[Cite as *State v. Reid*, 2021-Ohio-1523.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28954
	:	
v.	:	Trial Court Case No. 2001-CR-1371
	:	
TYRONE REID	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 30th day of April, 2021.

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DONOVAN, J.

{¶ 1} Tyrone Reid appeals from an order of the Montgomery County Court of Common Pleas, which overruled his pro se "Motion to Reinstate the Defendant's Motion for Leave to File Motion for New Trial." The trial court essentially treated the motion as a successive petition for postconviction relief, and it found that the evidence on which Reid relied was not newly discovered evidence. We affirm the judgment of the trial court.

{¶ 2} Reid has filed numerous postconviction motions in the trial court, including a May 2011 motion for leave to file a delayed motion for a new trial, a June 2011 motion for a new trial and resentencing based upon a void judgment, and a November 2011 motion to dismiss the indictment based upon the destruction of material, exculpatory evidence. We addressed these prior motions and affirmed the trial court's rulings on these motions in *State v. Reid*, 2d Dist. Montgomery No. 24987, 2012-Ohio-5316, ¶ 5-8. In that case, we stated:

> In 2002, a jury found Reid guilty of the 2001 murder of Cedron Brown, the accompanying gun specification, and for having a weapon under disability. He was acquitted of the felony murder of William Thomas and aggravated robbery. *See State v. Reid,* 2d Dist. Montgomery No. 19729, 2003-Ohio-6079, ¶ 1; *State v. Reid,* 2d Dist. Montgomery Nos. 21499, 21573, 2007-Ohio-2427, ¶ 13; *State v. Reid,* 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, ¶ 2.
>
> The jury heard testimony that on March 25, 2001, Billy Thomas, Cedron Brown, Jabree Yates, and Reid were at a residence located at 523 Delaware Avenue in the City of Dayton. Brown and Yates were in the drug trade and sold drugs from this residence. Yates testified that he fell asleep

and woke to the sound of a gun shot. According to him, Brown had been shot and Reid was holding the gun. Reid and Thomas then "rushed" Yates ordering him to give them his money, which he did. Reid gave Thomas the gun and then left the residence. Yates and Thomas then fought over the gun, which resulted in Yates disarming Thomas. Yates testified that at that point Reid was attempting to re-enter the residence through a window and that Reid was armed with a shotgun. Yates shot at Reid and Reid disappeared through the window. Thomas then tried to exit the residence through a window, and Yates shot at him. Both Thomas and Brown died from gun shot wounds. *See generally State v. Reid,* 2d Dist. Montgomery No. 19729, 2003-Ohio-6079, ¶ 2-14.

Reid received an aggregate sentence of 18 years to life for his convictions. He appealed his conviction * * *, which was affirmed by this court. *Reid,* 2d Dist. Montgomery No. 19729, 2003-Ohio-6079.

Since that appeal, Reid has filed numerous unsuccessful motions, post-conviction actions and appeals in an effort to undo his conviction.

{¶ 3} On May 7, 2019, Reid filed a petition to vacate or set aside his conviction based on newly discovered evidence that was outside the record. He requested an evidentiary hearing. Reid argued that the Dayton Police Department ("DPD") had misrepresented its records retention policy and that the State had failed to turn over 911 recordings related to the shooting, in violation of his due process rights and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1953). The trial court dismissed the petition based upon the doctrine of res judicata, finding that "the matter of the missing

911 call(s) has been litigated previously in post-conviction proceedings." Reid appealed, and this Court dismissed his appeal for failure to timely file a notice of appeal. *State v. Reid,* 2d Dist. Montgomery No. 28477 (Decision & Final Judgment Entry, Aug. 26, 2019).

{¶ 4} On July 8, 2019, Reid filed a "Motion to Expand the Record" to include certain juvenile court records. On July 18, 2019, he filed a motion for leave to have certain witnesses declared unavailable and a motion for leave to file a motion for new trial, the latter of which is the subject of this appeal.

{¶ 5} In his motion for leave to file a motion for new trial, Reid asserted that he had been unavoidably prevented from discovering that the State violated his rights to due process when it withheld material, exculpatory evidence, namely "the exact location of, and the detailed account of the impounding of, the station wagon" driven by William Thomas and Reid. He claimed that he was prejudiced by not having been given this information. Reid asserted that he had since "received the authenticated Dayton Police Department's police report" prepared on March 6, 2019, which indicated that the vehicle had been located and impounded for processing, but the State had "represented that the vehicle never existed and that Reid was lying about it."

{¶ 6} Reid further asserted that the State had mislead him and the court by claiming that no 911 recordings existed in the course of discovery. He argued that the attached police report reflected that the 911 recordings were in the possession of the Dayton Police Department (DPD), and "by extension, the State of Ohio." Reid asserted that DPD's retention policy for 911 recordings was 10 years, not 60 days as represented by the State. He also argued that the existence and the destruction of the 911 recording of the call made by him "was extremely prejudicial" and materially affected his substantial

rights because the 911 call made by Reid "establishe[d] the fact that the State intentionally suppressed the call, and it prevented [Reid] from having a full defense." According to Reid, the evidence was material in that it showed he had reported the shooting, which supported his claim that he was "a target and victim."

{¶ 7} Reid also argued that another 911 call from Nettie Spidell showed "that an eye witness described the State's key witness Jabree Yates as the actual gunman." Reid asserted that he was entitled to the 911 calls prior to his mandatory bind-over hearing, which occurred on April 24, 2001, 29 days after the homicide, and which was "well within even the 60-day retention policy used by the State as an excuse for why it never provided the defendant with this evidence."

{¶ 8} Finally, Reid asserted that he was "unavoidably prevented" from discovering his counsel's deficient performance, namely, counsel's failure to conduct a proper and adequate investigation, failure to secure the 911 tape recordings that were in the possession of the State, and failure to secure the "exculpatory evidence concerning the station wagon driven by * * * William Thomas" and Reid. Reid argued that he went to trial with none of this evidence in violation of his substantial rights. Reid asserted that defense counsel also failed to interview certain witnesses who could have either identified Jabree Yates as the shooter or described him to the police in such a way that it would have been clear that Reid was not the gunman. Reid attached highlighted transcript pages, a "Detective Investigatory Product," portions of police reports, a DPD "Schedule of Records Retention and Disposition," and his own affidavit attesting to his innocence.

{¶ 9} On July 30, 2019, the trial court overruled Reid's motion to expand the record and for leave to file a motion for a new trial. The court noted that, on June 11, 2019, it

had dismissed Reid's petition to vacate his conviction based upon newly discovered evidence, and Reid had appealed that order on July 23, 2019 (Montgomery App. No. 28477).[1] Thus, in the trial court's view, it did not have jurisdiction "to entertain any motions and/or petitions that are within the ambit of the Appellate Court's jurisdiction," including Reid's then-pending motions, because any rulings it made could "create the potential" for rulings inconsistent within the appellate court and because the trial court lacked jurisdiction to consider such motions while an appeal was pending. (We dismissed the appeal in Case No. 28477 in August 2019, and the Supreme Court declined to accept jurisdiction of the matter in Case No. 2018-1418 in January 2020.)

{¶ 10} Reid filed his motion to reinstate his motion for leave to file a motion for new trial based on evidence outside the record in the trial court on September 9, 2020. The motion noted that Reid's motion for leave to file a motion for new trial had previously been "put on hold" by the trial court due to pending appeals and that, during the intervening period, the Ohio Supreme Court had also issued an order tolling time requirements due to the Covid-19 pandemic.

{¶ 11} The trial court overruled Reid's motion on October 14, 2020. It stated:

> Defendant has filed many motions for post conviction relief since he was convicted in January of 2003. He has pursued five (5) appeals. His conviction has been upheld. He has a motion for new

[1] In its June 11, 2019 order, the trial court found that the only evidence outside the record that had arguably been newly discovered was Exhibit B, the DPD retention schedule, but this exhibit did not constitute newly discovered evidence. The court also found that matter of "the missing 911 call(s)" previously had been litigated in postconviction proceedings. Thus, the court dismissed the petition based on res judicata.

trial on the same grounds that he is asserting here.

This is a successive petition and the exceptions do not apply. The petition cannot be entertained. The motion is also barred by virtue of the doctrine of res judicata. * * *

{¶ 12} Reid asserts seven assignments of error on appeal:

APPELLANT WAS UNAVOIDABLY PREVENTED FROM DISCOVERING THE STATE VIOLATED BRADY V. MARYLAND, JUV.R. 24 AND THE OHIO SUPREME COURT HOLDINGS OF STATE V. IACONA AND IN RE D.M. WHEN IN 2019, THE DAYTON POLICE DEPARTMENT PROVIDED AN AUTHENTICATED POLICE REPORT THAT SHOWS THE VEHICLE THAT WAS SO CRUCIAL TO APPELLANT'S DEFENSE, WHICH THE STATE AND ITS WITNESS DET. BURKE CLAIMED NEVER EXISTED, WAS IN FACT IN POLICE CUSTODY THE ENTIRE TIME. THIS SUPPRESSION ALSO MISLED THE JURY.

BASED UPON NEWLY DISCOVERED EVIDENCE, PROVIDED BY THE CITY OF DAYTON, A POLITICAL SUBDIVISION AND THE DAYTON POLICE DEPARTMENT IN 2019, THE STATE VIOLATED JUV.R. 24 AND BRADY V. MARYLAND WHEN IT DESTROYED MULTIPLE 911 TAPE RECORDINGS MADE BY THE APPELLANT, EYEWITNESS NETTIE SPIDELL ETC. AND USED A 'FALSE RETENTION POLICY' TO COVER-UP ITS EVIDENCE.

BASED ON NEWLY DISCOVERED EVIDENCE PROVIDED BY THE CITY OF DAYTON, AND FIRSTHAND OBSERVATIONS OF

OFFICER LOCKE, THE MULTIPLE 911 RECORDINGS AND THE STATION WAGON DRIVEN BY WILLIAM THOMAS WAS "MATERIAL" AND THEIR EXCULPATORY VALUE WAS APPARENT BEFORE ITS DESTRUCTION.

BASED UPON NEWLY DISCOVERED EVIDENCE PROVIDED BY THE CITY OF DAYTON, AND THE DAYTON POLICE DEPARTMENT, THE STATE DID ACT IN "BAD FAITH" WHEN IT CHOSE TO PRESERVE ITS WITNESS DAMIAN ADAMS' 911 RECORDING BUT DESTROYED THE APPELLANT'S NETTIE SPIDELL ET AL. AS A RESULT A FUNDAMENTAL MISCARRIAGE OF JUSTICE ENSUED DENYING APPELLANT'S GUARANTEED RIGHT TO DUE PROCESS AND A FAIR TRIAL.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A HEARING ON APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL WHEN THE NEW EVIDENCE SHOWS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE, INTERVIEW AND SUBPOENA AS DEFENSE WITNESSES THE EYEWITNESSES TO THIS SHOOTING: JARON RUSSELL, RICKY RAKESTRAW AND NETTIE SPIDELL, WHO TOLD DETECTIVES THEY COULD IDENTIFY JABREE YATES AS THE GUNMAN. THIS WAS A VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION.

THE APPELLANT WAS UNAVOIDABLY PREVENTED FROM

DISCOVERING THAT COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION UNTIL THE CITY OF DAYTON * * * AND THE DAYTON POLICE DEPARTMENT IN 2019 PROVIDED NEWLY DISCOVERED EVIDENCE THAT SHOWS COUNSEL FAILED TO MAKE A REASONABLE INVESTIGATION INTO THE WHEREABOUTS OF EXCULPATORY EVIDENCE IN THE POSSESSION OF THE STATE.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A HEARING ON APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL, WHEN THE RECORD AND CIRCUMSTANCES SUPPORT APPELLANT'S CLAIM THAT HE WAS UNAVOIDABLY PREVENTED FROM DISCOVERING THE EVIDENCE AT ISSUE THAT WAS ONLY COMPILED IN MARCH 2019, AND THE EVIDENCE IN QUESTION IS NEW WITHIN THE CONTEXT OF SOUTER V. JONES, 395 F.3D 577, 596 (6TH CIR. 2005).

{¶ 13} Reid attached to his brief police reports (Exhibits A and D); a DPD "Schedule of Records Retention and Disposition" (Exhibit B); a DPD "Incident Info Display" (Exhibit C); and a "Detective Investigatory Product" that lists "Citizen Information" for witnesses Damien Adams, Robert Essex, Ricky Rakestraw, Jaron Russell, M. Saylor, and Resoyna Spidell (Exhibit E). The following are also attached without any exhibit designation: multiple undated pages from transcripts; Reid's June 11, 2001 motion for disclosure of exculpatory evidence, the State's May 2, 2011 memorandum contra Reid's

"Motion for Determination Under R.C. 149.43(B)(8)," and the trial court's decision overruling Reid's "Motion for Request for Justiciable Claim Finding for Public Records Pursuant to R.C. 149.43(B)(8)."[2]

{¶ 14} The State responds that the trial court did not err in finding that Reid's motion was a successive petition for postconviction relief for which no exception applied and that the motion was also barred by res judicata. The State argues that Reid was not unavoidably prevented from filing a timely motion for a new trial. The State also asserts that the "majority of the evidence" that Reid attached to his brief and/or to his motion for leave to file a motion for a new trial had either been given to him in preparation for trial or "had been attached to one of the numerous motions he filed with the trial court and this Court following his conviction."

{¶ 15} The State asserts that, although Reid claims that the police reports were compiled in March 2019 and accordingly were newly discovered evidence, further review shows "that these were the police reports that were completed on or around March 26, 2001" and would have been available to Reid during discovery and trial preparation. The State notes that Reid's discovery request attached to his brief contained a request for police reports. The State also asserts that motions filed by Reid on June 20, 2005 and July 14, 2005, included "the same or substantially similar" police reports from March 2001

[2] We note that on January 29, 2021, the State filed a motion to strike Reid's exhibits, asserting that "none of these documents were attached to the motion that Reid is currently appealing," namely his motion to reinstate. Reid opposed the motion to strike, and on February 23, 2021, this Court issued a decision acknowledging that "the exhibits were all at some point filed in the underlying case or otherwise part of the record. Thus, the materials would not be 'new evidence' impermissibly added to the record. However, to the extent that any particular exhibit was not part of the record of the underlying case, it will not be considered."

and "incident info display," and that Reid made "nearly the same or similar arguments that he does in his current brief, 15.5 years later." The State notes that in his July 18, 2019 motion to have witnesses declared unavailable, Reid also admitted that he made " 'numerous' attempts to locate" Nettie Spidell to no avail, "so Reid's assertion that her 911 call would be exculpatory is a bare bones assertion."

{¶ 16} The State asserts that "the issue of missing 911 calls and tapes was discussed at pretrial hearings, as well as at trial and in post-conviction pleadings, as seen in the documents attached to Reid's brief." In a footnote, the State notes that the police report reflected that, when police spoke to Nettie Spidell, she "had no information." According to the State, the fact that Reid did not have the DPD's retention policy at the time of trial "does not negate the fact that Reid had knowledge that there may have been missing 911 tapes prior to trial."

{¶ 17} Regarding Reid's ineffective assistance argument, the State asserts that he "was not unavoidably prevented from discovering what he believes to be ineffective assistance of counsel or that he was denied a fair trial," in that all "of Reid's claims in this appeal arise from events occurring during the course of his trial."

{¶ 18} More importantly, the State asserts that Reid's claims were not brought within a reasonable time, and that his documents did not support his claim that he was unavoidably prevented from timely discovering the evidence, which was clearly available to him during the time of trial preparation; it directs our attention to *State v. Reid*, 2d Dist. Montgomery No. 24987, 2012-Ohio-5316. The State asserts that the trial court did not abuse its discretion by not holding an evidentiary hearing or in overruling Reid's motion because Reid had "not demonstrated by clear and convincing evidence that he was

unavoidably prevented from timely filing the motion for a new trial." The State also argues that, even if Reid's motion were construed as a petition for postconviction relief, it failed for the same reasons and was a successive petition to which none of the exceptions in R.C. 2953.23(A) applied. According to the State, Reid failed to satisfy the first preliminary showing under R.C. 2953.23(A)(1), and therefore the trial court lacked jurisdiction to consider the petition.

{¶ 19} Finally, the State asserts that Reid's motion was barred by res judicata, since all of his assertions dealt with issues that arose at the time of trial and the information Reid claimed to be newly discovered evidence was not, in fact, new evidence. Further, because all the issues arose at trial or during trial preparation, these claims could have and should have been raised on direct appeal.

{¶ 20} In reply, regarding his numerous filings over the years, Reid asserts that the issues he has raised have never been deemed frivolous, they were just procedurally barred in prior proceedings "for one reason or another," as might be expected with a pro se "juvenile appellant-litigant." Reid asserts that the "authenticated police reports are the only documents in existence that can show that the State withheld evidence" that the vehicle not only existed but was in the State's possession "the entire time it was misleading the jury." He asserts that his exhibits were authenticated and met the requirements of Evid.R. 901(A) and (b)(7). He argues that the authenticated police reports, firsthand observations made by members of the DPD, and the 2001 DPD record retention policy show "that there is no way 911 tapes involving a double homicide were to be destroyed before 10 years had passed" and that the claims raised by Reid are not baseless.

{¶ 21} Reid asserts his innocence and asks this Court to remand this case for a hearing to ascertain how "so much evidence in the State's possession could be withheld, or destroyed," how trial counsel could have failed to call eyewitnesses to the crime who said that Jabree Yates that was the shooter, rather than Reid, why the State denied that there were any 911 tapes for 12 years but then confessed having possessed but destroyed multiple tapes "except the one that served their purpose." He asserts that the trial court abused its discretion when it failed to conduct a hearing on his motion for leave to file a motion for a new trial.

{¶ 22} While the trial court characterized Reid's motion as a successive petition for post-conviction relief, the caption of his motion makes clear that he sought reinstatement of his motion for leave to file a motion for a new trial.

{¶ 23} As this Court has noted:

> Generally, "[a] reviewing court will not disturb a trial court's decision granting or denying a Crim.R. 33 motion for new trial absent an abuse of discretion." (Citation omitted.) *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 82. However, the Supreme Court of Ohio has indicated that a trial court's ruling on a motion for new trial claiming a *Brady* violation should be reviewed using "a due process analysis rather than an abuse of discretion test because the issue on review concern[s] [the defendant's] due process right to a fair trial, namely the suppression by the prosecution of evidence favorable to [the defendant]." *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). *Accord State v. Oldaker,* 4th Dist. Meigs No. 16CA3, 2017-Ohio-1201, ¶ 19; *State v. Webb*, 12th Dist.

Clermont No. CA2014-01-013, 2014-Ohio-2894, ¶ 16; *State v. Keith*, 192 Ohio App.3d 231, 2011-Ohio-407, 948 N.E.2d 976, ¶ 41 (3d Dist.); *State v. Hoffman*, 11th Dist. Lake No. 2001-L-022, 2002-Ohio-6576, ¶ 19.

Based on this precedent, we review de novo a trial court's ruling on a motion for new trial alleging a *Brady* violation, as the relevant inquiry is whether due process was violated by the prosecutor's failure to disclose evidence. *State v. Moore*, 3d Dist. Union No. 14-08-43, 2009-Ohio-2106, ¶ 19; *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 35 (8th Dist.); *United States v. Bullock*, 130 Fed.Appx. 706, 722 (6th Cir.2005), citing *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir.1991) ("[t]he standard of review for the materiality of a purported *Brady* violation is *de novo* because it presents a mixed question of law and fact").

* * *

Pursuant to the United States Supreme Court's decision in *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. Therefore, in order to establish a due process violation under *Brady*, the defendant must demonstrate that: "(1) the prosecution failed to disclose evidence upon request; (2) the evidence was favorable to the defendant; and (3) the evidence was material." *State v. Goney*, 2d Dist. Greene No. 2017-CA-43, 2018-Ohio-2115, ¶ 66; *Moore v. Illinois*, 408 U.S. 786, 794-

795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

Because exculpatory and impeachment evidence are favorable to the defendant, both types of evidence may be the subject of a *Brady* violation, so long as the evidence is material. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "Evidence is considered material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *State v. Royster*, 2d Dist. Montgomery No. 26378, 2015-Ohio-625, ¶ 16, quoting *Bagley* at 682. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley* at 682.

"As a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 49. "The United States Supreme Court has rejected a standard of materiality that focuses 'on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence.' " *Id.*, quoting *United States v. Agurs*, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), fn. 20.

Furthermore, no *Brady* violation occurs when the undisclosed evidence is cumulative to evidence already known by the defense at the time of trial. *See State v. Cook*, 1st Dist. Hamilton No. C-950090, 1995 WL 763671, *3 (Dec. 29, 1995). There is also no *Brady* violation "if the

> evidence that was allegedly withheld is merely cumulative to evidence presented at trial." (Citations omitted.) *State v. Bonilla*, 2d Dist. Greene No. 2008 CA 68, 2009-Ohio-4784, ¶ 26.

State v. Smith, 2d Dist. Montgomery No. 27853, 2018-Ohio-4691, ¶ 24-29.

{¶ 24} By way of background, we initially note that on April 13, 2012, this Court addressed Reid's appeal "from a final order that denied his motion filed pursuant to R.C. 149.43(B)(8) requesting the trial court to find that he is seeking information subject to release as a public record and that the information sought is necessary to support what appears to be a justiciable claim." *Reid*, 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, ¶ 1. Reid asked "the trial court to find that certain records, including all 911 calls made to Dayton police concerning his offense and records concerning a particular vehicle contained in Dayton police impound logs, are public records and are necessary to support what appears to be a justiciable claim by Defendant." *Id*. at ¶ 3.

{¶ 25} Reid argued that the trial court abused its discretion in not finding that the records he sought were necessary to support a justiciable claim. He also argued that the State had "admitted suppressing the recording of a 911 call made by Nettie Spidell." *Id*. at ¶ 7. Addressing these arguments, this Court concluded as follows:

> * * * Since his conviction, [Reid] has filed numerous motions, post-conviction actions and appeals. [Reid] has exhausted his available remedies and his conviction has become final. As a result, any claim for relief [Reid] might present is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims barred by res judicata are not justiciable.

While res judicata would not bar a post-appeal motion for a new trial based upon newly discovered evidence, *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, the information [Reid] seeks regarding recorded 911 calls to police and the vehicle police impounded is not newly discovered, because it was either provided to defense counsel at trial or referenced in police reports provided to defense counsel at trial. See: Trial Court's Decision of August 6, 2007, overruling [Reid's] motion for expert assistance[3]; Trial Court's Decision of May 4, 2011, overruling [Reid's] motion for a finding of a justiciable claim to support disclosure of public records.

With respect to the 911 calls police received after the shooting that led to the deaths of Cedron Brown and William Thomas, [Reid] claims that the police report he attached to his motion demonstrates that the State destroyed or suppressed a recorded 911 call made by Nettie Spidell. The trial court found that no such thing is demonstrated because the record demonstrates that, prior to trial, Defendant was provided with all tape recorded 911 calls Dayton police had. See: Trial Court's August 6, 2007 Decision overruling [Reid's] motion for expert assistance. Furthermore, the failure to preserve all of the 911 calls is hardly sinister, because typically tapes of 911 calls are recycled pursuant to Dayton Police Department policy

[3] The trial court's decision stated: "It seems [Reid] disagrees as a factual matter with determinations that were made but all these issues were before the Courts and this is not a situation of new or undiscovered evidence. It is not a scenario involving exculpatory evidence that [Reid] was prevented from discovering either by malfeasance or nonfeasance from a substantive point of view."

> after sixty days. *Id.* More importantly, there is no evidence that whatever Ms. Spidell may have said when she called 911 would have exonerated [Reid] or aided his defense. Therefore, [Reid] has not shown that the recordings of the 911 calls he seeks, if they exist, are necessary to support a justiciable claim. [Reid] has failed to satisfy his statutory duty under R.C. 149.43(B)(8). * * *
>
> With respect to [Reid's] request that the trial court find that the records concerning a particular motor vehicle, which [Reid] believes are located in Dayton police impound logs, are necessary to support a justiciable claim, [Reid] has likewise failed to show how these records, if they exist, would aid his defense and support a justiciable claim.
>
> Because [Reid] has not demonstrated that he has a justiciable claim or that the public records he seeks are necessary to support that claim, the trial court did not abuse its discretion when it overruled [Reid's] motion seeking a justiciable claim finding pursuant to R.C. 149.43(B)(8).

(Footnote added.) *Reid,* 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, at ¶ 9-13.

{¶ 26} We further note that, on November 13, 2012, this Court addressed in part Reid's appeal from the trial court's decision denying his motion for leave to file a delayed motion for a new trial and his motion to dismiss the indictment based upon destruction of material exculpatory evidence. *Reid*, 2d Dist. Montgomery No. 24987, 2012-Ohio-5316. We described the motions as "based on the alleged recent discovery that recordings of 911 calls that came in on the night of the crime were destroyed prior to trial," *id*. at ¶ 2, and we stated that the issue before this court on appeal was whether the evidence was

newly discovered and warranted a new trial. *Id*. We concluded that Reid's arguments lacked merit. Regarding the recordings of the 911 calls, we found that this issue had previously been before this court at least once, and we had concluded that, prior to trial, Reid had been fully aware that the recordings of the 911 calls were destroyed. "Thus, this is not newly discovered evidence." *Id*. at ¶ 4.

{¶ 27} This Court further determined:

> * * * The record reveals that, on the night of the crimes, witnesses called 911. Reid alleges that he made one of these calls and that he told the 911 operator that Yates was shooting at him and his friend, Thomas. Reid claims that these tapes were destroyed, he was not informed of their existence, and the jury never got to hear the recordings of the 911 calls, which could possibly, in his opinion, cast doubt on whether he killed Brown.
>
> * * *
>
> Clearly, the new trial motion filed approximately nine years after the jury's verdict does not meet the time requirements in Crim.R. 33(B). Therefore, Reid was required to show by clear and convincing evidence that either he was unavoidably prevented from filing his motion for a new trial based on prosecutorial misconduct within 14 days of the jury verdict or that he was unavoidably prevented from discovering the new evidence within 120 days of the verdict.
>
> Reid cannot meet either standard because the destruction of the recordings of the 911 calls was disclosed prior to the 2002 trial and he was not unavoidably prevented from discovering the tapes or the destruction of

> the tapes. In 2006, Reid filed a delayed petition for post-conviction relief. *Reid,* 2d Dist. Montgomery Nos. 21499, 21573, 2007-Ohio-2427. The petition claimed that Reid was unavoidably prevented from discovering prosecutorial misconduct that occurred when the recording of his 911 call that he made from Geraldine Jones' residence after the shooting was destroyed. The trial court found no merit with that position and denied the petition. We affirmed that decision and explained that if the recording existed, Reid had the ability to discover the recording and the prosecutorial misconduct at the time of trial. *Id.* at ¶ 26. Reid claims he spoke to the 911 operator. Thus, he would know of the existence of his own phone call and it was within his ability to discover what happened to that recording.

{¶ 28} This Court further noted our decision in *State v. Reid,* 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, and concluded that our prior opinions had indicated "that [Reid] was not unavoidably prevented from discovering this information and in fact had this information prior to trial. Consequently, he cannot meet the requirements for filing an untimely motion for a new trial." *Reid,* 2d Dist. Montgomery No. 24987, 2012-Ohio-5316, ¶ 14.

{¶ 29} The same is true of the motion Reid sought to have reinstated in the more recent trial court proceedings. Pursuant to a due process analysis, we cannot conclude that Reid was denied due process or that the State failed to disclose material evidence favorable to him. As previously (and repeatedly) noted, at the time of trial, Reid was aware of the 911 recordings and of the existence of the vehicle which he claims to have driven around the time of the incident. As this Court noted above, "the information

Defendant seeks regarding recorded 911 calls to police and the vehicle police impounded is not newly discovered, because it was either provided to defense counsel at trial or referenced in police reports provided to defense counsel at trial." *Reid*, 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, ¶ 10. Since the evidence upon which Reid relies was not newly discovered, his motion was barred of res judicata.[4] For the foregoing reasons, Reid was not entitled to a hearing on his motion. In other words, the trial court properly overruled Reid's motion to reinstate his motion for leave to file a motion for a new trial.

{¶ 30} Reid's assigned errors are overruled.

{¶ 31} The judgment of the trial court is affirmed.

. . . . . .

TUCKER, P.J. and WELBAUM, J., concur.

Copies sent to:

Mathias H. Heck, Jr.
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Tyrone Reid
Hon. Timothy N. O'Connell

[4] "The doctrine of res judicata bars a criminal defendant from raising and litigating in any proceedings any defense or claimed lack of due process that was raised or could have been raised on direct appeal from the conviction. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 94, 671 N.E.2d 233, 1996-Ohio-337, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 177, 226 N.E.2d 104; *State v. Murnahan* (1992), 63 Ohio St.3d 60, 62, 584 N.E.2d 1204. Res judicata applies to the litigation of any post conviction issues which were or could have been litigated on direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169." *State v. Young*, 2d Dist. Montgomery No. 20813, 2005-Ohio-5584, ¶ 8.