

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
	:	
Plaintiff-Appellee,	:	
	:	<b>CASE NOS. 2003-L-065</b>
- VS -	:	<b>and 2003-L-066</b>
	:	
TIMOTHY K. RICHTER,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case Nos. 01 CR 000507 and 01 CR 000231.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Amy E. Cheatham*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Paul J. Mooney*, 1 Bratenahl, Suite 1309, Cleveland, OH 44108 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal arises from the Lake County Court of Common Pleas. On October 17, 2001, appellant, Timothy K. Richter, pled guilty to one count of domestic violence in Case No. 01-CR-000231 and also pled guilty to one count of attempted rape in violation of R.C. 2923.02 and 2907.02, a second degree felony, and three counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), third degree felonies in Case

No. 01-CR-000507. The charges arose from Richter's conduct with his stepdaughter who was between the ages of seven and twelve at the time the incidents occurred.

{¶2} On November 14, 2001, a sentencing hearing took place relating to both cases. Richter was sentenced to twelve months imprisonment on the domestic violence charge, as well as six years imprisonment for the attempted rape conviction; three years for one count of gross sexual imposition; and one year each on the two remaining counts of gross sexual imposition. Richter was ordered to serve the sentences in both cases concurrent with each other, but all the sentences in the second case were to be served consecutively to each other, for a total term of eleven years imprisonment. Richter was also adjudicated a sexual predator.

{¶3} On May 24, 2002, Richter filed a delayed appeal of the guilty plea and sexual predator adjudication with this court.<sup>1</sup> In its opinion dated December 12, 2003, this court affirmed the judgment of the trial court.<sup>2</sup>

{¶4} On June 20, 2002, appellant filed three post-conviction motions with the trial court: a motion for appointment of counsel, motion for expert witness, as well as a post-conviction petition. In the motion for appointment of counsel, Richter sought an order appointing counsel to represent him on his petition for post-conviction relief. That motion was denied by the trial court.

{¶5} In the motion for expert witness, Richter sought an order to allow Richter to retain "a psychiatrist with specific expertise in psychiatric medicines" to assist in his post-conviction petition. The trial court also denied that motion.

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1. *State v. Richter*, 11th Dist. No. 2002-L-080, 2003-Ohio-6734.

2. *Id.*

{¶6} Richter also filed a petition for post-conviction relief and set forth five grounds for relief: (1) he was denied effective assistance of counsel at his change of plea hearing and sentencing hearing when trial counsel informed Richter he was eligible for judicial release; (2) he was denied effective assistance of counsel at his sentencing hearing when counsel failed to inform him of his right to appeal his sentence and sexual predator adjudication; (3) the trial court erred at sentencing when it failed to inform Richter that his stated prison term exceeded the maximum sentence for his most serious offense and he could appeal his sentence; (4) his guilty plea was not voluntary as neither trial counsel nor the court addressed the effect of psychotropic medications on Richter's plea; and (5) the court failed to comply with the sentencing requirements imposed by R.C. 2929.19.

{¶7} The state filed a response to the post-conviction petition and a motion for summary judgment. In a judgment entry dated March 24, 2003, the trial court denied Richter's post-conviction petition. In its judgment, the trial court addressed the merits of Richter's arguments and included findings of fact and conclusions of law.

{¶8} Richter subsequently filed this appeal of the denial of his post-conviction petition in both trial court cases. Both appeals have been consolidated by this court for all purposes.

{¶9} Richter presents a single assignment of error on appeal:

{¶10} "The trial court abused its discretion when it failed to properly weigh the credibility of appellant's affidavit and grant appellant a hearing before denying his motion for post-conviction relief."

{¶11} As noted in the foregoing, Richter filed a delayed appeal of his guilty plea in trial court Case No. 01 CR 000507 and the sexual predator adjudication. That appeal

was still pending at the time Richter filed his petition for post-conviction relief. In that direct appeal to this court, Richter raised four assignments of error.

{¶12} The first assignment of error alleged his guilty plea was not knowing and voluntary as Richter had been under the influence of psychotropic medications when the plea was made. A review of the record revealed the trial court inquired into what medications Richter was currently taking, and whether they affected his ability to understand what was transpiring. Richter assured the court that he was able to understand the proceedings. The court also asked Richter to state the day, date and time, to which he responded correctly. This court determined, based on an examination of the record, Richter's plea was knowing and voluntary and was not affected by the medications he was taking.<sup>3</sup>

{¶13} In his second assignment of error Richter alleged the sexual predator adjudication was against the manifest weight of the evidence. Richter did not dispute that he had committed a sexually-oriented offense, but challenged the finding of a likelihood to reoffend. This court concluded, based on the record, the state had established, through clear and convincing evidence that Richter was likely to reoffend.<sup>4</sup>

{¶14} The third assignment of error related to the trial court's failure to adhere to the statutory requirements in making the sexual predator determination. This court concluded the trial court properly considered the statutory factors and properly adhered to the procedural requirements of a sexual predator hearing.<sup>5</sup>

{¶15} The fourth and final assignment of error was an ineffective assistance of counsel claim, alleging Richter's trial counsel erred in permitting him to enter a guilty

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3. *Richter*, ¶21.

4. *Id.* at ¶28.

5. *Id.* at ¶37.

plea when he was under the influence of medications. As it had noted in the first assignment the plea was knowing and voluntary, this court concluded that Richter had suffered no prejudice and thus did not address whether counsel's performance was deficient. Therefore, this court found all of Richter's assignments of error to be without merit and the judgment of the trial court was affirmed.<sup>6</sup>

{¶16} In his petition, Richter raised the identical issues as grounds for post-conviction relief that were pending in his delayed appeal with this court. The trial court elected to address the issues raised in Richter's petition on the merits, and ultimately denied the petition. This court subsequently addressed the merits of Richter's arguments on direct appeal. However, rather than addressing the merits of Richter's petition, we must first determine whether the current appeal of the petition is barred by the doctrine of res judicata.

{¶17} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment.*"<sup>7</sup>

{¶18} As a direct appeal from a judgment of conviction is limited solely to the trial court record, a petition for post-conviction relief may not be barred by res judicata if the claims set forth in the petition are based on evidence *dehors* the record.<sup>8</sup> Moreover, any additional evidence attached to a petition for post-conviction relief must meet a

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6. *Richter*, at ¶43.

7. (Emphasis added.) *State v. Perry* (1967), 10 Ohio St.2d 175.

8. *State v. Cole* (1982), 2 Ohio St.3d 112.

“threshold standard of cogency.”<sup>9</sup> In other words, the additional evidence must be more than marginally significant and not discernible from an examination of the existing trial court record in order to defeat a res judicata bar.<sup>10</sup>

{¶19} In the instant case, the only additional evidence presented by Richter in his post-conviction petition was a letter sent to him from counsel while he was incarcerated. Dated December 19, 2001, the letter informs Richter that he is eligible for judicial release. As the issue of Richter’s eligibility for judicial release was argued by Richter unsuccessfully in his direct appeal, we conclude this letter, containing the same information which served as the basis for the contention previously asserted by Richter on appeal, does not permit Richter to elude the res judicata bar.

{¶20} Res judicata does not apply to an ineffective assistance of counsel claim only when the appellant’s trial counsel and appellate counsel are the same, as counsel has an inherent conflict of interest.<sup>11</sup> In the instant case, Richter was represented by Attorney Margaret Campbell at trial and by Attorney Paul Mooney in his direct appeal. Since Richter was represented by different counsel on appeal, any ineffective assistance claims relating to trial counsel should have been raised on direct appeal.

{¶21} In his direct appeal, Richter raised ineffective assistance of counsel based solely on the notion that counsel permitted him to enter a guilty plea when he was under the influence of medications. In his post-conviction petition, Richter alleges trial counsel was ineffective in failing to inform him that he could appeal his sentence and sexual predator adjudication. We conclude this claim should have been raised in the direct appeal and, as such, is now barred by res judicata.

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9. (Citation omitted.) *State v. Lawson* (1995), 103 Ohio App.3d 307, 315.

10. *Id.*

11. *State v. Lentz* (1994), 70 Ohio St.3d 527, 530.

{¶22} A review of the record reveals Richter never filed a direct appeal of trial court Case No. 01 CR 000231, relating to the domestic violence plea. The delayed appeal before this court related only to trial court Case No. 01 CR 000507, which was the attempted rape and gross sexual imposition convictions. Thus, as the notice of appeal period has lapsed, this court is without jurisdiction to consider the merits of an appeal relating to the domestic violence conviction.

{¶23} Thus, based on the foregoing, the issues raised by Richter in his petition for post-conviction relief are barred by the doctrine of res judicata and his assignment of error is without merit. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

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WILLIAM M. O'NEILL, J., dissenting.

{¶24} I respectfully disagree with the majority regarding its res judicata analysis as it relates to Richter's petition for postconviction relief. The majority correctly notes that a petition may not be barred by the doctrine of res judicata if the specific claims set forth in the petition are based on evidence dehors the record.<sup>12</sup> The majority

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12. *State v. Cole* (1982), 2 Ohio St.3d 112, 114.

subsequently concludes that the evidence presented by Richter in his petition was merely a recitation of the identical arguments set forth in his direct appeal. I disagree.

{¶25} In order for Richter's waiver of his constitutional guarantees to be valid there must be "an intentional relinquishment or abandonment of a known right or privilege."<sup>13</sup> Therefore, the trial court has the burden of ensuring that the waiver is voluntarily, intelligently, and knowingly made with the defendant fully understanding the charges against him.<sup>14</sup>

{¶26} In his petition, Richter noted that he was undergoing outpatient psychiatric treatment both before and after his plea hearing and that he was on various psychotropic medications during the time he rendered his plea. The issue of medications was addressed by the trial court as the majority notes. However, the colloquy between Richter and the trial court, essentially a recitation of the time and date and whether Richter understood his plea, is hardly adequate for the state to satisfy its burden of establishing a knowing, intelligent, and voluntary plea. The evidence of Richter's psychiatric history, coupled with the number of psychotropic medications he had been taking, clearly meet the "threshold standard of cogency" for evidential material required to defeat the res judicata bar and compel an examination and evaluation of Richter prior to an acceptance of his guilty plea to establish the knowing, intelligent, and voluntary nature of his plea.

{¶27} Accordingly, I must respectfully dissent.

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13. *State v. Mikulic* (1996), 116 Ohio App.3d 787, 790.

14. *Id.*