

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO.	C-250081
Plaintiff-Appellee,	:	TRIAL NOS.	B-1507289-A B-1601998
vs.	:		
KENT SMITH,	:	<i>JUDGMENT ENTRY</i>	
Defendant-Appellant.	:		

ZAYAS, Presiding Judge.

This court sua sponte removes this cause from the regular calendar and places it on the court's accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

Kent Smith appeals the denial of his motion for leave to file a motion for a new trial without a hearing, his applications for DNA testing, and his successive postconviction petition to vacate and set aside his convictions.

Smith was convicted of two counts of aggravated robbery, two counts of aggravated burglary, four counts of burglary, one count of felonious assault, and four counts of having a weapon while under a disability. *State v. Smith*, 2019-Ohio-5264, ¶ 1 (1st Dist.). This court reversed one aggravated-burglary and one burglary conviction and remanded the cause for a new sentencing hearing. *Id.* at ¶ 3.

In July 2023 and August 2023, Smith filed applications for DNA testing. Smith sought DNA testing on weapons and a sweatshirt that were previously tested and matched Smith's DNA. Smith also requested to test fecal matter that was discovered

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in an unflushed toilet in one of the homes that was burglarized. In support of his request, Smith attached a police report that noted the presence of the fecal matter and contained a request that the toilet not be flushed.

In December 2023 and January 2024, Smith filed a petition to vacate the judgment and a motion for leave to file a motion for a new trial along with the motion for a new trial pursuant to Crim.R. 33(A)(1) and (2) and Crim.R. 33(B). Smith asserted claims of ineffective assistance of counsel, *Brady* violations, and prosecutorial misconduct.

Smith attached the correspondence between himself and the Hamilton County Public Defender's Office and between the public defender's office and DNA Diagnostics Center, and multiple police investigative reports from the 2015 robberies and burglaries that formed the basis for his convictions. A family member had filed public-records requests to obtain the 2015 police reports. However, Smith provided no explanation as to how he was unavoidably prevented from discovering the 2015 police reports. Notably, the State provided multiple police reports to Smith as memorialized in the State's discovery responses filed on April 18, 2016, and September 29, 2016.

The trial court denied all of the motions without a hearing, and Smith now appeals.

In his first assignment of error, Smith contends that the trial court erred by denying his motion for leave to file a motion for a new trial. Under Crim.R. 33(A)(6), a new trial may be granted “[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial” and the defendant's substantial rights were materially affected. “An untimely motion for a new trial based on newly discovered evidence may be filed

only if the defendant first establishes by clear and convincing evidence that he was unavoidably prevented from discovering the evidence within the 120-day period.” *State v. Hatton*, 2022-Ohio-3991, ¶ 27, citing Crim.R. 33(B).

Smith filed his motion for leave almost six years after the verdict was rendered. The correspondence regarding DNA testing merely established that the guns were not submitted to an independent lab for DNA testing, information that was available to Smith at the time of trial. Smith did not allege that the 2015 police reports had been newly discovered. The plea agreement between the State and his codefendant did not exist at the time of his trial, and Smith did not explain how he was prevented from filing a timely motion for a new trial when the plea agreement was available within the 120-day period. *See id.* at ¶ 27.

Accordingly, the trial court did not abuse its discretion in concluding that Smith failed to establish “by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely [within the 120-day period].” *See Crim.R. 33(B)*. We overrule the first assignment of error.

Next, Smith argues the State violated its *Brady* obligations by withholding the Marshall Avenue police report and presenting perjured testimony. Smith claimed the police report was undisclosed but provided no evidence to support this allegation, and the State’s discovery responses established that multiple police reports were provided to Smith in discovery. Smith also did not explain how he was prevented from filing a timely motion for a new trial where the police report was available within the 120-day period. *See Hatton*, 2022-Ohio-391, at ¶ 27. We overrule the second assignment of error.

In his third assignment of error, Smith asserts that the trial court abused its discretion when it applied *res judicata* to his postconviction petition claim of

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ineffective assistance of counsel because it was based on newly discovered evidence and denied the petition without a hearing. Under R.C. 2953.23(A)(1)(a), an untimely filed postconviction petition may be entertained by the common pleas court if the petitioner was “unavoidably prevented from discovery of the facts” upon which the postconviction claim depends.

As previously discussed, Smith did not show that he was unavoidably prevented from discovering the facts upon which his postconviction claim depended. Therefore, the common pleas court did not have jurisdiction to entertain the petition, as the unavoidably-prevented exception provided by R.C. 2953.23 was not established, and the court did not err in dismissing the postconviction claim without a hearing. *See State v. Smith*, 2022-Ohio-12, ¶ 8 (1st Dist.).

In his fourth assignment of error, Smith contends that the trial court erred by denying his request for DNA testing. Smith’s applications indicated that all of the items except for the fecal matter had a prior definitive DNA test result. Under R.C. 2953.74(A), a trial court must reject an application where a definitive DNA test has already been conducted.

With respect to the fecal matter, under R.C. 2953.74(C)(4), a court may only accept an application for postconviction DNA testing if it finds that an exclusion test result will be outcome determinative. The DNA testing of the fecal matter, assuming it was preserved, would not be outcome determinative. At most, it would only establish that someone else had defecated in the toilet. We overrule the fourth assignment of error and affirm the judgments of the trial court.

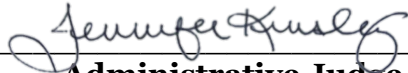
The court further orders that 1) a copy of this Judgment constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

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NESTOR and MOORE, JJ., concur.

To the clerk:

Enter upon the journal of the court on 11/12/2025 per order of the court.

By: 
Administrative Judge