

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-056
- vs -	:	<u>OPINION</u>
	:	2/13/2012
JERRY R. LAWSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 1987 CR 05488

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Randall L. Porter, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Jerry Lawson, appeals the decisions of the Clermont County Court of Common Pleas denying his motion for postconviction relief and denying his request for a new trial. We affirm the decisions of the trial court.

{¶ 2} This court has heard several of Lawson's appeals, each stemming from his 1987 murder charge and subsequent conviction and death sentence. The relevant facts

remain the same. On September 23, 1987, Lawson shot and killed Timothy Martin in retaliation for Martin implicating Lawson and his brother, Timothy Lawson, in a number of residential burglaries. Martin had been acting as a police informant, and had testified before the Clermont County Grand Jury. Martin was also expected to testify at the Lawson brothers' trial on the burglary charges.

{¶ 3} The Lawson brothers met with William Payton and his sister, Sue Payton, to discuss the allegations and statements made by Martin. At this meeting, Lawson persuaded Payton to call Martin and tell him that he knew of a marijuana field that could be raided. Martin then agreed to meet with Payton and the Lawson brothers, and the four men drove along back roads through Clinton and Brown counties before stopping near an old barn in a secluded area. Once there, the men exited the vehicle and walked a short distance into a nearby woods to look for the fictitious marijuana field. There, Lawson pulled out a handgun and shot Martin in the back. Martin fell to the ground and pleaded with the men to take him to the hospital. Lawson, however, confronted Martin about being a "snitch" and then offered Martin a knife to "put [himself] out of [his] misery." When Martin refused to kill himself, Lawson began kicking and beating him in his head and ribs. Lawson continued to beat and berate Martin until he died approximately 45 minutes later.

{¶ 4} Once Martin died, Lawson ordered his brother and Payton to drag Martin's body to a shallow hole next to a fallen tree where they then covered the body with bark and debris. Lawson then turned the gun on Payton and threatened to kill him and his family if he went to the authorities.

{¶ 5} Two days later, Payton met with F.B.I. special agent Larry Watson, with whom he had prior contact on an unrelated narcotics matter. Payton informed Watson of the Martin murder, and he and his sister agreed to cooperate with police. Both helped the police covertly obtain taped statements from Lawson in which he described in detail how and why

he had killed Martin.

{¶ 6} Lawson was charged with two counts of aggravated murder, three counts of kidnapping, two counts of intimidation, aggravated robbery, aggravated burglary, and gross abuse of a corpse. All counts, except the abuse of a corpse, carried specifications. After initially pleading not guilty to the charges, Lawson changed his plea to not guilty by reason of insanity, stipulating that he had shot and killed Martin.

{¶ 7} In 1988, a jury found Lawson guilty, and after a mitigation hearing recommended the death penalty on the aggravated murder charges. The trial court accepted the jury's recommendation and further imposed concurrent sentences for the remaining charges. Lawson appealed his convictions and death sentence to this court, and we affirmed. *State v. Lawson*, 12th Dist. No. CA88-05-044 (June 4, 1990). The Ohio Supreme Court also affirmed Lawson's convictions and death sentence in *State v. Lawson*, 64 Ohio St.3d 336, 1992-Ohio-47. The United States Supreme Court denied Lawson's writ of certiorari. *Lawson v. Ohio*, 507 U.S. 1007, 113 S.Ct. 1653 (1993). Lawson then sought postconviction relief, and argued 41 claims for relief before the trial court. The trial court, without a hearing, dismissed Lawson's petition, and Lawson appealed that decision. This court affirmed the trial court's dismissal, and found that the court did not err in dismissing the motion because the files and record demonstrated that Lawson was not entitled to relief. *State v. Lawson*, 103 Ohio App.3d 307 (1995). The Ohio Supreme Court then declined to accept jurisdiction of the case. *State v. Lawson*, 74 Ohio St.3d 1404 (1995).

{¶ 8} After exhausting these state remedies, Lawson filed a petition for a writ of habeas corpus. The United States District Court for the Southern District of Ohio granted in part and denied in part Lawson's motion, and vacated Lawson's death sentence. *Lawson v. Warden, Mansfield Correctional Institution*, 197 F.Supp.2d 1072 (S.D.Ohio 2002). Both the state and Lawson appealed that decision to the Sixth Circuit.

{¶ 9} In 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), and held that executing a mentally retarded person violates the Eighth Amendment. During the habeas relief process before the federal court, Lawson argued that he was mentally retarded. The Sixth Circuit ordered that Lawson's appeal from the district court be held in abeyance while Lawson exhausted his claims in the state courts alleging mental retardation and government interference of his right to counsel. *Lawson v. Warden*, Sixth Circuit Case Nos. 02-3413, 02-3483 (Aug. 13, 2003). Lawson then filed another motion for postconviction relief with the trial court asserting the two claims. The trial court held a hearing, and denied Lawson's motion specific to his mental retardation claim, and this court affirmed the trial court's holding. *State v. Lawson*, 12th Dist. No. CA2007-12-116, 2008-Ohio-6066. The Ohio Supreme Court declined to hear Lawson's appeal. *State v. Lawson*, 123 Ohio St.3d 1523, 2009-Ohio-6487. Lawson then pursued the other argument in his 2003 motion for postconviction relief, claiming that the state had interfered with his constitutional right to counsel. The trial court dismissed Lawson's petition. Lawson now appeals the trial court's decision, raising the following assignments of error.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT JERRY LAWSON'S REQUESTS TO CONDUCT DISCOVERY.

{¶ 12} Lawson argues in his first assignment of error that the trial court erred in denying his request for discovery because a trial court must provide a postconviction petitioner the right of discovery in order to comport with due process considerations.

{¶ 13} After several of Lawson's original pretrial hearings, Lawson would confer with his counsel in the courtroom. A deputy from the Clermont County Sheriff's Department maintained security in the courtroom while inmates were in the courtroom and when the conversations occurred. On one occasion, a deputy overheard Lawson and his counsel

talking about the need to find and interview William Payton, who they referred to as the "third party" or "3." The deputy later shared what he overheard with the prosecutor in a report that was not disclosed before or during the trial. Up to that point, and afterwards, Lawson's counsel had been unable to locate Payton.

{¶ 14} At some point prior to trial, Lawson's counsel heard that Payton was in the courthouse and approached him in the hallway of the courthouse. The prosecutor then suggested that Payton not talk to Lawson's counsel. Payton did not speak to Lawson's counsel, nor did he appear as a witness at the trial.

{¶ 15} Lawson now argues that he was entitled to discovery, and that if he had been granted discovery, he could have factually developed (1) the full extent of the privileged information that the deputy overheard, (2) the extent of the privileged information the deputy forwarded to the prosecutor, and (3) the state's use of the privileged information.

{¶ 16} However, and as this court has consistently held, Lawson is not *entitled* to discovery to support his claim for relief. "A postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. Postconviction relief is not a constitutional right, and it affords a petitioner no rights beyond those granted by the controlling statute, R.C. 2953.23. *Id.*; see also *State v. Steffen*, 70 Ohio St.3d 399, 410, (1994), citing *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, (1989). Moreover, and according to R.C. 2953.23, "there is no requirement of civil discovery in post-conviction proceedings." *State v. Samatar*, 10th Dist. No. 03AP-1057, 2004-Ohio-2641, ¶ 23, citing *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158 (1999). "Since R.C. 2953.21 does not contain a provision entitling a post-conviction petitioner to discovery during the post-conviction process * * *, the denial of [this] request[] is not a violation of due process." *State v. Jackson*, 3rd Dist. No. 1-04-31, 2004-Ohio-5350, ¶ 23.

{¶ 17} The granting or overruling of discovery motions rest within the sound discretion of the trial court. *State v. Stojetz*, 12th Dist. No. CA2009-06-013, 2010-Ohio-2544, ¶ 75. Rather than a mere error of law or judgment, an abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160.

{¶ 18} Although a petitioner is not automatically entitled to discovery, discovery may be warranted when the petitioner sets forth operative facts that would demonstrate a substantive claim for relief. *State v. Kapper*, 5 Ohio St.3d 36 (1983). A petitioner sets forth operative facts by attaching documentary evidence dehors the record, which if true constitute a constitutional error in his case. *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, ¶ 36.

{¶ 19} Lawson claims that he attached sufficient documentation to his petitions that demonstrates a constitutional error. We disagree. Lawson claims that his constitutional right to an attorney was violated when the deputy overheard his conversations between himself and counsel. However, and as will be discussed in further detail under Lawson's third assignment of error, Lawson and his counsel chose to speak in a public setting where deputies were within hearing distance, and the deputy's act of overhearing the conversations did not violate the constitution in any way.

{¶ 20} Further, and specific to the contents of the conversation overheard by the deputy, William Payton was identified during the initial pretrial discovery, his identity was certainly known to the state and to Lawson, and the record does not contain any indication that the state learned any new information from the overheard conversation. Payton cooperated with police, and the state was well-aware of his involvement in the events preceding Martin's murder. Moreover, there is no indication in the record that Lawson took any steps to move the court to require Payton to appear or cooperate with his defense.

While Lawson attempts to attribute Payton's absence or lack of cooperation to the state's actions, such may have occurred for various reasons such as Lawson pointing a gun at Payton and threatening to kill him and his family if he talked.

{¶ 21} The conversation overheard by the deputy, in no way prejudiced Lawson during his trial or constituted a constitutional violation. Having failed to set forth operative facts, which if true constitute a constitutional error in his case, Lawson was not entitled to discovery. Therefore, the trial court did not abuse its discretion in denying Lawson's request for discovery, and Lawson's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED WHEN IT DID NOT DECLARE R.C. § 2953.21 AND 2953.23(A)(2) CONSTITUTIONALLY INFIRM ON THEIR FACE AND AS APPLIED TO PETITIONER LAWSON.

{¶ 24} Lawson argues in his second assignment of error that the trial court erred in not finding portions of Ohio's postconviction statute unconstitutional because such sections are violative of the Supremacy Clause, Separation of Powers doctrine, "Due Course of Law," and various constitutional amendments.

{¶ 25} Lawson argues that R.C. 2953.21 and R.C. 2953.23(A)(2) should be deemed unconstitutional. R.C. 2953.21 sets forth the general postconviction relief protocol, and the version of R.C. 2953.23(A)(2) in place at the time the third petition was filed, set forth the following regarding successive petitions for postconviction relief:

(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 *both* of the following apply.

(1) 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 * * * .

(b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing 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.

(2) The petitioner *shows by clear and convincing evidence* that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted of, if the claim challenges a sentence of death that, but for the constitutional error at the sentencing hearing, no reasonable fact-finder would have found the petitioner eligible for the death sentence. (Emphasis added.)

{¶ 26} This court has already addressed the constitutionality of Ohio's postconviction relief statutory scheme, and has found such constitutional. *State v. McGuire*, 12th Dist.No. CA2000-10-011, 2001 WL 409424 (Apr. 23, 2001). Other districts have also upheld the statute as constitutional. See *State v. Taylor*, 8th Dist. No. 80271, 2002-Ohio-2742 at ¶ 13; *State v. Davie*, 11th Dist. No.2000-T-0104 (Dec. 21, 2001); and *State v. Byrd*, 145 Ohio App.3d 318 (2001).

{¶ 27} In *McGuire*, this court dismissed the same argument now set forth by Lawson, that the statute violates the Supremacy Clause because it calls for the petitioner to show by clear and convincing evidence that but for the constitutional error at trial, the fact-finder would not have found the defendant guilty. However, there is no indication that Ohio's statute conflicts with the federal regulatory scheme or that the federal government meant to preempt state statutes on this area of the law. *McGuire*, 12th Dist. No. CA2000-10-011.

{¶ 28} This court similarly dismissed arguments that the statute violates the Separation of Powers Doctrine, and recognized that the Ohio legislators have the discretion to create a civil proceeding by which prisoners can seek review of their convictions. *Id.*

{¶ 29} We also dismissed the "Due Course of Law" and due process arguments because a successive petition for postconviction relief is a statutory right, rather than a constitutional right. The statutory provisions are valid because they bear a real and

substantial relation to the public health, safety, morals or general welfare of the public and are not otherwise unreasonable or arbitrary. *Id.*

{¶ 30} Despite Lawson's invitation, this court sees no reason to revisit *McGuire*. We continue to find that the postconviction relief statute is constitutional on its face. We also disagree with Lawson's contention that the statute is unconstitutional as applied to him. Lawson argues that if we were to apply a more lenient standard than "clear and convincing", his petition "clearly establishes a substantial violation of his rights to render his convictions void under the United States Constitution."

{¶ 31} However, Lawson's argument disregards the fact that he has been afforded ample opportunity to challenge his convictions. As discussed in our recitation of the facts, Lawson has been afforded the right to direct appeals, as well as two prior petitions for postconviction relief. Within these appeals and petitions, Lawson has put forth several constitutional claims, and exercised his right to challenge every aspect of the legal process before and after he was convicted of aggravated murder. This court fails to see how the standard set forth in R.C. 2953.23(A)(2) has denied Lawson from making any constitutional argument or has precluded him from challenging his conviction on multiple occasions.

{¶ 32} We also note that the R.C. 2953.23(A)(2)'s clear and convincing standard did not become applicable until Lawson was afforded a full trial and mitigation hearing, and then appealed the decision of the jury and trial court to this court, the Ohio Supreme Court, as well as the federal courts. The clear and convincing standard applied *only after* Lawson filed an unsuccessful petition for postconviction relief and sought a second, and now a third petition for postconviction relief. As we stated in *McGuire*, the legislators created a "reasonable procedural hurdle" when it promulgated R.C. 2953.23(A)(2), when balancing the need for final judgment against a petitioner's right to challenge his conviction on the basis of constitutional violations. *McGuire*, 12th Dist. No. CA2000-10-011 at *8. The state is entitled

at some point to the finality of the judgment, and applying a clear and convincing standard to a third petition for postconviction relief is not unconstitutional.

{¶ 33} Having found that Ohio's R.C. 2953.23 is not unconstitutional on its face or as applied to Lawson, his second assignment of error is overruled.

{¶ 34} Assignment of Error No. 3:

{¶ 35} THE TRIAL COURT ERRED WHEN IT DID NOT GRANT JERRY LAWSON A NEW TRIAL.

{¶ 36} Lawson argues in his final assignment of error that the trial court erred by denying his request for a new trial based on the information overheard by the deputy.

{¶ 37} As previously stated, a deputy from the Clermont County Sheriff's Department overheard Lawson and his attorney discussing the four people who were present when Martin was shot and killed. The deputy documented the conversation he overheard, and this information was discovered as part of the habeas action in the federal court.

{¶ 38} According to the documentation, the overheard conversation occurred two days after the indictment was returned, and occurred in the courtroom after a hearing. During the conversation, Lawson and his counsel referred to himself and his brother as "1" and "2" and referred to Payton as "3" or "third party" and to Martin as "4." The deputy overheard Lawson and his counsel make reference to locating number "3" and the importance of interviewing him. The deputy reported what he had overheard to the prosecutor and such report was not disclosed to the defense prior to the trial. Lawson now argues that the deputy overhearing and reporting the conversation denied his right to counsel as afforded by the Sixth Amendment. We disagree.

{¶ 39} This case is highly analogous to *State v. Wakefield*, 4th Dist. No. 422, 1980 WL 351084 (Sept. 2, 1980), in which the defendant therein challenged the admission of an officer's testimony at trial regarding an overheard conversation while the officer guarded the

defendant at jail. The attorney and defendant held a somewhat impromptu conversation in an open area where the officer was standing by for security purposes. The *Wakefield* court stated that while the right to private consultation with an attorney is a constitutional right, "the exercise of such right is conditioned upon conformity with reasonable rules and regulations of the institution in which the client is confined." *Id.* at *2.

{¶ 40} The court went on to state that a defendant waives the right to private consultation where he and counsel agree to conduct the conversation even though the officer's presence is known to the attorney and client. Moreover, the court stated, "if the consultation is carried on in a sufficiently loud voice to be inadvertently heard by the officer, we do not perceive how it can be fairly asserted that the right to private consultation has been infringed * * *." *Id.* We agree.

{¶ 41} Lawson cites *State v. Milligan*, 40 Ohio St.3d 341 (1988), for the proposition that the overheard conversation constitutes a constitutional violation. However, we find *Milligan* distinguishable from the case at bar. In *Milligan*, the court recited the facts as follows:

* * * temporary jail director Robert Bartlett, on instructions from Athens County Sheriff Robert Allen, removed appellant from his jail cell so that appellant could converse by telephone with his attorney. During the telephone conversation, Bartlett stood near appellant and secretly taped his remarks. A copy of the tape was made at Bartlett's request. The original recording was given to Sheriff Allen.

{¶ 42} The court analyzed the Sixth Amendment, and determined that the right to counsel is "much broader" than the Fourth Amendment's requirement that the person have a reasonable expectation of privacy before rights protecting against illegal search and seizure attach. *Id.* at 343. After finding that the theory of reasonable expectation of privacy is not applicable to a communication between attorney and client, the court held that evidence obtained through the deliberate and "unauthorized interception of a private conversation

between a criminal defendant and his attorney" was subject to suppression. *Id.* Here, however, the conversations were not private, and the record does not indicate that courtroom security deliberately intercepted the conversation.

{¶ 43} The record is clear that Lawson and his attorney would often speak after Lawson's court appearances because the courthouse provided a convenient setting. Unlike being called from his cell so that he could talk over the phone with his attorney, Lawson and his counsel voluntarily chose to discuss matters pertaining to the case in the public courtroom. It is reasonable to infer that Lawson and his attorney were aware that they were speaking in a public area because Lawson and his attorney used numbers as a code to refer to particular people and participants. Lawson and his counsel knowingly and voluntarily held their conversation within hearing distance of the deputy, and with a voice loud enough for the deputy to hear the conversation.

{¶ 44} During a deposition, Lawson's trial counsel testified that the conversations would take place in the court "with a deputy not out of the room, but far enough away *at least we thought* that our conversations were not being overheard." This testimony establishes that both Lawson and his counsel were well-aware that the deputy was in the room at the time they chose to converse, and that they could not state with certainty that they were not being overheard, thus they conversed in code at times. Despite Lawson and his counsel's assumption that the deputy could not overhear him, the record does not contain any indication that the deputy created the circumstances so that he could eavesdrop, or that any unnatural placement or movement occurred so that the deputy was within hearing distance, as was the case in *Milligan*. Contrary to the facts in *Milligan*, it is overwhelmingly clear here that the deputy's purpose was to provide routine courtroom/inmate security.

{¶ 45} Had Lawson and his counsel wished to protect the right to private consultation, they could have chosen to discuss matters in the jail where Lawson had the right to hold

discussions with counsel without security personnel in the room. Such was Lawson's right. His choice not to do so, however, is not a violation of his constitutional right to counsel.

{¶ 46} As stated previously, before Lawson is entitled to postconviction relief, he had to first show by *clear and convincing evidence* that, but for constitutional error at trial, no reasonable fact-finder would have found him guilty of aggravated murder, or found him eligible for the death sentence. Lawson has failed to do so.

{¶ 47} Even assuming arguendo that there was a constitutional error similar to that set forth in *Milligan*, Lawson has failed to demonstrate how such error would demonstrate that *no reasonable* fact-finder would have found him guilty. We are not faced with a situation where a witness was hidden from the defense, where the conversation exposed crucial trial strategy, or where an interview with Payton could illuminate decisive information to Lawson's defense.

{¶ 48} At trial, Lawson claimed that he was not guilty by reason of insanity, and suffered a brief reactive psychosis at the time he killed Martin. The jury heard testimony from Lawson's brother, Timothy, that at the time of the shooting, Lawson's "face was real bright red, his eyes were bright looking; he just looked like a crazy person." Timothy also testified that Lawson was in a "crazed state" and was "acting like a wild person." Therefore, the jury already had before it evidence of Lawson's psychological state at the time of the murder, and Lawson was able to present his insanity defense without testimony from Payton.

{¶ 49} Moreover, Payton's recitation to law officials of the events leading up to the murder did not depict a man suffering from brief reactive psychosis during the planning and execution of the murder. Instead, Payton described Lawson meeting with him and his sister, expressing his hatred of Martin for implicating himself and his brother, as well as Lawson's intimations that Martin was disparaging of his family and friends. Lawson concealed a gun, drove a long distance through back roads, and then lured Martin to a fictitious marijuana field

so that he could kill him. Lawson then beat and berated Martin over an extended period of time until he finally died from his injuries. Payton's testimony regarding this systematic and methodical chain of events precipitated by Lawson would have cut against Lawson's defense that he did not have criminal culpability due to a sudden and short-term display of psychotic behavior.

{¶ 50} Notwithstanding what an interview with Payton could add or detract from Lawson's defense, the record does not contain any information that the state used or gained anything from the information in the deputy's report of the overheard statement. To assert otherwise, Lawson argues that once the state knew of his desire to find and interview Payton, the state attempted to hide or secret Payton away from Lawson's counsel so that he could not be interviewed. In support of this claim, Lawson makes reference to his trial counsel's deposition in which he recalled trying to speak to Payton in the courthouse hallway and a prosecutor suggesting that Payton not speak to defense counsel. As stated by the trial court, and with which we completely agree, "this does not demonstrate that the state was attempting to hide Payton from defense counsel; instead, it merely establishes that, on one occasion, an assistant prosecutor advised Payton not to speak with defense counsel in a hallway of the courthouse." The record does not contain any indication, nor does Lawson point to any other evidence, that the state hid Payton. Due to Payton's early cooperation in reporting the crime to the FBI, nothing in the record suggests that an interview with Payton would have been beneficial to Lawson. Furthermore, and as already mentioned, Lawson did not ask the court to facilitate an interview or otherwise move the court to require Payton to appear.

{¶ 51} Lawson alleged that the constitutional error was the fact that his conversation was overheard and that the prosecutor failed to disclose the report to defense counsel. However, and as previously discussed, Lawson's constitutional rights were not violated by the

overheard conversation or by the prosecution knowing that Lawson was interested in finding or interviewing Payton. After reviewing the record, Lawson has failed to establish that the overheard conversation or that not having the opportunity to interview Payton was a constitutional error or that, but for the alleged error, no reasonable jury could have found him guilty or sentenced him to death.

{¶ 52} As pertinent to Lawson's petition for relief, and pursuant to R.C. 2953.23(A), the trial court could not consider Lawson's successive petition for postconviction relief unless both of the following conditions were met: Lawson was unavoidably prevented from discovery of the facts upon which he relied to present the claim for relief; and he was able to show by clear and convincing evidence that, but for his alleged constitutional error at trial, no reasonable fact-finder would have found him guilty of aggravated murder.

{¶ 53} We agree with the trial court that Lawson was unavoidably prevented from discovering the deputy's report regarding the overheard conversation because such was not turned over until discovery occurred in the federal court habeas action. However, we also agree with the trial court that Lawson failed to fulfill the second requirement of R.C. 2953.23(A)(2), and could not demonstrate a constitutional violation or that absent the alleged violation, he would not have been convicted.

{¶ 54} Having found that Lawson failed to fulfill the criteria set forth in R.C. 2953.23, his third assignment of error is overruled.

{¶ 55} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.