

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO :
Plaintiff-Respondent : **CASE NO. 2007 CR 000792**
vs. : **Judge McBride**
KEVIN MICHAEL THORNTON : **DECISION/ENTRY**
Defendant-Petitioner :

Nick Horton, assistant prosecuting attorney for the plaintiff-respondent state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Ohio Innocence Project, Donald R. Caster, counsel for the defendant-petitioner Kevin Thornton, University of Cincinnati College of Law, P.O. Box 210040, Cincinnati, Ohio 45221-0040.

This cause is before the court for consideration of a petition for postconviction relief filed by the defendant-petitioner Kevin Thornton.

The court entered a briefing schedule regarding the petition for postconviction relief on June 18, 2014. When the final memorandum was submitted pursuant to that briefing schedule on July 28, 2014, the court took the issues raised by the petition under advisement.

Upon consideration of the petition, the record of the proceeding, the evidence submitted for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The court hereby incorporates its findings of fact as set forth in its decision denying the defendant's previous petition for post-conviction relief and motion for new trial, which stated as follows:

"On September 19, 2007, the defendant was charged in a two-count indictment with (1) Aggravated Burglary in violation of R.C. 2911.01(A)(1), a felony of the first degree and (2) Kidnapping in violation of R.C. 2905.01(A)(2), a felony of the first degree. Both counts also contained firearm specifications.

The defendant was charged with perpetrating an armed robbery at Cash Express in Milford, Ohio. Video surveillance of the incident showed an individual wearing sunglasses, a baseball cap, and gloves enter the business, point a gun at an employee, bind that employee's hands and feet with zip ties, and leave a short time later with money belonging to Cash Express.

A jury trial held on November 26-29, 2007 resulted in a hung jury. A second trial was held on April 7-10, 2008 and the defendant was found guilty of both of the crimes charged in the indictment.

On May 5, 2008, the defendant filed a motion for a new trial alleging new evidence; specifically presenting an affidavit from a witness who averred that his cellmate at the Clermont County Jail confessed to the crime at issue in the present case. Thereafter, on June 19, 2008, the defendant filed a motion to dismiss or, in the alternative, a motion for a new trial, based on the Ohio Supreme Court's holding in *State v. Colon* (2008), 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-

Ohio-1624. The court denied the motions in a written decision issued on August 15, 2008. On September 14, 2008, the defendant was sentenced to a prison term of twelve years.

The defendant appealed to the Twelfth District Court of Appeals which affirmed the defendant's conviction and the denial of the motion for new trial and remanded the case for re-sentencing on the issue of merger. The defendant filed a motion for reconsideration and to re-open his appeal on August 31, 2009 which was subsequently denied by the appellate court. Thereafter, the Ohio Supreme Court denied the defendant's motion to file a delayed appeal. The defendant was re-sentenced by this court on September 11, 2009 to the same twelve-year prison term.

On November 9, 2011, the court entered an order by the agreement of counsel to allow the collection of evidence for the purpose of DNA testing. On May 23, 2012, the defendant filed the present motion for leave to file motion for new trial and petition for post-conviction relief. In that motion, the defendant directs the court's attention to the results of Y-STR DNA testing of the zip ties in evidence in this case and of a photogrammetric analysis of a still frame from the surveillance video taken at the Cash Express.

Y-STR DNA analysis is used to test male specific DNA on the Y-chromosome and this type of analysis has been performed at the DNA Diagnostic Center since 2005. The DNA Diagnostic Center is a private DNA laboratory located in Fairfield, Ohio, where the defendant's DNA expert, Dr. Julie A. Heinig, is employed. Y-STR DNA analysis was deemed preferable in the present case because the employee of the Cash Express who was tied up with the zip ties was female and this type of testing would not return results for female DNA. Dr. Heinig performed Y-STR testing on the two zip ties and concluded that the resulting profiles were not consistent with the defendant and he was excluded as a contributor. Dr. Heinig found that the DNA profiles on both zip ties matched each other and also concluded that there was one contributor and that person was not the defendant. Dr. Heinig also opined that DNA could have been transferred to the zip ties in numerous ways even though the perpetrator was wearing gloves, including the zip ties being put in the perpetrator's mouth or the perpetrator touching his forehead, inner ear, etc. and then touching the zip ties.

Philip F. Locke, Jr., who is a Science & Technology Advisor to the Ohio Innocence Project and who holds a Master of Electrical Engineering degree, performed a photogrammetric analysis to determine the height of the perpetrator in the surveillance video. Photogrammetry is the process of determining the actual size of an object in a photograph or video by comparing it to other objects in the photograph of known actual size. Locke visited the Milford Cash Express on two different occasions and took measurements of the door and one of the window panels. Scaling the perspective-projected height of the door against the prospective-projected height of the perpetrator yielded a perpetrator height of 6'1" in shoes and wearing a hat. Allowing for a total of 2 inches to account for the shoes and the baseball hat results in a perpetrator height in bare feet of 5'11". The defendant is approximately 6'4" tall. Locke concluded, within a margin of error of three-fourths of an inch, that the height disparity between the defendant and the perpetrator in the surveillance video is five inches, leading Locke to conclude to a reasonable degree of scientific certainty that the perpetrator in the video 'could not possibly be Kevin Thornton.'"¹ (internal citations omitted)

This court's decision denying Thornton's motion for new trial and petition for postconviction relief was appealed to the Twelfth District Court of Appeals. That court affirmed the denial of the motion and petition, noting in part that "Thornton failed to demonstrate that, had the DNA and photogrammetric evidence been introduced at trial, the result of the trial would have been different."² The court further held that "[t]hough this information could certainly have been beneficial to Thornton's case, the DNA evidence does not conclusively eliminate Thornton as the perpetrator and the discrepancy between Thornton's height and the height of the man shown in the surveillance footage was argued by trial counsel[.]" and, as such, Thornton was unable

¹ Decision/Entry, filed August 17, 2012, pgs. 2-5.

² *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 39.

to show that “but for the ineffectiveness of his trial counsel in not presenting the DNA and photogrammetric evidence, he would not have been found guilty.”³

Kevin Thornton’s new petition for postconviction relief cites to the same DNA testing and photogrammetric evidence and claims relief on the theory that his “continued incarceration, despite his actual innocence, deprives him of rights secured by Article I, Section 1 and Article I, Section 9 of the of the Ohio Constitution and by the Eighth and Fourteenth Amendments for the United States Constitution.”⁴

LEGAL ANALYSIS

R.C. 2953.21 provides in relevant part as follows:

“(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other

³ Id.

⁴ Petition for Postconviction Relief, filed June 13, 2014, pg. 3.

appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, 'actual innocence' means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

* * *

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

The present petition was filed outside of the time limits set forth in R.C. 2953.21(A)(2) and is also a successive petition. While the petitioner argues that "this Court should adjudicate Mr. Thornton's claim by resorting to equitable tolling[.]" the doctrine of equitable tolling is not applicable to postconviction petitions as the right to file a postconviction petition is a statutory right, not a constitutional right, and the petitioner

is not entitled to any rights above and beyond those granted by the statute.⁵ Therefore, the present petition was not timely filed and must be analyzed under R.C. 2953.23, which states in pertinent part as follows:

“(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either 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, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(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 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.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the

⁵ *State v. Macias*, 6th Dist. Lucas No. L-01-1391, 2003-Ohio-684, ¶ 10.

aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, ‘actual innocence’ has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and ‘former section 2953.82 of the Revised Code’ has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code.”

“Unless the defendant makes the showings required by R.C. 2953.23(A), the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for postconviction relief.”⁶

In its memorandum in opposition to the present petition, the State addresses several possible legal arguments because it was unsure as to whether the petitioner was presenting his actual innocence argument as a “stand-alone” claim or a “gateway” claim. In his reply memorandum, the petitioner stated that, through his present petition, he is “presenting actual innocence as a stand-alone claim, asserting that because he is actually innocent, his continued incarceration works a violation of his constitutional rights.”⁷

This particular legal issue has been squarely addressed by the Twelfth District Court of Appeals in *State v. Watson*, 126 Ohio App.3d 316, 710 N.E.2d 340 (12th Dist.,1998). In that case, the petitioner contented that a claim of actual innocence was cognizable under the Ohio and United States Constitutions.⁸ The court held as follows:

“In *Herrera v. Collins* (1993), 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203, the United States Supreme Court held that ‘a claim of ‘actual innocence’ is not itself a constitutional claim.’ *Id.* at 404, 113 S.Ct. at 862, 122 L.Ed.2d at 219. We

⁶ *State v. Webb*, 5th Dist. Richland No. 10CA67, 2010-Ohio-5499, ¶ 14, quoting *State v. Haschenburger*, 7th Dist. Mahoning No. 08-MA-223, 2009-Ohio-6527, ¶ 12.

⁷ Petitioner’s Reply Memorandum in Support of Petition for Postconviction Relief, filed July 28, 2014, pg. 2, fn. 1.

⁸ *Watson*, supra, 126 Ohio App.3d at 323.

have similarly held that a 'claim of 'actual innocence' does not constitute a substantive ground for postconviction relief.' *State v. Loza* (Oct. 13, 1997), Butler App. No. CA96-10-214, unreported, at 20, 1997 WL 634348 . See, also, *State v. Weaver* (Dec. 31, 1997), Lorain App. No. 97CA006686, unreported, at 11-12, 1997 WL 823965; *State v. Campbell* (Jan. 8, 1997), Hamilton App. No. C-950746, unreported, at 13, 1997 WL 5182, appeal dismissed (1997), 78 Ohio St.3d 1491, 678 N.E.2d 1228.

Since the United States Supreme Court has not recognized actual innocence as a constitutional right, we also refuse to judicially create such a constitutional right. The trial court did not err in dismissing appellant's claim of actual innocence because his claim fails to raise 'a denial or infringement of [appellant's] rights under the Ohio Constitution or the Constitution of the United States' as required by R.C. 2953.21."⁹

The petitioner in the present action asks this court to essentially disregard this holding and find that a claim of "actual innocence" constitutes a substantive ground for postconviction relief. This court declines to do so. The petitioner does not cite to any legal authority decided after the *Watson* decision which would alter the legal analysis set forth in that case.

As a result, the petitioner has failed to set forth any substantive ground for postconviction relief and has not met the requirements of R.C. 2953.21 or R.C. 2953.23. As such, his petition must be denied.

⁹ Id.

CONCLUSION

The defendant-petitioner Kevin Thornton’s petition for postconviction relief is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via E-Mail on this _____ day of September 2014 to the following parties:

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