ORIGINAL

THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No. 14-0982
Appellee	)	
vs.	)	On Appeal from the Cuyahoga County Court of Appeals
TODD WEST	)	
Appellant	)	Case No. 100445

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

For the Appellee:

Cuyahoga County Prosecutor's Office
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For the Appellant:

Todd West 604-897
Richland Correctional Institution
1001 Olives burg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

Pro se

FILED
JUN 11 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUN 11 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

Statement of the Case and Facts.....1

Argument.....

Proposition of Law No. I:.....2
The court of appeals erred when it determined the trial counsel was not ineffective for waiving the suppression hearing prior to trial.

Proposition of Law No. II:.....3
The court of appeals erred when it determined the trial court did not abuse it discretion violating the due process and equal protection clause when it denied the petition claiming the officers did not conduct a fly-over thermal imaging search of the Scranton Ave. property

Proposition of Law No. III:.....4
The court of appeals erred when it determined the trial court did not abuse it discretion violating the due process and equal protection clause when it denied the petition without a search warrant.

Proposition of Law No. IV:.....6
The court of appeals erred when it determined the trial court was not permitted to entertain the Appellant's second amended petition violating the Fourteenth Amendment to the United States Constitution.

Conclusion.....8

Certificate of Service.....9

Appendix.....

Judgment Entry (Apr. 10, 2014) Cuyahoga County Court of Appeals.....A

Judgment Entry (May 6, 2014) Cuyahoga County Court of Appeals.....B
Motion for Reconsideration – App.R. 26(A)

Explanation Of Why This Case Is A Case Of Public Or Great General Interest And Involves A Substantial Constitutional Question

Appellant Timothy West is a convicted drug felon who has maintained his innocence from the initiation of this case. During the pre-trial phase of the case, counsel for the Appellant moved to suppress the search and seizure of his property on Scranton Ave; however, the trial judge held an *in camera* hearing, in lieu of an evidentiary hearing and denied the motion without preserving evidence in the record for appellate review.

Subsequent to trial, the Appellant discovered through new counsel the state failed to obtain a proper search warrant prior to searching his property at Scranton Ave. and obtain a copy of the thermal imaging search warrant and the results do not exist. Accordingly, the Appellant claims, the trial court conducted an i*n camera* review with an incomplete record causing the Appellant to be prejudiced.

This case obviously is a case of general public interest and this Court should accept this case for review, or, in the alternative, remand this case sua sponte to address the merits with a proper time review.

STATEMENT OF THE CASE AND FACTS

Appellant Timothy West was indicted by the Cuyahoga County Grand Jury on March 29, 2011 with one count of manufacturing/cultivating marijuana, pursuant to O.R.C. § 2925.04, a felony of the second degree; one count of drug trafficking (motor vehicle), pursuant to O.R.C. § 2925.03, a felony of the second degree; one count of Possession of Criminal Tools, pursuant to O.R.C. § 2923.24. a felony of the fifth degree. Appellant plead not guilty at his arraignment and the matter proceeded to a jury trial on September 13, 2011. The jury convicted the Appellant on

all counts. On September 16, 2011, the trial court sentenced the Appellant to eight years of incarceration on the manufacturing and trafficking offense to run consecutive and twelve months to be served concurrently with the sixteen year sentence. The drug possession and trafficking convictions were merged for purposes of sentencing.

Subsequent to trial, the Appellant obtained an affidavit from new counsel claiming his investigation revealed the authorities did not obtain a search warrant for the thermal imaging fly-over, and if they did, there is no evidence to buttress the fly-over was actually performed to obtain the search warrant to search the Scranton Ave. property.

ARGUMENT

Proposition of Law No. I: The court of appeals erred when it determined the trial counsel was not ineffective for waiving the suppression hearing prior to trial.

To establish ineffective assistance of counsel, the Appellant must show that "(1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense. To warrant reversal, the applicant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." State v. Jarrells, 8th Dist, Cuyahoga No. 99329, 2013-Ohio-3813, ¶24, *citing* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

The first prong the Appellant must muster under Strickland is counsel waiving the suppression hearing, challenging to search warrants of the thermal imaging fly-over and the search conducted at the Scranton Ave, residence claimed a thermal imaging fly-over was conducted after obtaining a search warrant to conduct the thermal imaging fly-over. The officer

executing the affidavit to obtain the search of the Scranton Ave. property averred the Scranton Ave. property exhibited an excessive amount of heat to establish probable cause that an illegal growing operation of marijuana was being performed by the Appellant. When defense counsel motioned the trial court to challenge the search warrants for the fly-over and the search of the Scranton Ave. property, he should have challenged the results of the fly-over that was used to obtain the Scranton Ave. search warrant and the time the search warrant was signed since a showing exists the search was made prior to the warrant being signed by the judge or magistrate.

Subsequent to trial the Appellant discovered the thermal imaging fly-over used to obtain the search warrant at the Scranton Ave. property was never preformed. The court of appeals adopted the finding by the trial court claiming the fly-over was conducted, on the simple fact the search warrant was provided to defense counsel without any facts to support this finding.

The court of appeals held Appellant should have addressed this error on appeal; however, in its next sentence the court of appeals claimed the subject was not developed for appeal, *Id.* at 6, *citing* State v. West, 2012-Ohio-6138 at ¶ 25. Therefore, the court of appeals determined it was not presentable on appeal and the Appellant's motion to reopen his appeal pursuant to App.R. 26(B). See, also State v. West, 2014-Ohio-198.

Accordingly, the court of appeals erred when it determined the Appellant should have addressed this error in his direct appeal.

Proposition of Law No. II: The court of appeals erred when it determined the trial court did not abuse it discretion violating the due process and equal protection clause when it denied the petition claiming the officers did not conduct a fly-over thermal imaging search of the Scranton Ave. property.

The Supreme Court of the United States held, that using a thermal-imaging device to

measure the amount of heat emanating from a residence is a search and is presumptively unreasonable without a warrant. Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038 (2001).

The court of appeals violated the Appellant's fourteenth amendment rights claiming it is obvious the flyover search was conducted without a scintilla of evidence to support this ground. The investigation officers obtained a search warrant for the Scranton Ave. property to perform a thermal imaging investigation. The officer stated under oath, when obtaining the search warrant for the Scranton Ave. property, the fly-over emanated heat from the building sustaining a plausible marijuana grow operation.

Subsequent to trial, the Appellant was informed by a different attorney the fly-over results do not exists establishing a *prima facie* showing that perjured testimony was used to obtain the Scranton Ave. search warrant. Since the trial record was devoid of the fly-over results, the only remedy to proffer this constitutional claim was a post conviction petition pursuant to O.R.C § 2953.21.

The doctrine of *res judicata* can not lie in this situation since it is imperative the trial record contain the actual results to avoid the appearance of regularity. Since the record devoids the actual fly-over results, the court of appeals can not make a succinct claim, it is obvious the fly-over was held without any evidence to support this statement.

Accordingly, the court of appeals erred when it determined the Appellant should have addressed this error in his direct appeal.

Proposition of Law No. III: The court of appeals erred when it determined the trial court did not abuse it discretion violating the due process and equal protection clause when it denied the petition without a search warrant.

The court of appeals adopted the trial court's finding based upon unauthenticated evidence that dehors the record. The evidence should have been ignored, or, in the alternative, stricken from the record since the actual holder of the documents did not authenticate each document provided by the State of Ohio.

The petition sought relief addressing the State of Ohio did not have a valid search warrant to conduct the thermal imaging fly-over since no results could be located or produced. Since the State did not provide the results of the search, a due process violation exists warranting relief.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87. The doctrine has been extended such that the individual prosecutor has a duty to learn of 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, 115 S.Ct. 1555 (1995). The doctrine also applies whether there has been a specific request, a general request, or, no request by the defendant for exculpatory evidence. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985).

Petitioner opines the prosecution failed to disclose the search warrant results and the fly-over thermal imaging used to incriminate the Appellant. For the purpose of a Brady analysis, evidence is deemed material only of there is 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. State v. Johnston.

39 Ohio St.3d 48, 529 N.E.2d 898 (1988), ¶ 5 of the syllabus, following Bagley. The importance of the fly over results is detrimental to the conviction and search of the Scranton Ave. property against the Appellant, along with the fruits of the poisonous tree.

Along with the suppression of evidence, the prosecution suborned perjury with the Scranton Ave, property search warrant affidavit, claiming the fly-over was done. This has never been supported with evidence, reliable to justify this statement. The Supreme Court has held the prosecution may not suborn perjury. Mooney v. Hollohan (1935), 294 U.S. 103, 55 S.Ct. 340, nor introduce testimony it knows or should have known is false without correcting it. Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct. 1173. To establish a Napue claim, a defendant must show that (1) the statement was actually false; (2) the statement was material and (3) the prosecution knew it was false. Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998). The burden is on the defendant to show the testimony was actually false, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony. Id. See also, State v. Iacona, 93 Ohio St.3d 83, 97, 2001 Ohio 1292, 752 N.E.2d 937 (2001).

Accordingly, the court of appeals erred when it determined the Appellant should have addressed this error in his direct appeal.

Proposition of Law No. IV: The court of appeals erred when it determined the trial court was not permitted to entertain the Appellant's second amended petition violating the Fourteenth Amendment to the United States Constitution.

There is no dispute, the record corroborates the Appellee drafted the finding of facts and conclusion of law for the trial court when it filed the proposed finding of facts and conclusion of law. Therefore, the Appellee inadvertently or tactfully drafted errors in the trial court's opinion,

giving the Appellant a false impression the trial court corrected or change the order that denied the second amended petition and properly entertained the second amended petition. Even though the finding of facts and conclusion of law drafted by the Appellee contained incorrect facts and interpretation of law, the Appellant surmised the trial court overlooked these errors when it entertained the Appellant's second amended petition.

There is no disputing the Appellant filed a "bare-bone" timely petition. Id. at ¶ 3. There is no dispute, the Appellant filed a proper amended petition of right since the Appellee never filed an answer to the petition pursuant to O.R.C § 2953.21(F). Id. at ¶ 3. There is no dispute, the state filed a response against the amended petition. Id. at ¶ 3. There is no dispute, the Appellant filed a motion for leave to file a second amended petition. Id. at ¶ 3. The finding of facts issued by the trial court denied the motion for leave; however, entertained the merits of the second amended petition drafted by the Appellee and the Appellant surmised the order that denied leave was vacated or reversed since an interlocutory order was issued. Id. at ¶ 3. This Court, however, disagreed with the trial court's procedure that denied leave and proceeded to entertain the merits of the second amended petition and disregarded the grounds addressed from the Appellant's second ground for relief.

Since the trial court adopted the error drafted by the Appellee in the finding of facts and conclusion of law, the Appellant was prejudiced when this Court disregarded the second amended complaint without reversing the finding of facts and conclusion of law back to the trial court to correct the error allowing the Appellant to properly challenge the intent of the trial court. For example, if the trial court intended to entertain the merits of the second amended petition it

should correct the order that denied leave. If the trial court intended to deny leave against the second amended petition, the merit review should be removed and the Appellant will be placed on notice to challenge the trial court abused its discretion to deny leave that should be liberally granted. Civ.R. 15 and O.R.C § 2953.21(F). It is obvious why the Appellee did not challenge the errors in the finding of facts and conclusion of law, since they drafted the opinion and order.

This Court should protect the Appellant's due process by remanding the finding of facts and conclusion of law issued by the trial court to correct the opinion rendered to read what the court actually intended, supported by law. Assuming arguendo, this Court concludes the Appellant should have addressed an error in his favor, it would have been futile in this case, since the language in the order issued by the trial court can be surmised the motion for leave to amend the petition a second time was change when the trial court entertained the merits. An interlocutory order can be change at anytime and since a final order has yet been issued, the trial court had discretion to change the order that denied leave.

Accordingly, this Court should reconsider the order issued on April 10, 2014 and remand the finding of facts and conclusion of law for corrections and proper application of law.

CONCLUSION

This Court should accept this case for further review to correct the miscarriage of justice occurring in the inferior courts.

Respectfully submitted,

Todd West 604-897
Richland Correctional Institution
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

CERTIFICATE OF SERVICE

A copy of the foregoing has been served on the Cuyahoga County Prosecutor at 1200 Ontario Street, Justice Center, Cleveland, Ohio 44113 on this 5th day of June, 2014.

Todd West

APR 1 0 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100445

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TODD WEST

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-548609-A

BEFORE: Stewart, J., S. Gallagher, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 10, 2014

A

FOR APPELLANT

Todd West, pro se
Inmate No. 604-897
Richland Correctional Institution
1001 Olivesburg Road
P.O. Box 8107
Mansfield, OH 44901

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 10 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MELODY J. STEWART, J.:

{¶1} Petitioner Todd West and his brother, Timothy, operated a large marijuana growing operation in a commercial building in the city of Cleveland. The lighting required to cultivate marijuana indoors gives off a great deal of heat that the police can identify on the infrared spectrum, so the police obtained a search warrant to conduct a flyover of the building and assess its heat-signature. The results of the flyover, along with other information gleaned through investigation, enabled the police to obtain a search warrant for the building, the execution of which uncovered hundreds of marijuana plants. A jury found West guilty of drug trafficking, drug possession, and possession of criminal tools.

{¶2} West appealed from the conviction and argued that the court erred by refusing to suppress the results of the flyover on grounds that the police failed to justify it. We found that trial counsel waived a hearing on the flyover issue. That waiver left the record on appeal so undeveloped (the affidavit in support of the search warrant was not in the record) that West could not prove that a search warrant was issued in error. *See State v. West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2012-Ohio-6138, ¶ 25.

{¶3} While his direct appeal was pending, West filed a bare-bones petition for postconviction relief. He then amended his petition as a matter of right by raising two grounds for relief: trial counsel was ineffective for failing to

question whether the flyover occurred before the warrant actually issued and that the affidavit filed with the request for a search warrant was based on hearsay. The state filed a brief in opposition to the petition. Just four days after receiving the state's response, West sought leave to file a second amended petition for postconviction relief. The court denied leave, yet considered those claims anyway and proceeded to rule that all the claims for relief in the first and second amended petitions were barred by res judicata because the claims could have been raised on direct appeal. The court also found that even if it addressed West's claims for relief on the merits, those claims were meritless because it was obvious that the flyover was conducted on the same day that the court issued the flyover warrant; that hearsay can support an affidavit seeking a search warrant; and that the clerk of court's failure to locate the search warrant is not proof that the warrant did not issue.

{¶4} In this appeal, West sets forth five assignments of error that collectively challenge the court's refusal to grant postconviction relief. He argues that the court erred by finding the petition barred by res judicata and by failing to conduct a hearing on the petition. He also argues that, to the extent the court did consider the substantive claims for relief, it erred by finding that defense counsel was not ineffective for waiving a hearing on the motion to suppress evidence; that the court erred by finding that the police did obtain a

warrant to conduct a flyover; and that even if a warrant for the flyover issued, it issued on less than probable cause. We find no error.

I

{¶5} Although not argued by either party, we find that the court should not have considered the claims raised in the second amended petition.

{¶6} West's arguments on appeal are based in part on the claims he raised in his second amended petition. He filed the second amended petition after the state filed a response to his first amended petition, so further amendment was possible only by leave of court. *See* R.C. 2953.21(F). The motion for leave, filed at the same time as the second amended petition, was inartfully titled — West called it a "motion for leave to amend the attached second amended post conviction petition." The court denied the motion for leave and at the same time it denied the second amended petition (albeit without issuing findings of fact and conclusions of law). *See* R. 74 and 75.

{¶7} When ruling on the merits of the petition for postconviction relief, the court stated that it would construe the motion for leave to file a second amended petition as a motion for leave to amend the original petition and denied it. Inexplicably, the court then said that it would consider the arguments raised in the second petition "for the benefit of Defendant."

{¶8} Having twice denied West's leave to file a second amended petition, the court should not have considered the claims in the second amended petition on the merits.

II

{¶9} We agree with the court that West's claims were barred by res judicata. Postconviction proceedings are not criminal in nature — they are "a collateral civil attack on the [criminal] judgment." *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994), citing *State v. Crowder*, 60 Ohio St.3d 151, 573 N.E.2d 652 (1991). To preserve the finality of judgments, the courts will not entertain in postconviction proceedings any trial errors or any claimed lack of due process that was raised or could have been raised by the defendant at the trial. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶10} West has on multiple occasions challenged the effectiveness of trial counsel's performance in failing to raise issues relating to the flyover of the commercial building at trial. His motion to suppress evidence argued that the results of the flyover, which in turn were used to obtain a warrant to search the building, were "undocumented, vague and subject to interpretation." On direct appeal, we stated: "There was no hearing on the motion to suppress the evidence obtained from the thermal imaging flyovers and searches because trial counsel waived it, and the affidavits in support of the search warrant is [sic] not

part of the record on appeal." *State v. West*, 2012-Ohio-6138, at ¶ 25. Having raised questions regarding the flyover in his motion to suppress evidence, West could also have raised the arguments that he now makes in postconviction proceedings: that there was no evidence to show that the flyover did not occur before the warrant authorizing it had actually issued; that there is no evidence to show that the flyover actually occurred; and that there were no copies of the affidavit submitted by the police when they asked for a search warrant to conduct a flyover. All of the facts going to these issues were available to West prior to trial, so they could have been raised in a motion to suppress evidence. Any argument that trial counsel failed to raise them could have been made on direct appeal, making them res judicata.

{¶11} The record also shows that West raised many of these same issues when he challenged the effectiveness of appellate counsel in failing to raise issues relating to the motion to suppress on direct appeal. In *State v. West*, 8th Dist. Cuyahoga Nos. 97398 and 97899, 2014-Ohio-198, *reopening disallowed*, Motion No. 463529, West argued that trial counsel was ineffective for waiving a hearing on the motion to suppress. Denying the motion to reopen the appeal, we specifically rejected on the merits his arguments that he was denied due process because the state failed to disclose favorable evidence; and that trial counsel was ineffective for waiving an evidentiary hearing on the motion to

suppress evidence and failing to ensure that the record contained the evidence reviewed by the court in ruling on the motion to suppress evidence.

{¶12} An App.R. 26(B) application for reopening is a "collateral postconviction remedy[.]" *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 22. Consistent with our precedent that res judicata applies not only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised, *see State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 42 (8th Dist.), we find that all of the claims raised in the petition for postconviction relief were addressed in the application to reopen the appeal and are res judicata for purposes of the amended petition for postconviction relief.

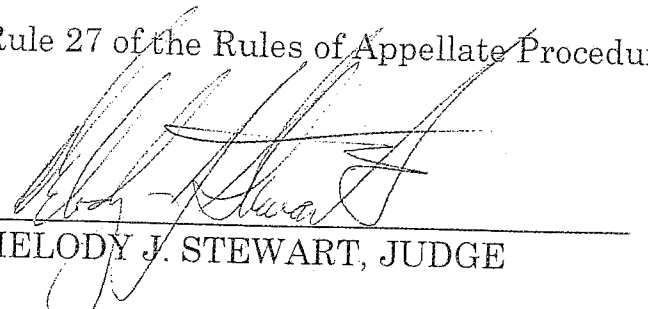
{¶13} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 100445 | LOWER COURT NO. CR-11-548609-A

COMMON PLEAS COURT

-vs-

TODD WEST

Appellant

MOTION NO. 474039

Date 05/06/14

Journal Entry

Motion by appellant, pro se, for reconsideration is denied.

CA13100445
84138945

RECEIVED FOR FILING
MAY X 6 2014
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

Presiding Judge SEAN C. GALLAGHER, Concurs

Judge MARY EILEEN KILBANE, Concurs

MELODY J. STEWART
Judge

B