[Cite as *State v. Whatley*, 2024-Ohio-4909.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

Nos. 113638 and 113653

v. :

DWIGHT WHATLEY, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-04-450519-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristen Hatcher, Assistant Prosecuting Attorney, *for appellee.*

Dwight Whatley, *pro se.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Dwight Whatley appeals the denial of his belated petition for postconviction relief and motion for leave to file a motion for new trial. In both of those motions, Whatley claims the State suppressed exculpatory evidence before Whatley's 2005 trial, in which he was found guilty of four counts of aggravated

murder, two counts of aggravated burglary, six counts of aggravated robbery, and three counts of kidnapping. He was also found guilty of several attendant firearm specifications. Finding no merit to his arguments, we affirm.

{¶ 2} The facts of Whatley's case were summarized in the direct appeal. *State v. Whatley*, 2006-Ohio-2465, ¶ 4-15 (8th Dist.).

> Whatley's convictions result from an incident that occurred on the night of March 18, 2004 at a combination delicatessen/convenience store with a connected residence located at the corner of East 79th Street and Central Avenue in Cleveland, Ohio. The store owner, Arman Howard Lovett, his live-in girlfriend, Carolyn Pitts, and their employee-boarder, Jeffrey Burton, all were present on the premises.
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> Pitts worked that night at the store counter when she took a food order for a young man later identified as Daniel Grant. While she prepared the order, she noticed that Grant left. Grant returned a few minutes later in the company of four other men, one of whom was Whatley; Pitts knew Whatley as "Fats."
>
> Pitts started a conversation with Whatley as she finished preparing Grant's sandwich, but her remarks were interrupted when one of the others called out an order for "everybody [to] put your hands up." She looked up to see that the three other men had donned ski masks, and that they, Grant and Whatley all held guns in their hands. Whatley carried a shotgun.
>
> The five men gathered Pitts, Lovett and Burton and forced the captives out to the patio area of the premises, where they each were laid on the ground to be bound hand and foot with duct tape. Pitts had a coat placed over her head. Thereafter, she heard some of the assailants running; they sought valuables in the store and the residence, since one of them demanded of Lovett the location of keys and the combination to a safe.
>
> In spite of Lovett's apparent compliance, Whatley urged Pitts to tell him where Lovett kept all his money. He emphasized his sincerity by firing his shotgun into the concrete floor. Since he appeared to be the leader of the group, Pitts told him Lovett did not have much money,

and asked him to spare her life. Whatley replied without emotion that he had to kill her because she recognized him.

Eventually, all of the captives were removed to the basement of the residence. As they lay on the floor, one of the assailants wondered "What [they were] going to do with them?" Someone answered, "Let's just do them."

From under the fabric that had been placed haphazardly over her head, Pitts saw one of the masked men use a steak knife to slice at Burton's throat. When that method did not succeed in killing Burton, another man fired a bullet into his head; Lovett also was murdered with one shot in the head. Observing these shootings, Pitts placed her hands over her head before her turn came. Although she felt a shot strike her, the bullet's force became dissipated as it passed through her hand, the fabric, and her skull; thus, Pitts did not receive a fatal wound.

Pitts waited until she believed the assailants were gone before she rose and summoned the police. When the police arrived, Pitts told them that one of the men responsible for the incident was "Fats;" she did not know Whatley's real name.

Officers followed tracks left in the snow that led to the backyard of a residence located at 2363 East 77th Street. Along the route, the officers found some of Lovett's papers and lesser valuables. Moreover, beneath a van parked in the driveway of the residence, officers discovered five weapons; one was a shotgun. Additionally, two of the handguns that were found proved, respectively, to have fired the fatal shots into Lovett and Burton, and to have fired the shot into Pitts' head.

At Whatley's trial, James Chalklett testified that on the day prior to the incident, Whatley came to Chalklett's apartment carrying a shotgun which Whatley requested to leave overnight. The following evening, Whatley returned with two other men, proceeded into a bedroom, and, subsequently, another two men arrived to join them. Curious, Chalklett looked into the room; he saw Whatley handling two handguns. Chalklett identified these guns as two of the weapons that were later recovered from underneath the van. Chalklett further testified that Whatley asked for his shotgun before the five men left together.

Similarly, Joanna Workman, who lived at 2363 East 77th Street, testified that on the night of the incident, she admitted into her home two men who were friends of her cousin just before she heard shots

> fired nearby. Within minutes, Whatley and another man came to her door. Workman demanded that all four of them go.
>
> Tyshaun Hampton testified that on the night of the incident he received a telephone call from an acquaintance, who asked him to come to 2363 East 77th Street to give him a ride. When Hampton arrived, he saw that his acquaintance was in the company of four other men, one of whom was Whatley. They placed a metal box into the trunk of Hampton's vehicle before he took them to another location. Hampton later watched as the men broke into the box, which contained approximately $ 3,500.00 in cash. Whatley seemed unhappy with the amount. Subsequently, Hampton drove his passengers to a place where they burned the clothing they had been wearing.

Id. Whatley was sentenced to two life terms without the possibility of parole, after the jury rejected the capital specifications, and 21 years for the firearm specifications, all of which were consecutively imposed. *Id.* at ¶ 18.

{¶ 3} In early 2022, Whatley's cousin made a public records request to obtain the investigative file for Whatley's case. Fifteen months later, Whatley filed his motion for leave to file a motion for new trial claiming that he was not aware of evidence contained in the police report and, therefore, the State violated his constitutional rights by suppressing that information. Six months following the motion for leave, Whatley filed a belated petition for postconviction relief advancing the same allegations as contained in the motion for leave. The trial court denied both motions, and this appeal followed.

{¶ 4} In both of Whatley's assignments of error, he claims the trial court erred in denying his motion for leave to file a motion for new trial and his petition for postconviction relief because, as he claims, he was not required to show that he could have timely discovered the information based on *State v. Hatton*, 2022-Ohio-

3991, and *State v. Bethel*, 2022-Ohio-783. In order for the trial court to have to possess jurisdiction over an untimely petition for postconviction relief or a motion for leave to file a motion for new trial, the offender must first establish that he was unavoidably prevented from discovery of the facts on which he relies. *Bethel* at ¶ 25, citing R.C. 2053.23(A)(1)(a). In *Bethel*, the Ohio Supreme Court clarified that an offender may demonstrate the "unavoidably prevented" requirement in R.C. 2953.23(A)(1)(a) by establishing that the prosecution suppressed the evidence on which the petitioner relies. *Id.*

{¶ 5} Whatley's entire focus in this case is his unsupported belief that the State suppressed evidence within the police report he recently obtained, and because the evidence was "suppressed," he was not required to demonstrate that he was unavoidably prevented from timely obtaining the information. Because, however, he has presented no evidence of any suppression other than his self-serving statement that he personally was not aware of the evidence during his trial, Whatley's arguments are without merit.

{¶ 6} A party who fails to timely file a motion for new trial must seek leave from the trial court to file a delayed motion for new trial. *State v. Murphy*, 2021-Ohio-3925, ¶ 25 (8th Dist.), citing *State v. Hale*, 2019-Ohio-1890, ¶ 9 (8th Dist.). This court reviews a trial court's denial of leave to file an untimely motion for new trial for an abuse of discretion. *State v. Briscoe*, 2021-Ohio-4317, ¶ 19 (8th Dist.), citing *State v. Sutton*, 2016-Ohio-7612, ¶ 13 (8th Dist.). In determining whether leave should be granted under Crim.R. 33, the offender must "demonstrate by clear

and convincing proof that he or she was unavoidably prevented from filing the motion for a new trial." *State v. Hale*, 2023-Ohio-3894, ¶ 20 (8th Dist.). Importantly, "'[w]hen a defendant seeks leave to file a motion for a new trial under Crim.R. 33(B), the trial court may not consider the merits of the proposed motion for a new trial until after it grants the motion for leave.'" *Id.*, quoting *State v. Hatton*, 2022-Ohio-3991, ¶ 30, and *State v. Bethel*, 2022-Ohio-783, ¶ 41. "'The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial.'" *Id.,* citing *Hatton* at ¶ 30.

{¶ 7} A defendant is "unavoidably prevented" from discovering new evidence if he "'had *no* knowledge of the existence of the ground' supporting the new-trial motion and could not have learned of the existence of that ground within the time prescribed for filing a new-trial motion." (Emphasis in original.) *State v. Lenard*, 2023-Ohio-4529, ¶ 10 (8th Dist.), quoting *State v. Conner*, 2016-Ohio-301, ¶ 21 (8th Dist.). Under binding black-letter law, "[a] defendant cannot claim that evidence was undiscoverable merely because the defendant or his defense counsel did not undertake to obtain the evidence sooner." *Id.*, citing *State v. Jackson*, 2019-Ohio-4893, ¶ 20 (8th Dist.), citing *State v. Cashin*, 2017-Ohio-9289 (10th Dist.). "'[I]f a defendant is aware of the evidence at the time of trial, then it is not newly discovered evidence under Rule 33.'" *State v. Ambartsoumov*, 2013-Ohio-3011, ¶ 23 (10th Dist.), quoting *United States v. Sims*, 72 Fed.Appx. 249, 252 (6th Cir.

2003). There is a stark contrast between "newly discovered evidence" and that which is merely "newly available." *State v. Sawyer*, 2004-Ohio-6911, ¶ 14, fn. 4 (8th Dist.).

{¶ 8} "When a defendant seeks leave to file a motion for a new trial under Crim.R. 33(B), the trial court may not consider the merits of the proposed motion for a new trial until after it grants the motion for leave." *State v. Hatton*, 2022-Ohio-3991, ¶ 30, citing *State v. Bethel*, 2022-Ohio-783, ¶ 41. "The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial." *Id.* Notwithstanding, even if the offender demonstrates the "unavoidably prevented" prong of the analysis, that alone is insufficient to demonstrate reversible error with the trial court's decision denying the motion for leave. If the hearing on a motion for new trial would be "an exercise in futility" in light of decisions within the same case pertaining to a simultaneously filed petition for postconviction relief, no reversible error over the denial of leave has occurred. *Bethel* at ¶ 59.

{¶ 9} In *Bethel*, the Ohio Supreme Court concluded that there was no *Brady* violation under the postconviction-relief analysis that the court was required to undertake in light of the arguments presented. *Id.* at ¶ 20. *Bethel* acknowledged under the separate Crim.R. 33 analysis that the same *Brady* claims should have warranted the granting of leave to file a motion for new trial, but that act would have been futile because the trial court, in that anticipated hearing, would have been

required to apply *Bethel's* analysis on the *Brady* claim in light of the fact that the offender relied on the same claim for both the postconviction relief motion and the motion for leave to file a motion for new trial. *Id.* at ¶ 59. *Bethel* thus establishes that appellate courts must consider the implications of any petition for postconviction relief in reviewing a motion for leave to file a motion for new trial in which the same arguments are advanced.

{¶ 10} In this case, Whatley filed a motion for leave and also a separate petition for postconviction relief advancing the same claims. Unlike the hearing requirement relevant to the motion for leave to file a motion for new trial, the trial court is not required to conduct a hearing in considering a petition for postconviction relief. *See Bethel.* The sole question at this juncture is whether the trial court possessed jurisdiction to consider the merits of that petition, an issue that turns on the suppression question. *Id.* at ¶ 31. Because Whatley's claim for relief will largely depend on review of the belated petition for postconviction relief, our analysis begins there.

{¶ 11} "'[W]hether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely petition for postconviction relief is a question of law, which appellate courts review de novo.'" *State v. Apanovitch,* 2018-Ohio-4744, ¶ 24, quoting *State v. Kane*, 2017-Ohio-7838, ¶ 9 (10th Dist.). R.C. 2953.23(A) permits a prisoner to file an untimely petition for postconviction relief under limited circumstances. Relevant to this case, R.C. 2953.23(A) requires Whatley to (1) show he "was unavoidably prevented from discovery of the facts upon which the petitioner

must rely to present the claim for relief," and (2) show "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 . . . . "[T]he 'unavoidably prevented' requirement in R.C. 2953.23(A)(1) mirrors the 'unavoidably prevented' requirement in Crim.R. 33(B)." *State v. Murphy*, 2021-Ohio-3925, ¶ 37 (8th Dist.), citing *State v. Waddy*, 2016-Ohio-4911, ¶ 27 (10th Dist.).

{¶ 12} In this case, Whatley claims that he was unavoidably prevented from discovering the evidence contained in the police reports because the State suppressed that evidence. He does not present any other argument in this appeal.

{¶ 13} In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), it was recognized that the prosecution has an affirmative duty to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment. *Id.*; *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). *Brady* applies regardless of whether evidence is suppressed by the State willfully or inadvertently. *Strickler v. Greene*, 527 U.S. 263, 282 (1999). In *Bethel*, however, the Ohio Supreme Court recognized that unlike other evidence supporting a petition for postconviction relief, "criminal defendants have no duty to 'scavenge for hints of undisclosed *Brady* material.'" *Bethel* at ¶ 24. An offender satisfies the "unavoidably prevented" requirement by merely establishing that the prosecution suppressed the evidence on which the defendant relies. *Id.*

{¶ 14} Whatley claims that the contents of the police report and additional evidence referenced therein were not made available or known to him before his trial. There is no requirement, however, for this to have occurred. *State v. Dye*, 2024-Ohio-3191, ¶ 26 (8th Dist.), citing *State v. Bluford*, 2004-Ohio-4088, ¶ 26 (8th Dist.), and *State v. Jones*, 2016-Ohio-5387, ¶ 9 (10th Dist.). Defendants are not generally "privy to the exchange of discovery," and as a result, these types of claims depend on the knowledge of trial counsel or the State's concession. *Id.* Instead of offering evidence that the information was suppressed or withheld, Whatley, similar to the offender in *Dye,* merely "offers his unverified belief that his counsel was unaware of the existence or the contents of the police report before trial." *Id.* at ¶ 28.

{¶ 15} Especially for the purposes of belated petitions for postconviction relief, "'[u]nsubstantiated, self-serving allegations are not sufficient to demonstrate entitlement to an evidentiary hearing.'" *Id.* at ¶ 27, quoting *State v. Walter*, 2020-Ohio-6741, ¶ 9 (8th Dist.), and *State v. Hill*, 2019-Ohio-365, ¶ 70 (1st Dist.). A petition for postconviction relief must present some evidence demonstrating the unavoidably prevented prong of the analysis, including whether the State suppressed the evidence at issue. In this case, Whatley presumes that the State withheld the evidence contained in the police report because his trial counsel failed to discuss that information at trial. According to Whatley, it would be "illogical to believe that defense counsel would not have used" the evidence at trial if he in fact had access to it.

{¶ 16} Whatley's argument is purely speculative. There is no evidentiary basis to conclude that the police reports and any additional evidence in those reports were suppressed by the State in this particular case. Because Whatley's entire appellate argument rests on his argument that he demonstrated the suppression of evidence as the basis of both his belated petition for postconviction relief and his motion for leave to file a motion for new trial, we must affirm. Whatley has not identified any evidence other than his self-serving, speculative assumptions that the State withheld any evidence at the time of his trial.

{¶ 17} In order to be entitled to relief, Whatley was required to demonstrate that he was unavoidably prevented from timely discovering the information contained in the investigative file Whatley recently obtained. It was for this reason the trial court thoroughly addressed this issue. In this appeal, however, Whatley has not presented any arguments demonstrating error with the trial court's conclusion on this point. His sole claim is focused on the suppression issue alone. There is no relief that can be offered without this panel impermissibly providing arguments and authority on behalf of Whatley. *See* App.R. 16(A)(7); *State v. Quarterman*, 2014-Ohio-4034, ¶ 19.

{¶ 18} The trial court lacked jurisdiction to consider the petition for postconviction relief based on Whatley's failure to present evidence that the State suppressed any information contained in the police reports Whatley belatedly obtained. That conclusion also supports the trial court's decision denying Whatley's motion for leave to file a motion for new trial. Any motion for new trial based on the

alleged *Brady* violation would be futile at this point in light of the foregoing conclusion that Whatley's *Brady* claim is wholly speculative. *See Bethel* at ¶ 59.

{¶ 19} The decisions of the trial court are affirmed.

It is ordered that appellee recover from appellant 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 common pleas court 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.

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SEAN C. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
WILLIAM A. KLATT, J.,* CONCUR

(*Sitting by assignment: William A. Klatt, J., retired, of the Tenth District Court of Appeals.)