Butch kept saying,

"Everything went wrong. We killed them."

The State also presented testimony from Joseph Dalesandro indicating he was in the car that drove to Atwater, also indicating he could smell the smoke from the gun when Petitioner re-entered the car. State of Ohio also presented other witnesses as to statements given by the Petitioner to certain people in jail. The Petitioner offered some exhibits and then rested. The jury retired, and returned a verdict of guilty, and also guilty of death penalty specifications.

A mitigation hearing was held, evidence was presented by the defendant. The jury, upon considering that evidence, found that the aggravating circumstances outweighed the mitigating circumstances, and recommended the death penalty for the defendant. The Judge, in his sentencing entry, determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced the defendant to death.

On July 3rd, 1997, Petitioner filed for post-conviction relief, and to that petition attached affidavits from Joseph Dalesandro, Butch Wolcott, and Gary St. Clair recanting their testimony indicating that none of them had anything to do with the murders of the Hartigs in Atwater, also indicating that Prosecutor's investigator, Ron Craig, put words in their mouths and threatened them. Affidavits were also filed by parents of the parties indicating that the defendants' attorneys indicated to defendants they should accept the offer of a life sentence, as they were facing the death penalty, and also that Ron Craig interrogated

a juvenile, Butch Wolcott, without his parents being present.

The Court also heard testimony from Victoria Buckwalter, the appointed investigator for defense counsel Peter Cahoon and George Keith. She testified that there was no investigation of an acclaimed alibi on a purse snatching, which may have occurred in Alliance, Ohio; to certain ballistic reports; to interviews conducted by her of co-defendants, and also a phone call received by her prior to the mitigation hearing where Petitioner indicated that he wanted to proclaim his innocence at the mitigation hearing, which he did not. Investigator Buckwalter was discharged by Petitioner's attorneys as an investigator prior to trial and replaced by Annette Mitchell.

CONCLUSIONS OF LAW

Petitioner claims that this relief should be granted because he was actually innocent of the murders of the Hartigs, because Gary St. Clair, Butch Wolcott, and Joseph Dalesandro recanted their testimony indicating they were never involved in the Hartig murders. Petitioner also indicated no physical evidence linked him to the murders. However, eye witness testimony at the trial indicated that the Petitioner was in the house, had a gun, and that shots were heard. Admissions were also made to third parties after the murder to indicate these individuals had knowledge of that murder prior to the time any news media had discussed it.

It is clear under Ohio law that a recantation by an important witness is not by itself grounds for a new trial, and should be looked upon with the "utmost suspicion." See State v. Brooks,

(1994) Cuyahoga Appellate Case 65088, unreported. This Court finds there was sufficient evidence by the State of Ohio to substantiate the verdict of the jury in this case.

The second issue presented is prosecutorial misconduct. The thrust of this issue is that the testimony obtained from Butch Wolcott and Joseph Dalesandro were as a result of intimidation and suggestion by Investigator Ron Craig of the Prosecutor's Office. This claim is again supported by affidavits of the co-defendants and their parents. These affidavits recanting their previous testimony again are to be taken with "utmost suspicion." The Court finds that these allegations are not well taken and therefore overruled.

The third issue presented is withholding of exculpatory evidence that is material to either the guilt or innocence of the defendant. In determining this issue, evidence should be deemed material only if there's a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. State v. Jackson (1991) 57 Ohio State 3d, 29 and State v. Johnson (1988) 39 Ohio State 3d, 48.

The Petitioner's argument in this case is that the State withheld exculpatory evidence that the defendant may have been involved in a purse snatching in Alliance on the day that this incident occurred. The fact that he may or may not have been involved in a purse snatching on that day wouldn't in fact constitute exculpatory evidence, because it was not established that the result in the trial would have been different if that

evidence was presented. The Petitioner also admits he told his defense attorneys about it, and also argues because it was not used, it was grounds of ineffective assistance of counsel. The Court finds that any information allegedly withheld is not exculpatory, and fails to establish the Petitioner's innocence.

The fourth issue raised in the petition is ineffective assistance of counsel. The basic test for ineffective assistance of counsel is that you must show the counsel's performance was deficient, and that the counsel made errors so serious that it was not functioning as counsel guaranteed under the Sixth Amendment. Secondly, the Petitioner must show the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. See State v. Smith (1997) Portage County, Appellate 96275, unreported, and State v. Jackson (1980) 65 Ohio State 2d, 107.

Petitioner claims a number of incidents. First basis is pretrial publicity. The Court finds the Court, State of Ohio and the defense counsel questioned the jury, and that there was no irregularity in the proceedings, and a jury was lawfully seated. The record therefore is devoid of showing any ineffective assistance of counsel in the voir dire examination as to pretrial publicity.

Secondly, Petitioner claims defense counsel failed to raise the alibi defense of the purse snatching. Petitioner has raised no evidence which adequately demonstrates he had an alibi or that his counsel made an unreasonable tactical decision in failing to put on alibi defense. Further, this issue should have been raised in

Petitioner's direct appeal, and does not survive the doctrine of res judicata. See State v. Cole (1982) 2 Ohio State 3d, 12.

The third issue defendant raised is that there were other suspects in this murder. Again, the defendant has failed to establish that this was an unreasonable tactical decision, and failed to establish that there was sufficient operative facts or evidentiary materials which show it prejudiced the outcome of the trial.

The next issue presented was whether or not it constituted ineffective assistance of counsel by failure of defense counsel to call witnesses to impeach the testimony of Joseph Dalesandro and Butch Wolcott regarding the fact that they smelled or saw smoke from the Petitioner's gun. Again, there's no evidence presented that this was an inappropriate trial tactic or that it prejudiced the outcome of the trial.

The next issue presented is whether or not defense counsel's failure to question Gary St. Clair and Butch Wolcott regarding the weapon used constituted ineffective assistance of counsel. Again, this is trial strategy and should not be second guessed, and Petitioner failed to establish that Petitioner was prejudiced as a result of the failure to cross examine on that issue.

Petitioner also alleges that trial counsel's failure to impeach Butch Wolcott's testimony regarding timing of the murder was ineffective assistance of counsel. Again, there's been no evidence whatsoever presented that this in any way prejudiced the

outcome of the trial or that it was inappropriate trial strategy by Petitioner's counsel.

Petitioner also alleges that counsel's failure to discuss the physical evidence at the scene constituted ineffective assistance of counsel. Again, there is no indication that this was an inappropriate trial strategy or that it prejudiced or affected the outcome of the trial.

Petitioner further argues that counsel failed to argue that that this crime did not fit the modus operandi of previous crimes done by the defendant. Again, this is a matter of trial strategy, and defendant failed to establish that it prejudiced the outcome of the trial.

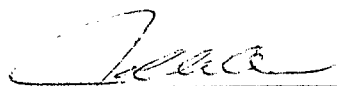
The Court further finds that all of these issues raised by the defendant in post-conviction relief proceedings are barred under the doctrine of res judicata, which bars any claim that was or could have been raised at trial or on direct appeal. State v. Steffen (1994), 70 Ohio State 3d, 399. In State v. Cole (1982) 2 Ohio State 3d, 12, that where a post-conviction relief alleges ineffective assistance of counsel during trial is barred by res judicata where the Petitioner has new counsel on direct appeal of a conviction, and the claim of ineffective counsel could have been raised on direct appeal. In this case, the Petitioner did have new counsel in direct appeal.

After a thorough review of Petitioner's petition, supporting affidavits, evidence presented, and the record, the Court finds defendant has failed to meet the burden to show a violation of his

Constitutional Rights, and therefore is not entitled to the relief the Petitioner seeks.

IT IS THEREFORE ORDERED that Petitioner's petition is hereby dismissed.

SO ORDERED.



HON. JOHN A. ENLOW
JUDGE, COURT OF COMMON PLEAS

cc: Francis Ricciardi, Assistant Prosecuting Attorney
Eugene Muldowney, Assistant Prosecuting Attorney
John J. Gideon, Attorney for Defendant

JR 318 PAGE 1633

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TYRONE NOLING,

Petitioner,

VS.

MARGARET BRADSHAW, WARDEN.

Respondent.

CASE NO. 5:04 CV 1232

JUDGE DONALD C. NUGENT

ORDER

Before the Court is Petitioner, Tyrone Noling's Motion for Preservation of Evidence, (ECF No. 67)(hereinafter "Preservation Motion") and a Motion to Stay this Case and Hold It In Abeyance Pending Exhaustion, (ECF No. 66)(hereinafter "Motion to Stay"). The Respondent opposed both Motions. (ECF Nos. 69, 70). The Petitioner filed a Reply brief for the Motion to Stay on September 20, 2006. (ECF No. 75). For the following reasons, the Court denies both Motions.

1. Preservation Motion

Petitioner first requests that this Court order the preservation of all evidence pertaining to his case in the possession of the Stark, Portage, and Alliance Police Departments, and the Portage County Prosecutor's Office. The Respondent maintains that a court order is unnecessary because there is no

indication from these law enforcement agencies that the Petitioner's file will be destroyed.

The Court finds the Respondent's reasoning to be persuasive. The Petitioner does not set forth any reasons why he believes evidence concerning his case will be destroyed. Absent any indication to the contrary, the Court expects that the above mentioned law enforcement agencies will preserve this evidence. Accordingly, the Court denies the Preservation Motion.

II. Motion to Stay

The Petitioner next asks the Court to stay this case and hold it in abeyance pending his return to state court to exhaust the actual innocence and *Brady v. Maryland*, 373 U.S. 83 (1963), claims raised in the Petition. He asserts that a recent Plain Dealer (hereinafter "PD") article revealed that the State of Ohio withheld pertinent information regarding another suspect in the murders. He also claims that a State witness, Robynn Elliot, who testified during Petitioner's trial that Petitioner had told her about the murders before they became known to the public, stated during her grand jury testimony and to a police investigator that she was unsure whether Petitioner spoke to her before or after the publication of the murders. Finally, the Petitioner notes that the article revealed the opinion of the examining psychiatrist of one of Petitioner's co-defendant's who now asserts that a police investigator coerced him into falsely accusing the Petitioner of the murder. The examining psychiatrist, who initially believed the co-defendant had repressed the memory of the murders, stated in the PD article that he remains uncertain whether the co-defendant was ever involved with them. Because he has not yet asserted a *Brady* violation or an actual innocence claim based on the information that came to light in the PD article, Petitioner contends, the Court should now permit him to return to state court and exhaust these claims.

Inherent in a federal court's ability to hear a case is its ability to stay a case and hold it in

abeyance. *Int'l Bhd. Of Elec. Workers v. AT & T Network Sys.*, 879 F.2d 864 (Table), 1989 WL 78212, at *8 (6th Cir. July 17, 1989)(citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Before granting a party's motion to stay a case and hold it in abeyance, however, a court must evaluate three facts: (1) the hardship the movant will endure if the case goes forward; (2) the injury to the opposing party; and (3) the public's interest, "including the judiciary's interest in efficiency, economy, and fairness." *Hill v. Mitchell*, 30 F.Supp.2d 997, 1000 (S.D. Ohio 1998) (citing *Landis, supra*; *Lynch v. Johns-Mansville Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Bedel v. Thompson*, 103 F.R.D. 78 (S.D. Ohio 1984)).

In the recent *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court provided guidance to habeas courts regarding when it is appropriate to stay a case pending a petitioner's return to state court. The *Rhines* Court cautioned that stay and abeyance, if utilized too often, would frustrate the Anti-Terrorism and Effective Death Penalty Act's, "twin purposes" of reducing delay and encouraging petitioner's to fully exhaust claims in state court prior to filing a federal habeas petition. *Id.* at 276-77. Accordingly, the Court held that habeas courts should only grant a petitioner's motion to stay the federal habeas case to exhaust a claim in state court if that court determines "there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* at 277. Moreover, a district court should only grant a stay if it appears that there is some merit to the petitioner's unexhausted claims. *Id.*

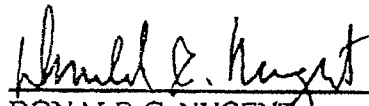
In the instant case, the Petitioner has failed to explain why he did not previously fully exhaust his actual innocence and *Brady* claims in state court. In her opposition to the Petitioner's Motion to Stay, the Respondent asserts that all of the "new" information contained within the PD article was previously published in a Cleveland Scene Magazine article on September 10, 2003. That article

predated the Petitioner's initiation of his habeas litigation. Although the Petitioner argues in his Reply brief that the Cleveland Scene article did not "reference the significant documentary support upon which the Plain Dealer article relied," he fails to articulate how the information raising doubt about his participation in the Hartigs' murders differs among the two articles.¹ Unless the Petitioner can provide this Court with some further explanation as to why he did not fully investigate these claims after the release of the Cleveland Scene article in 1993, the Court must heed the admonitions of the *Rhines* Court and find that there is no good cause to stay this proceedings pending Petitioner's return to state court for exhaustion. The Motion to Stay is denied.

III. Conclusion

For the foregoing reasons, the Petitioner's Motion for Preservation of Evidence, (ECF No. 67), and Motion to Stay this Case and Hold It In Abeyance Pending Exhaustion, (ECF No. 66), is denied.

IT IS SO ORDERED.


DONALD C. NUGENT
United States District Judge

DATED: November 6, 2026

¹ A review of both articles reveals that they raise substantially similar arguments regarding Petitioner's innocence and coercion on the part of a police investigator.