[Cite as *State v. Boaston*, 2021-Ohio-360.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-17-1278

Appellee — Trial Court No. CR0201401647

v.

Ronald Boaston — **DECISION AND JUDGMENT**

Appellant — Decided: January 29, 2021

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen P. Hanudel, for appellant.

* * * * *

MAYLE, J.

{¶ 1} Appellant, Ronald Boaston, appeals the October 16, 2017 judgment of the Lucas County Court of Common Pleas denying his petition for postconviction relief and request for funds to hire court-appointed experts. For the following reasons, we affirm.

I. Background and Facts

{¶ 2} In 2015, Boaston was convicted of murdering his ex-wife, Brandi Gonyer-Boaston. On appeal, he argued, among other things, that the trial court erred in (1) allowing the deputy coroner who conducted the autopsy, Dr. Diane Scala-Barnett, to testify regarding Brandi's time of death based on her stomach contents (the "time-of-death opinion") and that an abrasion on Brandi's chin was consistent with the pattern, shape, and texture of a buckle and some Velcro on one of Boaston's gloves (the "glove-buckle opinion") because these opinions were not in Dr. Scala-Barnett's written expert report, as required by Crim.R. 16(K), and (2) permitting a Toledo Police Department detective, Jay Gast, to testify regarding cellphone tower tracking without establishing the scientific validity of such evidence. *See State v. Boaston*, 2017-Ohio-8770, 100 N.E.3d 1002 (6th Dist.). We determined that (1) Boaston waived the Crim.R. 16(K) issue by failing to raise it before trial because defense counsel knew that Dr. Scala-Barnett planned to testify about Brandi's time of death based on her stomach contents and to opine on the similarity of the abrasion and the glove buckle, but did not move to exclude Dr. Scala-Barnett's testimony until after the jury was empaneled; (2) Boaston did not raise concerns about the validity of the cellphone tower tracking evidence at trial, so he waived all but plain error regarding that issue; and (3) it was not plain error for the trial court to accept testimony about cellphone tower tracking from a detective without conducting a hearing regarding the testimony's scientific reliability. *Id.* at ¶ 49, 56, 62, 65-66.

{¶ 3} Boaston appealed to the Supreme Court of Ohio, which accepted his appeal on the Crim.R. 16(K) issue and affirmed his conviction, albeit on different grounds. *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44. The court determined that Crim.R. 16(K) *required* the exclusion of Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion because they were not included in her written report, and that the trial court erred in allowing her to testify regarding these matters. *Id.* at ¶ 55-59. However, the court also concluded that the error was harmless because Dr. Scala-Barnett's opinions were "not essential to the state's prosecution of the charged crimes" and "did little more than connect dots that were all too readily apparent." *Id.* at ¶ 64. Moreover, the court found that "even without the deputy coroner's opinion testimony on Brandi's time of death and the glove-buckle comparison, the remaining evidence overwhelmingly establishes Boaston's guilt beyond any reasonable doubt." *Id.* at ¶ 65. The court cataloged the record evidence of Boaston's jealousy, controlling behavior, installation of spyware on Brandi's phones, his "tumultuous" relationship with Brandi, his refusal to accept Brandi's clear desire to leave the relationship and move out of their shared apartment, the steps he took in preparation of Brandi's murder (including making ATM withdrawals, putting gas in her vehicle, asking a friend for "assistance 'to take care of business,'" and calling Brandi the morning of the murder to make sure that she came to the apartment when she got off of work), and the lack of activity on Boaston's cellphone during the timeframe when Brandi was likely murdered and transported to Fulton County. *Id.* at ¶ 66-68.

{¶ 4} On the whole, the Supreme Court said that

> [i]t strains credulity to think that in the span of 46 minutes, Brandi left [Boaston's] residence, was abducted by an unidentified assailant who partially undressed and killed her, wrapped her in plastic, stashed her body along with her dry clothing and shoes in the rear of her vehicle, drove the SUV 20 miles away, abandoned it off the country road, and mysteriously disappeared without a trace. *Id.* at ¶ 69.

Because all of this evidence established Boaston's guilt "beyond any reasonable doubt," the court found that he was not entitled to a new trial, despite the erroneous admission of Dr. Scala-Barnett's opinions. *Id.* at ¶ 70.

{¶ 5} The Supreme Court did not address the issue of Gast's opinion on cell tower tracking data.

{¶ 6} While his direct appeal was pending, Boaston filed the petition for postconviction relief underlying this appeal. In it, he raised three grounds for relief.

{¶ 7} First, Boaston claimed that the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose material evidence favorable to him when it presented Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion without Dr. Scala-Barnett including those opinions in her written report, as required by Crim.R. 16(K). He argued that his defense was prejudiced because it was "impossible" for any expert hired by trial counsel "to conduct a true expert analysis consisting of a scientific reasoning process * * *" without knowing what Dr.

Scala-Barnett's "reasoning process" was. He claimed that this resulted in him being "ambushed in trial," and that due process required that he be given an opportunity in a postconviction relief proceeding to have an expert pathologist review Dr. Scala-Barnett's conclusions.

{¶ 8} In support of this claim for relief, Boaston submitted the affidavit of his appellate attorney, Stephen Hanudel, who also represents Boaston in the postconviction relief proceedings. Hanudel averred that, based on his research, Dr. Scala-Barnett's "conclusion as to Ms. Gonyer-Boaston's time of death based on the stomach contents may have lacked sufficient scientific basis and needs independent expert evaluation." In reaching this conclusion, Hanudel spoke to four forensic pathologists.

{¶ 9} One forensic pathologist told him that "the science behind using stomach contents to determine time of death is disputed and controversial within the medical and scientific community[,]" but "did not express his personal position on the issue [and] was very careful to not come across as expressing any point of view that would indicate how he would feel about Dr. [Scala-]Barnett's conclusion, especially since he has not viewed the autopsy materials."

{¶ 10} The second "quickly expressed the willingness to evaluate Dr. [Scala-]Barnett's conclusion[, but] did not specifically state his position on the issue." Hanudel's "personal interpretation of his quick willingness to help as soon as I told him the issue was that the science is disputed and controversial."

{¶ 11} The third did not want to be involved in the case because he knows Dr. Scala-Barnett personally, but, because he was not going to be involved, he "talked a little more freely and expressed reservations as to the scientific reliability behind using stomach contents to determine time of death. He seemed to think that the reliability varies from case to case based on the specific facts involved."

{¶ 12} The final pathologist Hanudel spoke to also "expressed reservations about the scientific reliability behind using stomach contents to determine time of death." However, he ultimately "declined to get involved in the case. He seemed very busy with other matters."

{¶ 13} After his conversations with these pathologists, Hanudel was convinced that Dr. Scala-Barnett's "conclusions must be given a second look from an independent expert," and his "impression from all four is that Dr. [Scala-]Barnett may very well be wrong in her conclusion."

{¶ 14} Boaston's second claim for relief in his postconviction relief petition alleged that he received ineffective assistance of counsel because, although trial counsel consulted with experts in forensic pathology and cell tower tracking, he did not use those experts at trial. Boaston argues in his petition that, although trial counsel did not have a written report from Dr. Scala-Barnett that his forensic pathologist could have used to formulate an opinion before trial, trial counsel could have, for example, had the forensic pathologist observe Dr. Scala-Barnett's testimony and then testify in response. Boaston also faults trial counsel for failing to ask for a hearing under *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to get Dr. Scala-Barnett to justify her opinions before being allowed to testify. He argued that "[t]here was absolutely no sound strategy * * *" involved in trial counsel's decision not to call the experts to testify in some capacity, but instead to only cross-examine the state's experts.

{¶ 15} Although he stopped short of directly calling trial counsel ineffective, Hanudel provided more details about trial counsel's alleged ineffectiveness in his affidavit. First, he said that trial counsel consulted with a forensic pathologist, Dr. Thomas Young, who issued a written opinion (about a month before Dr. Scala-Barnett told trial counsel about her time-of-death opinion) that questioned whether Brandi's death was caused by strangulation. Trial counsel then spoke to Dr. Young about Dr. Scala-Barnett's time-of-death opinion. He believed that "there were way too many variables in the digestive process to render a time-of-death conclusion" based on stomach contents, but, according to Hanudel, "it was impossible for Dr. Young to formally express an opinion on the issue" without having a written opinion from Dr. Scala-Barnett that outlined her "scientific reasoning process * * *." Because trial counsel felt that Dr. Young's testimony "would amount to the same type of abstract conjecture as Dr. [Scala-]Barnett's[,]" he opted to rebut Dr. Scala-Barnett's testimony through cross-examination. According to Hanudel, the lack of a written report from Dr. Scala-Barnett had a "direct impact" on trial counsel's decision not to call Dr. Young to testify, and if counsel had been given a report "articulating [Dr. Scala-Barnett's] findings, analysis, and

conclusion * * *" regarding Brandi's time of death, he "would have had Dr. Young review the report and then issue his own report. This then may have resulted in a different decision on whether to have Dr. Young testify, despite Dr. Young's admission to [trial counsel] that he tends not to come across well in testimony."

{¶ 16} Hanudel also averred that trial counsel consulted with Midwest Data Group regarding the cell tower tracking data, but did not receive an opinion letter from Midwest Data Group, so there is nothing in writing that contradicts Gast's trial testimony about "cell tower sector pie slices." However, trial counsel spoke to someone at Midwest Data Group who "felt the cell tower sector pie slices are not perfectly even[,]" but counsel chose not to present the expert at trial because "he did not feel the testimony would be of much assistance to Mr. Boaston since he felt he could sufficiently cover the issues in cross examination [sic]."

{¶ 17} In preparing the postconviction relief petition, Hanudel contacted Larry Daniel who "has testified over 45 times in state and federal courts as a computer technology expert, cellular phone forensics expert, GPS forensics expert, and cellular technology expert." Hanudel gathered from his conversation with Daniel that cell tower sectors do not necessarily create "even pie slices"—which is what Gast testified to at trial, and what the state relied on to show that Boaston was not at home the morning Brandi's body was found, like he said he was, because his phone contacted a different sector of the cell tower near his house. Instead, Daniel told Hanudel that "the science is much more complicated and that sector overlap can often occur[,]" and, essentially, the

fact that Boaston's phone contacted a different side of the cell tower "may not mean what the State thinks it means."

{¶ 18} In his final claim for relief, Boaston argued that the DNA profile from an unknown male that was found on Brandi's pants should be tested because it could reveal the identity of the real killer. In support, he pointed out that the other DNA profile on the pants only showed that it was from a Boaston male and could not be linked to any specific Boaston male—i.e., it could have come from Boaston or one of his sons, who all saw Brandi regularly. He argued that the only other evidence putting Boaston with Brandi at the time she died was "a questionable opinion presented by Dr. [Scala-]Barnett that is not well backed by science." He also points out that there were no signs of foul play in Boaston's apartment, the cellphone tower tracking evidence showed that Boaston was in Toledo at all relevant times, there was no evidence that Boaston was in Fulton County (where Brandi's body was found), there was no DNA on the glove buckle that Dr. Scala-Barnett opined could have caused the abrasion on Brandi's chin, and the fact that Brandi's hair was found in the Velcro on Boaston's glove "means nothing because she and Boaston saw each other every day." He concluded that "[i]t is more than worthwhile to see if the unknown male DNA profile can be matched to anyone, especially in the State's criminal DNA database."

{¶ 19} In his affidavit in support of Boaston's petition, however, Hanudel averred that he had spoken to a forensic scientist at the Ohio Bureau of Criminal Investigation ("BCI") about whether "further testing could be done to determine the origin of the other

male DNA profile" on Brandi's pants. The BCI analyst told him that "based on the nature of the [other male DNA] sample, it was not possible to make any such determination with further testing."

{¶ 20} In addition to these claims for relief, Boaston included a request for court-appointed expert witness fees in his postconviction relief petition. He argued that he needed expert assistance to develop his claims, but that he lacked the funds to hire them. In his affidavit, Hanudel said that he was privately retained by Boaston's family to represent Boaston in postconviction matters, but that the family "simply does not have the funds to provide the up-front retainers the experts require and pay the potential total cost incurred by the experts."

{¶ 21} In response to Boaston's petition, the state filed a "MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT * * *" that also opposed Boaston's requests for additional DNA testing and funds for court-appointed experts. It argued that Boaston's claims for relief were barred by res judicata, his request for further DNA testing was undermined by Hanudel's admission that the BCI analyst told him that the source of the unknown DNA on Brandi's pants could not be determined, and Boaston was not entitled to court-appointed experts.

{¶ 22} Specifically, the state argued that Hanudel's affidavit did not support the petition because (1) it contained hearsay statements from experts, which, the state claimed, were entitled to little weight; (2) it contained extraneous and irrelevant information related to bite mark identification, which was not at issue in Boaston's case;

(3) Hanudel's description of trial counsel's decisions related to the expert witnesses "provide[d] evidence of precisely the strategic calculus that trial attorneys are permitted (and expected) to make * * *"; and (4) it acknowledged that "further testing of the unknown male DNA profile on Brandi's pants would not lead to any determinative result."

{¶ 23} Regardless, even assuming that Hanudel's affidavit did support Boaston's claims, the state argued that all of his claims related to Dr. Scala-Barnett's testimony and Gast's cell tower tracking data testimony were barred by res judicata because these claims were, or could have been, raised in Boaston's direct appeal, and did not fall into the exception to the res judicata bar for cases where the defendant presents new, competent, relevant, and material evidence from outside of the trial record. The state said that the issue of Dr. Scala-Barnett failing to include her time-of-death opinion and glove-buckle opinion in her written report was raised by trial counsel and was "central to his direct appeal." He also argued in his direct appeal that trial counsel was ineffective based on his handling of Dr. Scala-Barnett's trial testimony. The state further contended that Boaston's arguments that testimony about the glove buckle was highly prejudicial and inflammatory were "evidentiary issues that could have been handled on direct appeal, because they are based solely on the record of the trial itself."

{¶ 24} Further, the state argued, Boaston's claims related to Dr. Scala-Barnett's testimony failed on their merits. The state said that Boaston was not prejudiced by the report he received from Dr. Scala-Barnett because "Crim. Rule 16(K) allows some

flexibility in determining what constitutes a report[,]" and Dr. Scala-Barnett's autopsy report that noted the amount and appearance of Brandi's stomach contents and included a picture comparing the glove buckle to the abrasion on her chin fit within the rule's definition of a "report." Beyond that, trial counsel had actual knowledge of Dr. Scala-Barnett's time-of-death opinion because he discussed it with her 19 days before trial and did not seek a continuance to secure expert testimony to counter her opinion.

{¶ 25} Regarding Boaston's claim that the state committed a *Brady* violation by failing to disclose Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion, the state argued that these opinions did not fall within the scope of *Brady* because Boaston failed to show that the state withheld the evidence, Boaston was ignorant of the evidence, or the evidence was material (i.e., reasonably probable to change the outcome of the proceeding) and exculpatory (i.e., favorable to Boaston).

{¶ 26} Next, the state argued that Boaston could not prove that his trial counsel was ineffective because counsel's decision not to call an expert to counter Dr. Scala-Barnett's testimony was strategic, and Dr. Scala-Barnett's time-of-death opinion was not so scientifically questionable that it required a *Daubert* hearing, counsel's decision to rely on cross-examination was a "sensible trial tactic," and Boaston could not show that requesting a *Daubert* hearing would have resulted in the exclusion of Dr. Scala-Barnett's time-of-death opinion or changed the outcome of the trial.

{¶ 27} As to Gast's cell tower testimony, the state argued that Boaston also raised this issue in his direct appeal, so it was barred by res judicata, and that trial counsel's

decision to cross-examine Gast rather than calling an expert to rebut the cell tower testimony was trial strategy, not ineffective assistance.

{¶ 28} Regarding the additional DNA evidence on Brandi's pants, the state argued that Boaston failed to submit his request for additional DNA testing on a separate form, as required by R.C. 2953.73, he was not eligible for retesting under R.C. 2953.72(A)(6) because his DNA was included in the original test results, and he could not show that he either (1) did not have a DNA test taken at the trial stage or (2) did have a DNA test taken at the trial stage, but the test was not definitive and exclusion of his DNA would be outcome determinative, as required by R.C. 2953.74(B).

{¶ 29} Finally, the state argued that Boaston was not entitled to court-appointed experts in a postconviction relief proceeding because the postconviction relief statutes, R.C. 2953.21 to 2953.23, provide the exclusive postconviction remedies to which an offender is entitled, and court appointment of expert witnesses is not one of them.

{¶ 30} Boaston did not file a response to the state's motion.

{¶ 31} On October 16, 2017, without holding a hearing, the trial court issued its decision granting the state's motion to dismiss and denying Boaston's postconviction relief petition and request for appointment of expert witnesses.[1]

[1] Although the trial court's judgment entry says that the state's "Motion to Dismiss/Motion for Summary Judgment is found well-taken and GRANTED[,]" the court's findings of fact and conclusions of law make clear that it dismissed Boaston's petition on its face in accordance with R.C. 2953.21(C), (E), and (G).

{¶ 32} First, the court found that Boaston's postconviction relief petition failed to present any substantive grounds for relief and

> [r]ather than present substantive evidence, demonstrating operative facts that establish grounds for relief, [Boaston] proffered only his postconviction counsel's opinions regarding the evidence admitted at trial and trial counsel's decisions and trial strategy, with "expert" hearsay that offers no actual opinion. Even if the Court treated the hearsay statements as true, therefore, there is no cogent evidence contained within those statements demonstrating any basis for relief.

The court also found that Hanudel's summary of trial counsel's work did not rise to a level "demonstrating a constitutional violation meriting postconviction relief."

{¶ 33} Next, the court agreed with the state that the grounds for relief that Boaston raised in his postconviction relief petition were barred by res judicata. The court noted that Boaston's postconviction relief claims were identical to the claims that he raised in his direct appeal and he was unable to avoid the res judicata bar by bringing to the court's attention evidence dehors the record because he "proffered no new, competent, relevant and material evidence, relying only on hearsay that—even if treated as true statements—provide no evidence of facts demonstrating any substantive grounds for relief."

{¶ 34} Regarding Boaston's claim that the state committed a *Brady* violation by failing to timely disclose Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion in a written expert report, the trial court found that Boaston knew about Dr.

Scala-Barnett's opinions before trial—despite the state's failure to provide a written report—and had "failed to identify evidence that was actually withheld in violation of his constitutional rights * * *." And, even assuming that the late disclosure of Dr. Scala-Barnett's opinions constituted the withholding or suppression of evidence, Boaston failed to show that the evidence was material and exculpatory.

{¶ 35} As to Boaston's claims of ineffective assistance of counsel, the trial court found that he had failed to present sufficient operative facts demonstrating trial counsel's lack of competence and resulting prejudice to Boaston; the facts that Boaston had presented showed that Hanudel disagreed with trial counsel's trial strategy, not that trial counsel provided ineffective assistance. Moreover, Boaston could have argued his ineffective assistance claims in his direct appeal, so they were barred by res judicata.

{¶ 36} The trial court also agreed with the state that Boaston had failed to follow the statutory application procedure in R.C. 2953.72 regarding post-trial DNA testing, so it was not required to entertain his request for additional testing of the unknown male DNA on Brandi's pants. Regardless, Boaston could not show that he met the statutory criteria for post-trial DNA testing in R.C. 2953.73 to 2953.81, so the court was required to deny his request.

{¶ 37} Finally, the court found that Boaston was not entitled to funds for court-appointed experts to assist with his postconviction relief proceedings because the postconviction relief statutes do not permit discovery unless the petition and supporting evidence demonstrate substantive grounds for relief. As the court had already determined

that Boaston's petition and supporting evidence did not demonstrate substantive grounds for relief, he was not entitled to funds to retain experts.

{¶ 38} Boaston now appeals, raising two assignments of error:

1. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION RELIEF PETITION WITHOUT HOLDING AN EVIDENTIARY HEARING.

2. THE TRIAL COURT ERRED BY NOT ALLOWING COURT-APPOINTED EXPERT WITNESS FEES FOR APPELLANT TO HIRE EXPERTS WHO WOULD HAVE HELPED HIM FULLY DEVELOP HIS CLAIM FOR POST-CONVICTION RELIEF.

II. Law and Analysis

A. The postconviction relief statute and standard of review.

{¶ 39} A petition for postconviction relief under R.C. 2953.21 is the exclusive method by which an offender can raise collateral challenges to the validity of his conviction or sentence. R.C. 2953.21(J).[2] The basis for the petition must be "such a denial or infringement of the person's rights as to render the judgment void or voidable

[2] After Boaston filed his petition in February 2017, R.C. 2953.21 was amended to include provisions regarding postconviction discovery in cases where the petitioner was sentenced to death. *See* 2016 Am.Sub.S.B. No. 139, effective April 6, 2017. Although the amendment did not make any substantive changes to the provisions affecting Boaston, it did change the lettering of some of the sections applicable in this case. For clarity, all of our citations to R.C. 2953.21 refer to the prior version of the statute that was in effect when Boaston filed his petition and applies to his case. *See* 2014 Sub.H.B. No. 663.

under the Ohio Constitution or the Constitution of the United States * * *." R.C. 2953.21(A)(1)(a). Under R.C. 2953.21(C), the trial court is required to determine whether the petition presents substantive grounds for relief before granting a hearing. In doing so, the court shall consider the petition and any supporting affidavits and documentary evidence, along with "all the files and records pertaining to the proceedings against the petitioner * * *." *Id.* To be entitled to a hearing, the petitioner must set forth "sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus. The court is required to "proceed to a prompt hearing on the issues * * *" unless the petition and the record show that the petitioner is not entitled to relief. R.C. 2953.21(E). If the trial court does not find grounds for granting relief, it is required to deny the petition. R.C. 2953.21(G).

{¶ 40} The parties dispute the appropriate standard of review. Boaston argues that, because postconviction relief proceedings are civil proceedings collateral to the underlying criminal conviction and the trial court's dismissal of his petition on its face is akin to a dismissal under Civ.R. 12(B)(6), we should review the trial court's decision de novo, as we would a Civ.R. 12(B)(6) dismissal. He claims that our past reliance on *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, for the abuse-of-discretion standard in postconviction relief cases is misplaced—at least in cases where the trial court denies a petition without a hearing—because *Gondor* was decided after the trial court held an evidentiary hearing and "[i]t makes sense that abuse of discretion

would only apply when there has been a hearing so that the appellate court provides deference to the trial court's findings of fact and does not substitute its judgment for that of the trial court after taking testimony and evidence in a hearing." He did not cite to any cases involving postconviction relief petitions to support his argument.

{¶ 41} The state, on the other hand, argues that the Ohio Supreme Court has firmly established that we are to review the trial court's dismissal of a postconviction relief petition on its face for an abuse of discretion. In support of its argument, the state cites to *Calhoun*. In that case—which involved a postconviction relief petition that the trial court denied without a hearing—the Supreme Court held that a trial court reviewing a postconviction relief petition that includes affidavits "should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, *in the sound exercise of discretion*, judge their credibility in determining whether to accept the affidavits as true statements of fact. To hold otherwise would require a hearing for every postconviction relief petition." (Emphasis added.) *Id.* at 284. The court also noted that the postconviction relief statute "clearly calls for discretion in determining whether to grant a hearing * * *." *Id.* The court concluded by saying that its decision "simply affirm[ed] the trial court's discretion to judge the credibility of the petitions in order to discard frivolous claims." *Id.* at 292.

{¶ 42} Later, in *Gondor*, the Supreme Court acknowledged the trial court's "gatekeeping role" in determining whether a petitioner will receive a hearing on his postconviction relief petition. *Gondor* at ¶ 51. The court reiterated that it

> determined in *Calhoun* that the trial court's gatekeeping function in the postconviction relief process is entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. We established in *Calhoun* that *a court reviewing the trial court's decision in regard to its gatekeeping function should apply an abuse-of-discretion standard.* (Emphasis added.) *Gondor* at ¶ 52.

The court determined that the "consistent approach" was granting the trial court the same level of deference—i.e., abuse-of-discretion review—post-hearing. *Id.*

{¶ 43} Because the court determined that the same level of review applied to the trial court's decision to dismiss a petition summarily or after an evidentiary hearing, we believe that the holding in *Gondor* is applicable here. That is, "a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id.* at ¶ 58.

{¶ 44} However, there is an exception to this rule when the court summarily dismisses a postconviction relief petition on purely legal grounds (such as lack of subject-matter jurisdiction or res judicata). We review those grounds for dismissal de novo. *State v. Osley*, 6th Dist. Lucas No. L-17-1164, 2017-Ohio-8673, ¶ 8, citing *State v. Willis*, 2016-Ohio-335, 58 N.E.3d 515, ¶ 7 (6th Dist.).

B. The trial court properly denied Boaston's petition without a hearing.

{¶ 45} In his first assignment of error, Boaston argues that the trial court erred by dismissing his postconviction relief petition without holding an evidentiary hearing because the state committed a *Brady* violation by failing to provide a written report of Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion before trial and he received ineffective assistance of counsel because trial counsel failed to appropriately respond to being "ambushed" by Dr. Scala-Barnett's unwritten opinions and did not call an expert to contradict Gast's cell tower testimony. He argues that his claims are not barred by res judicata because they rely on evidence outside of the record, and that his petition "clearly contained enough factual matter challenging the State's key evidence and demonstrating the constitutional violations suffered by Boaston in how that evidence was presented." Ultimately, he contends, his petition "was not so meritless to warrant dismissing it without a full evidentiary hearing to test the ultimate substance to [his] claims."

{¶ 46} In response, the state argues that (1) the hearsay statements in Hanudel's affidavit did not provide the operative facts necessary to support the petition; (2) the trial court correctly determined that Boaston's claims related to Dr. Scala-Barnett's and Gast's testimony were barred by res judicata because he raised the same issues in his direct appeal; (3) Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion did not meet the three-part test required to show a meritorious *Brady* claim; and (4) Boaston could not show that his trial counsel was ineffective because deciding not to call experts

to rebut Dr. Scala-Barnett's and Gast's testimony was trial strategy and not requesting a *Daubert* hearing, alone, does not prove ineffective assistance.

{¶ 47} We will address each issue in turn.

1. Boaston's claimed *Brady* violation is barred by res judicata.

{¶ 48} Boaston first argues that his right to due process was violated when the state failed to disclose Dr. Scala-Barnett's time-of-death opinion. Because he could have raised this issue in his direct appeal, we find that it is barred by res judicata.

{¶ 49} The doctrine of res judicata prevents a convicted defendant who was represented by counsel from raising in any proceeding except an appeal from his conviction any defense or claimed lack of due process that he raised or could have raised at the trial that resulted in his conviction or on the appeal from the judgment of conviction. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Res judicata applies in postconviction relief proceedings and bars any issues that were or could have been raised at trial or on direct appeal. *State v. Heiney*, 6th Dist. Lucas No. L-19-1115, 2020-Ohio-2761, ¶ 21. A petitioner can avoid the application of res judicata if he provides new competent, relevant, and material evidence from outside of the record to support his claims. *State v. Redd*, 6th Dist. Lucas No. L-00-1148, 2001 WL 1001182, *1 (Aug. 31, 2001), citing *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). However, this "evidence dehors the record" cannot be something that existed and was available for use at the time of trial. *Id.*

{¶ 50} Here, Boaston and his trial counsel clearly knew about the state's belated disclosure of Dr. Scala-Barnett's time-of-death opinion and glove-buckle opinion (and the state's complete failure to provide Boaston with a written report of those opinions, as required by Crim.R. 16(K)) at the time of trial. But Boaston did not pursue the issue of a *Brady* violation in his direct appeal,[3] and his postconviction relief petition did not include any new evidence outside of the record related to the alleged *Brady* violation. Therefore, his *Brady* claim is precluded by res judicata. We find that this argument is without merit.

2. Boaston's ineffective assistance claim is barred by res judicata.

{¶ 51} Boaston's second claim is that trial counsel provided ineffective assistance by failing to call experts to rebut Dr. Scala-Barnett's and Gast's testimony and failing to request that the trial court conduct a *Daubert* hearing to require Dr. Scala-Barnett to justify her time-of-death opinion and glove-buckle opinion. He argues that his ineffective assistance claims are not barred by res judicata because they depend on evidence outside of the record. He also contends that a trial court must presume that the factual allegations in a postconviction relief petition and any accompanying affidavits are true when determining whether to hold a hearing—which the trial court did not do in this case—and, when viewed in that light, his petition at least warranted an evidentiary hearing.

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[3] In his direct appeal, Boaston mentioned in passing that the state committed a *Brady* violation by failing to provide Dr. Scala-Barnett's opinions in writing because trial counsel did not know how to begin to challenge the scientific validity of her conclusions, but he did not fully develop the argument, and we did not address *Brady* in our decision.

{¶ 52} Initially, we note that Boaston's contention that the trial court is required to presume the truth of the factual allegations in the petition and any accompanying affidavits is incorrect. In *Calhoun*, 86 Ohio St.3d at 284, 714 N.E.2d 905, the Supreme Court specifically held that trial courts have the discretion to judge the credibility of affidavits submitted in support of postconviction relief petitions and do not have to accept the factual allegations in them as true. As the court stated, "[t]o hold otherwise would require a hearing for every postconviction relief petition." *Id.*

{¶ 53} Turning to the merits of this argument, to prevail on a claim of ineffective assistance of counsel, the petitioner must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Properly licensed Ohio lawyers are presumed to be competent, *Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶ 62, and there are "countless" ways for an attorney to provide effective assistance in a case, so "'[j]udicial scrutiny of counsel's performance must be highly deferential.'" *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. "[E]ffective assistance of counsel does not equate with a winning defense strategy * * *." *State v. Strickland*, 6th Dist. Erie No. E-01-033, 2003-Ohio-491, ¶ 16.

{¶ 54} To establish ineffective assistance of counsel, the petitioner must show "(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability

that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Sanders*, 94 Ohio St.3d 150, 151, 761 N.E.2d 18 (2002), quoting *Strickland* at 694.

{¶ 55} Counsel is "strongly presumed" to have rendered adequate assistance and "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Smith*, 17 Ohio St.3d at 100, 477 N.E.2d 1128, quoting *Strickland* at 694-695. Generally, trial strategy and tactical decisions—even debatable ones—cannot form the basis of a claim of ineffective assistance of counsel. *State v. Grissom*, 6th Dist. Erie No. E-08-008, 2009-Ohio-2603, ¶ 22.

{¶ 56} The decision of whether or not to call an expert is generally considered a matter of trial strategy. *Heiney*, 6th Dist. Lucas No. L-19-1115, 2020-Ohio-2761, at ¶ 29, citing *State v. Teets*, 4th Dist. Pickaway No. 17CA21, 2018-Ohio-5019, ¶ 42; and *State v. Coleman*, 45 Ohio St.3d 298, 308, 544 N.E.2d 622 (1989). Indeed, "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993), citing *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 (1987).

{¶ 57} In its decision, the trial court found that Boaston's ineffective assistance claim was barred by res judicata because he raised an ineffective assistance claim in his direct appeal and the only evidence regarding trial counsel's ineffectiveness that he

presented with his postconviction relief petition was Hanudel's affidavit "demonstrating only disagreement with trial counsel's strategy and tactics." Boaston argues that the information in Hanudel's affidavit—including his discussions with trial counsel and his consultations with experts—is evidence outside of the record that precludes the application of res judicata to his ineffective assistance claim.

{¶ 58} While we agree with Boaston that the information in Hanudel's affidavit is information that was not available for review in his direct appeal, we find that it is not sufficient to overcome the res judicata bar. This is because merely attaching evidence dehors the record to the petition will not guarantee a postconviction relief hearing. *Heiney* at ¶ 24. Rather, the evidence "'must meet some threshold standard of cogency' to advance the petitioner's claim beyond mere hypothesis." *State v. Brown*, 6th Dist. Lucas No. L-99-1251, 2000 WL 20557, *3 (Jan. 14, 2000), quoting *State v. Lawson*, 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist.1995).

{¶ 59} In his affidavit, Hanudel outlines his post-trial conversations with trial counsel, which show that trial counsel made certain tactical decisions that Hanudel might not agree with (such as choosing to cross-examine Dr. Scala-Barnett rather than requesting a continuance to try to find an expert to testify or filing a pretrial motion to have her time-of-death opinion and glove-buckle opinion excluded, and choosing not to present the cell tower tracking data expert because he did not believe the expert would be helpful), but that do not fall below an objective standard of reasonable representation. The trial court was within its discretion to find that Hanudel's hearsay statements

regarding trial counsel's representation of Boaston and conversations with potential expert witnesses did not rise to the required "'threshold standard of cogency' to advance the petitioner's claim beyond mere hypothesis." *Brown* at *3, quoting *Lawson* at 315. Accordingly, we find that the trial court did not err by finding Boaston's ineffective assistance claim barred by res judicata.

{¶ 60} Additionally, we note, as the Supreme Court did, that there is substantial evidence in the record—apart from the testimony that Boaston contends was admitted because of trial counsel's ineffectiveness—that supported a finding that Boaston was guilty beyond a reasonable doubt. *See Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, at ¶ 65-70.

{¶ 61} Because both of Boaston's constitutional claims are barred by res judicata, we find that the trial court did not err by denying the postconviction relief petition without a hearing. Accordingly, his first assignment of error is not well-taken.

C. Boaston's request for expert funds is moot.

{¶ 62} In his second assignment of error, Boaston argues that the trial court erred by finding that he was not entitled to funds to hire court-appointed experts. Because we have determined that the court did not err in denying the postconviction relief petition, we find that the issue of funds to hire experts is moot. Boaston's second assignment of error is not well-taken.

III. Conclusion

{¶ 63} The October 16, 2017 judgment of the Lucas County Court of Common Pleas is affirmed. Boaston is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Christine E. Mayle, J.
CONCUR. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCURS IN JUDGMENT ONLY. JUDGE