

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 14-2110

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

KEVIN A. TOLLIVER,

Court of Appeals
Case No. 14AP-170

Defendant-Appellant

**MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION
TO JURISDICTION**

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant does not provide any compelling reason for this Court to expend its scarce judicial resources to review his meritless arguments. There is no conflict amongst lower courts. He merely presents a fact-laden mash of his meritless constitutional claims, none of which in the end would support the granting of untimely/successive post-conviction relief, even if the claims are considered cumulatively.

Defendant's appeal is also flawed from the outset by the fact that defendant does not set forth propositions of law that could serve as the syllabus in the case. Instead, defendant's propositions assert that the trial court "erred and abused its discretion," which again confirms that he is only seeking case-specific error correction rather than the development of the law in a way that would be beneficial to the bench and bar. This Court should decline jurisdiction in all respects.

STATEMENT OF FACTS

The State incorporates by reference the discussion of the evidence found on pages three through fourteen of the Tenth District opinion affirming defendant's conviction for murder with firearm specification. *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603. The State further incorporates the procedural history discussed in paragraphs 2 through 14 of the Tenth District decision below.

ARGUMENT

Response to Propositions of Law: A criminal defendant filing an untimely or successive post-conviction petition must satisfy the requirements for untimely/successive filing under R.C. 2953.23. The dismissal of such a petition is reviewed under an abuse-of-discretion standard.

The common pleas court did not abuse its discretion in dismissing the petition.

A. Untimely/Successive Petition was Barred – No Unavoidable Prevention

A common pleas court has no jurisdiction to entertain an untimely/successive petition unless the defendant establishes the criteria under R.C. 2953.23(A)(1)(a) & (b).

Defendant relied on no retroactive rights, so he could satisfy R.C. 2953.23(A)(1)(a) only by showing that he was “unavoidably prevented” from discovering the evidence in time to include it in the litigation of the first petition. “Unavoidable prevention” occurs when the party had no knowledge of the existence of the ground for relief and could not have learned of the existence of that ground within the time to submit it as part of the original proceedings. See *State v. Walden*, 19 Ohio App. 3d 141, 145-146, 483 N.E.2d 859 (1984). Defendant’s materials did not meet that standard.

The State noted below that most of the materials provided with the untimely/successive petition became available long ago. The Shipko report was dated November 6, 2006. The Breggin report was published in the Spring of 2006. Investigator Koch’s affidavit was dated in February 2005. The affidavits of Spencer, McMullen, and Andrews were all dated in October 2004. Some materials were dated more recently, i.e, defendant’s affidavit, the letter from King, the letter from Shipko, and the ex-wife’s affidavit. But these materials merely regurgitated information that was available before. In short, the “new” information was quite old.

Indeed, some other materials from Shipko were in fact provided at the time of the original post-conviction proceedings. With more diligence, the fuller Shipko report very well could have been submitted in an earlier fashion at the time of the original post-

conviction proceedings. Defendant actually pursued his “Paxil” ground for relief in the first petition and submitted materials in an effort to support that claim.

The information from the three jail inmates very well could have been sought during the trial or by the time of the conclusion of the original proceedings. The names of other inmates housed with defendant and/or Adams very likely were known to the defense or could have become known, even during trial, through inquiries with the jail. The defense actually did call another jail inmate during the trial, and so this line of investigation by all indications was pursued or could have been pursued at trial or later.

The information from Claire’s diary was known even during the direct appeal. The diary was raised as an assignment of error in that appeal. The defense was not unavoidably prevented from presenting the diary in the context of the original post-conviction proceedings.

Breggin’s 2006 publication was unavailable until 2006, but defendant still sought to submit similar information from other sources. Moreover, to the extent defendant would be attempting to create a claim of trial counsel ineffectiveness based on Breggin’s 2006 publication, trial counsel could not be faulted for failing to present Breggin in the much-earlier trial. Counsel could not be clairvoyant.

To the extent defendant was attempting to pursue an actual-innocence claim, actual innocence was not shown in the materials, and actual innocence does not provide a cognizable claim of constitutional dimension that would allow post-conviction relief anyway. Post-conviction relief is allowed only for *constitutional* violations, R.C. 2953.21(A), and “actual innocence” is not a claim of constitutional dimension.

Herrera v. Collins, 506 U.S. 390, 404, 416, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

Supposed newly discovered evidence has never been thought to rise to the level of a constitutional violation. *Id.* at 400; see, also, *State v. Powell*, 90 Ohio App.3d 260, 264-65, 629 N.E.2d 13 (1st Dist. 1993).

B. Successive Petition was Barred – No Outcome Determination

Even if defendant could have shown unavoidable prevention in respect to one or more of his items, he still would have been required to make the additional demonstration of outcome-determination as required by R.C. 2953.23(A)(1)(b). Under that provision, defendant was required to demonstrate “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.” R.C. 2953.23(A)(1)(b). Defendant’s materials fell far short of this high standard.

1. Overwhelming Evidence

In addition to the testimony of Joseph Adams, who testified that defendant admitted the killing, there was much more evidence that defendant was guilty. The evidence painted a vivid circumstantial portrait of defendant’s purposeful killing of Claire Schneider, from the tensions that existed between them late that evening, to their positions at the moment defendant killed Claire.

Tensions were present at the Krome bar, where a witness saw defendant definitely not happy and glaring at Claire from an upper floor. Tensions continued

outside the bar, when a witness standing in front of the bar could hear their voices from across the street.

The apartment building's surveillance tape showed the couple arriving back after the Krome incident. The tape showed that Claire exited the car before defendant parked it, and she walked into the building separately from defendant. Given what happened before and what happened afterward, this is a modest indication that tensions still existed.

Tensions escalated dramatically. A broken lamp and a freshly knocked over planter indicated a physical altercation, as did the numerous bruises found by the coroner on Claire.

A physical altercation is confirmed by neighbor Janet Parady, who lived directly above the Tolliver-Schneider apartment. Parady heard screaming, "No, no. Don't, don't. Oh, please. Please." Parady told police that "they have been fighting since – for about a half an hour." Someone seemed to be screaming "No, No." Parady could not really tell what was going on, but there seemed to be "a lot of like falling down or – and screaming." Although Parady thought that these events were occurring upstairs rather than downstairs, the evidence supported the conclusion that these events were occurring downstairs, given the occupant upstairs who denied any such tumult upstairs.

The half-hour altercation reached critical mass. When Claire was found dead by police, she was naked but wearing a coat. Whatever the source of the tensions, this coat-wearing fact indicates that she wanted to leave, and her nakedness indicates that she wanted to leave in a hurry without clothes in the winter weather.

Police found car keys on the floor in the bathroom at the bottom of the bathroom door. The proximity of the car keys to her dead body supports the conclusion that she possessed these keys in her final moments, dropping them to the floor at the very moment of the fatal attack at the bathroom door.

The evidence indicated that Claire had retreated there and locked the door because the door showed signs of physical damage near the hinges and the latch was busted out. To be sure, the defense claimed that the door was broken before this incident because defendant had called a friend earlier about repairing it. But that witness lacked credibility given his personal and financial biases toward defendant.

In addition, the jury was not required to believe the friend because, according to the friend, defendant had said he broke the door because his daughter had been locked inside. But there were two entrances into that bathroom, and the second entrance could not be locked from inside the bathroom. Defendant could have easily gained access to his daughter by going through this second entrance. On the other hand, the evidence suggested that Claire had barricaded that second door, given the presence of a stool in front of that door. Given such a barricade, defendant would have needed to break in to get Claire. The loud “falling down” heard by Parady is consistent with Parady having heard the door being forced.

Having forced entry, defendant now executed Claire, as shown by several facts. Claire’s step-aunt Teresa Reid was helping clean out the apartment on January 9th when she found a bloody white shirt in a clothes hamper. It was a man’s shirt, and defendant was the lone known man who had been living there. The shirt was his size.

The bloody shirt bore a distinctive eighteen-impact high velocity blowback splatter pattern on the right sleeve, which indicated to bloodstain expert Robert Young that the right sleeve was in close proximity to Claire's mouth when the fatal shot was fired.

The defense questioned the significance of the blowback splatter pattern because the police did not test those particular impact splatters to confirm that they were indeed Claire's blood. But the police did test a cutting from another part of the shirt and confirmed the presence of Claire's bloody DNA. Testing these small blowback splatters would have unnecessarily destroyed the distinctive blowback pattern in the process. There were only two people in the apartment, and only Claire suffered bloody injuries. Defendant bore no signs of any such injury, which left Claire as the sole possible contributor of the blowback splatter. Like defendant later told police about the blood on his body at the police station, "It's all hers."

In addition, Claire's neck bore a distinctive new bruise in precisely the location where a bruise would occur if defendant had been using his right hand to hold her neck. The bruise was elongated, as if left by a finger or fingers. The bruise corroborated the white shirt evidence, and vice versa, because defendant's act of holding Claire's neck with bruise-creating force like this would have placed the right shirt sleeve in line to receive the high velocity blowback splatter.

Corroboration for defendant wearing the white shirt was further provided by the surveillance tape. Shortly after they returned from Krome, defendant is seen exiting the apartment building. He is searching for something in the parking lot with a flashlight. Police later found Claire's wallet in the parking lot, which supported the view that he

had gone out to look for the wallet. As he was returning from this brief search for the wallet, the surveillance tape showed that he is wearing a *light colored* shirt and dark pants. The confluence of these facts (the bruise, the high velocity splatter, and light colored shirt on the tape) strongly united to support the ultimate conclusion that defendant was holding Claire's neck with his right hand while wearing the white shirt.

Meanwhile, defendant was holding the gun in his left hand in a sideways manner ninety degrees clockwise, as shown by the ballistics expert's analysis of the shape of the front of the gun and the matching muzzle impression/burn pattern on Claire's mouth. The front teeth were not damaged when the gun is fired, which means Claire's mouth was open at the critical time, which would allow the combination of bleeding in the mouth, high pressure arterial bleeding, and high pressure gun outgases in the mouth to create the high velocity blowback to leave the high velocity splatter on defendant's right sleeve.

Defendant was holding Claire against the bathroom door as well, as shown by the fact that the bullet exited the back of her head and created a projectile hole in the bathroom door. Some of Claire's hair was actually stuck to the bathroom door near the projectile hole, which corroborates the fact that she was being forcefully held against the door.

After the killing, signs of consciousness of guilt now came into play. Defendant repositioned the body at some time and likely several times, as shown by the numerous transfer bloodstain patterns on Claire's body, including multiple digit patterns, and as shown by the fact that the pen used by defendant to write a note was found *underneath*

Claire's body.

Defendant repeatedly claimed to have been unable to call 911 initially because he could not find a phone, but a cell phone was regularly kept by Claire in her purse, and defendant had two cell phones in his car. Even when he obtained Claire's cell phone, defendant did not call 911 but tried to get through to his ex-wife several times. He also checked his voice mail and Claire's voice mail and tried to reach a friend named Alvie Crank. The ex-wife testified for the defense, but even she admitted that she told defendant to call the police. He never did so, and the police came only because the ex-wife called them. This evidence showed that defendant had never wanted to report the matter to the police and that he was hiding a crime. His comment to his ex-wife, "I'm really in trouble" confirms this.

Before the police arrived, defendant hid evidence. The ex-wife testified that his hands were bloody when she saw him; but when the police arrived soon thereafter, defendant had washed his hands thoroughly. The act of washing the hands, combined with defendant's later repeated insistence that only Claire would have gunpowder on her hands, was the sign of a cover story, with defendant confident that he had washed off any gunpowder residue.

Finally, there were several reasons to doubt defendant's pose as a crying, hysterical, grieving boyfriend. Defendant repeatedly protested his love for Claire, but he did not love her enough to call 911 for help. He called his ex-wife instead; he called voice mail instead; he called his friend Alvie Crank instead. He told his ex-wife, "I'm really in trouble," with no mention that Claire was the one really in trouble with the

fatal injuries.

When neighbor Peter Kovarik saw defendant in the hallway, defendant bore no indications that he was hysterical. He made small talk with Kovarik, and when Kovarik asked defendant how he was doing, defendant said “Good.” But when defendant was at the police station, he repeatedly wailed “Oh my God.” Such conspicuous displays were merely a bad acting job.

2. Diary not Helpful to Defense

Claire’s diary entries did not cast any doubt on defendant’s guilt. The Tenth District on direct appeal concluded that the diary was at best a mixed bag and was not exculpatory anyway because the last entry preceded the killing by over two months.

{¶112} Defendant contends that the trial court’s failure to provide him access to the diary prejudiced his defense because it corroborated his claim that he and Claire were happy together and were planning to marry. Defendant contends that this evidence refutes the prosecution’s theory that Claire was attempting to escape her controlling boyfriend and that defendant killed Claire to prevent her from leaving him. Upon review of the diary, we disagree. The last entry in the diary is dated October 7, 2001, and predates Claire’s death by almost three months. Thus, the diary has little probative value regarding the state of their relationship at the time of Claire’s death. Further, although some of the entries discuss Claire’s love for and desire to marry defendant, including, we note, the last entry, other entries suggest problems in their relationship stemming from defendant’s drinking, “mad rage” and self-absorption. Indeed, at least one entry reveals that Claire was ready to go it alone if the time came.

{¶113} Further, in light of the other evidence presented at trial, we cannot say that the trial court’s failure to provide defendant access to the diary affected a substantial right of defendant. The sixth assignment of error is not well taken, and is overruled.

The diary entries simply were not favorable to the defense. Statements of love for defendant duplicated her father's admission at trial that "Claire told me that she loved Kevin." Moreover, the statements of love were coupled with complaints and concerns about the relationship, about defendant's "mad rage" and drinking problem, about defendant's potential wandering eye, and about defendant apparently returning to sleep with his ex-wife. While Claire repeatedly said that she is a patient person, the tone of much of the discussion revealed her impatience with all these problems. It hardly would have been helpful for defendant that the diary showed his "mad rage" while drunk when, on December 29, 2001, he had been drinking and murdered Claire.

To be sure, the October 7th entry revealed a plan to get married at the courthouse. But even that entry represented a mixed bag, since they clearly had not followed through. In addition, the defense had claimed in opening statement that they had decided to get married in "the summer of 2001," (T. 41), and so the diary actually cut against the defense's own time line. In any event, by December 29, 2001, defendant still had not bought her the desired engagement ring (though he told police he had), and Claire would have questioned whether defendant would ever actually commit.

The diary actually revealed that Claire in fact was ready to go it alone if the time came. Claire defiantly wrote that "Claire can & will exist without the Kevin Tolliver in her life." On another date, in what is a chilling coda to her life, Claire wrote, "I'd rather die than have to be totally dependent on one person." She did die literally with a coat on and car keys at the ready in an effort to leave, asserting her independence to the end.

3. Paxil Theory Unhelpful

Defendant's claim that Paxil withdrawal would have made Claire suicidal are ultimately inapposite. Even in light of the latest documentation submitted, the chances of Paxil withdrawal causing symptoms and then causing suicidal ideation were still extremely small. Reasonable counsel was not required to present such "small odds" evidence. Counsel could reasonably prefer to briefly reference the issue without the expert testimony that would show such small odds. One can readily envision the prosecution's cross-examination of an expert on this topic, since that cross-examination would easily reveal the rarity with which serious "Paxil withdrawal" may occur and the even greater rarity with which this syndrome might cause suicidal ideation.

Even if the evidence of Paxil withdrawal had been stronger, it would not have aided defendant's defense, since defendant himself had given a cover story that was inconsistent with suicide. The Tenth District discussed the inconsistency in paragraph 30 of its opinion affirming the denial of post-conviction relief. Defendant had left a handwritten note on the bathroom vanity, which said "*She did not know gun was loaded. I loved her. Could not find the phone.*" (Emphasis added) He told the police the same thing:

She was in the middle of a sentence when she *accidentally* shot herself. I feel it was my fault because *she didn't know the gun was loaded*. She said, "What do you want me to –" pow. I turned around and she was falling at my feet. I have nothing – (Emphasis added)

A suicide committed mid-sentence would contradict common sense, inasmuch as persons intent on suicide would be focusing on the task of self-destruction rather than

engaging in conversation. Equally so, a person intent on suicide would not use what they thought was an unloaded weapon. Pursuing a suicide theory would have contradicted defendant's very own version of events.

The physical evidence all pointed away from suicide as well. Although the coroner declined to opine between suicide and homicide, he indicated that it would be highly unusual that a person would commit suicide by firing a gun from outside the mouth into the mouth. In addition, the distinctive sideways angle of the gun at the time of shooting would have been extremely awkward for Claire to kill herself in a suicide or even by accident.

Other evidence showed that defendant killed Claire, including the man's white shirt with the high-impact blood spatter on the right sleeve, the positioning of the gun (which would have been in defendant's left hand), the location of a elongated bruise on Claire's neck (in the area where defendant's right hand would have been), the location of the bullet hole in the bathroom door, the positioning of some of Claire's hair next to the bullet hole, and the absence of bullet damage to her front teeth. Claire did not commit suicide mid-sentence, since such a killing would have damaged her front teeth. Nor would she have killed herself in such close proximity to the door as to leave some of her hair on the bathroom door. Nor was she wearing the white shirt when shot.

In this context, defendant's iffy claim that Paxil possibly can cause suicidal ideation simply would have made no difference in the outcome.

4. No Outcome Determination

Defendant cannot meet the high standard of showing under R.C.

2953.23(A)(1)(b) that *all* reasonable factfinders would have acquitted him. Admission of the out-of-date diary would not have helped. Admission of the iffy Paxil evidence would not have helped defendant's claim that she shot herself accidentally, a claim refuted by the physical evidence anyway. Shipko's claim that Paxil withdrawal contributed to a "suicidal gesture" represented a pro-defense view of the evidence that the jury simply would not have been required to accept. Much of the evidence showed that she made no "gesture" at all, let alone a gesture that was related to being "suicidal" and/or related to Paxil withdrawal. Shipko's "report" was little more than pure guesswork with a "Ph.D." attached to the letterhead, including Shipko's speculative claim that the nearly three-months-behind diary proved the absence of motive.

As for impeaching Adams with the testimony of other inmates, an attempt at such impeachment would not have clearly required the jury to disbelieve Adams. The jury could disbelieve the other inmates. The evidence of guilt was overwhelming even without Adams.

C. Various Claims Fail

Claim One failed because the evidentiary documentation was insufficient and did not satisfy the high threshold for relief in an untimely and successive petition.

Claims Two, Three, Four, and Five failed for the same reasons.

To the extent defendant claimed that this trial counsel was ineffective, the evidentiary documentation fell far short of supporting both prongs of *Strickland*.

To the extent defendant claimed that Dr. McCloy's testimony turned out to be false about Paxil, such a claim amounted to nothing more than a claim of actual

innocence, which did not rise to the level of a claim of constitutional dimension. False testimony is not a claim of constitutional dimension unless the State knowingly presented perjured testimony, and there was no evidentiary documentation to support such a claim. The issue of guilt or innocence is also barred by res judicata. Given the strong evidence of his guilt, defendant did not show “actual innocence” anyway.

To the extent defendant relied on the diary, such a claim was barred by res judicata. The value of the diary was actually litigated on appeal.

To the extent defendant contended that Adams violated his Fourth Amendment rights and his right to counsel, such claims were barred by res judicata, as any such challenge should have been raised, if at all, before Adams’ testimony and through investigation at that time. No state action was involved in such supposed violations anyway.

Defendant’s propositions of law do not warrant review.

Respectfully submitted,

/s/ Steven L. Taylor
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on December 18, 2014, to Kevin Tolliver, #428-576, Madison Correctional Institution, P.O. Box 740, WB 233 L, London, Ohio 43140.

/s/ Steven L. Taylor
STEVEN L. TAYLOR