

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                     |   |                              |
|---------------------|---|------------------------------|
| STATE OF OHIO       | : | JUDGES:                      |
|                     | : | Hon. W. Scott Gwin, P.J.     |
|                     | : | Hon. Julie A. Edwards, J.    |
| Plaintiff-Appellee  | : | Hon. Patricia A. Delaney, J. |
|                     | : |                              |
| -VS-                | : |                              |
|                     | : | Case No. 2008 AP 09 0061     |
| MARSHA J. MILLS     | : |                              |
|                     | : |                              |
| Defendant-Appellant | : | <u>O P I N I O N</u>         |

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| CHARACTER OF PROCEEDING: | Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2006 CR 10 0315 |
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| JUDGMENT: | Affirmed |
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| DATE OF JUDGMENT ENTRY: | October 21, 2009 |
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APPEARANCES:

|                        |                         |
|------------------------|-------------------------|
| For Plaintiff-Appellee | For Defendant-Appellant |
|------------------------|-------------------------|

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*Gwin, P.J.*

{¶1} Defendant-appellant Marsha Mills appeals from the September 12, 2008 Judgment Entry of the Tuscarawas County Court of Common Pleas overruling her Motion for Reconsideration. In that motion, appellant asked the trial court to re-examine its July 18, 2008 Judgment Entry overruling her Petition to Vacate or Set Aside Judgment and Sentence and her Amended Petition to Vacate or Set Aside Judgment and Sentence [hereafter referred to as “PCR petition”] and granting the plaintiff-appellee State of Ohio's motion to dismiss.

*STATEMENT OF FACTS IN THE CASE*

{¶2} This appeal stems from the death of two-year-old Noah Shoup while in appellant's care.

{¶3} Appellant was indicted by the Tuscarawas County Grand Jury on three counts of murder in violation of R.C. 2903.02(B), one count of felonious assault in violation of R.C. 2903.11(A)(1), and two counts of child endangering in violation of R.C. 2919.22(B)(1) and (3). The State voluntarily dismissed one count of murder and one count of child endangering. After considering the evidence presented the jury found the appellant guilty on the remaining charges. Appellant was sentenced to serve an aggregate prison term of fifteen years to life. For a complete statement of the underlying facts see *State v. Mills*, Tuscarawas App. No. 2007 AP 07 0039, 2009-Ohio-1849.

{¶4} On April 15, 2009, this Court upheld appellant's convictions and sentence. *State v. Mills*, supra. The Ohio Supreme Court denied jurisdiction over the case. *State v. Mills*, --- Ohio St.3d ----, --- N.E.2d ----, 2009-Ohio-4233 (Ohio Aug 26, 2009) (Table, NO. 2009-0996).

{¶5} Appellant filed her post-conviction petition pursuant to R.C. 2953.21 on April 28, 2008; she amended the petition on May 13, 2008. The state filed a motion to dismiss the petition on May 22, 2008. Appellant filed a reply to the state's motion on May 30, 2008.

{¶6} By Judgment Entry filed July 18, 2008, the trial court denied appellant's petition, amended petition, and granted the state's motion to dismiss.<sup>1</sup>

{¶7} On August 1, 2009 appellant filed a motion to reconsider. The state filed its opposition to the motion on August 8, 2008. By Judgment Entry filed September 12, 2008, the trial court denied appellant's motion to reconsider.

{¶8} It is from the trial court's Judgment Entry filed September 12, 2008 denying her Motion for Reconsideration that appellant timely appeals, raising the following assignment of error for our consideration:

{¶9} "I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR RECONSIDERATION OF ITS ENTRY DENYING POST CONVICTION RELIEF, AND ERRED IN DENYING AN EVIDENTIARY HEARING."

I.

{¶10} In her sole assignment of error, appellant maintains that the trial court erred in denying her Motion for Reconsideration without conducting an evidentiary hearing. For the reasons that follow, we disagree.

{¶11} We begin our analysis of the trial court's decision in the case at bar by noting a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State ex rel. Sawicki v. Court of Common Pleas of*

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<sup>1</sup> Appellant has filed a separate appeal of the trial court's denial of her PCR petition. See, *State v. Mills*, Tuscarawas App. No. 2008 AP 09 0051.

*Lucas Cty*, 121 Ohio St.3d 507, 905 N.E.2d 1192, 2009 -Ohio- 1523 at ¶ 21; *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

**{¶12}** In her fifteenth ground for relief in the PCR petition, appellant alleged that her trial counsel were ineffective because they failed to exercise a peremptory challenge to remove Juror Fitch because he was related to a law enforcement officer and counsel failed to discover that fact. See, *State v. Mills*, Tuscarawas App. No. 2008 AP 09 00512 at ¶ 108.

**{¶13}** In denying the fifteenth ground for relief in appellant's PCR petition, the trial court found there was no evidence submitted in support of the petition to support the appellant's claim that Juror Fitch was related to a law enforcement officer.

**{¶14}** In her motion to reconsider, appellant sought to provide the trial court with Juror Fitch's juror questionnaire, an obituary and a news article from a local newspaper that appellant claims would establish that Juror Fitch is related to someone in law enforcement.

**{¶15}** In denying the motion to reconsider, the trial court relied on our decision in *State v. Bennett*, Muskingum App. No. CT2005-0009, 2006-Ohio-2812. In *Bennett*, we noted, "'There is no authority for filing a motion for reconsideration of a final judgment at the trial court level in a criminal case.' *State v. Leach*, Clermont App. No. CA2004-02-011, 2005-Ohio-2370, at ¶ 6, citing *City of Cleveland Heights v. Richardson* (1983), 9 Ohio App.3d 152, 458 N.E.2d 901. It is well settled that a motion for

reconsideration of a final judgment is a nullity. *State v. Stillman*, Fairfield App.No.2005-CA-55, 2005-Ohio-6299, ¶ 36, citing *Pitts v. Ohio Dept. of Trans.* (1981), 67 Ohio St.2d 378, 379, 423 N.E.2d 1105. Pursuant to R.C. 2953.23(B), “[a]n order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.” *Bennett* at ¶ 13.

{¶16} However, R.C. 2953.21(A) (1) permits a petitioner to file a *second or successor petition for post conviction relief*, if (1) the petitioner shows unavoidable prevention from the discovery of the facts that the petitioner relies upon in the claim for relief and (2) the petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty. See R.C. 2953.23(A) (1). These requirements are written in the conjunctive, so the petitioner must meet both requirements. *State v. Turner*, Franklin App. No. 06AP-876, 2007-Ohio-1468, ¶ 18. If the petition fails to establish both requirements under R.C. 2953.23(A) (1), the court has no jurisdiction to consider the petition. *State v. Hutton*, Cuyahoga App. No. 80763, 2007-Ohio-5443, ¶ 23.

{¶17} In the case at bar, had either counsel or the trial court considered the motion to reconsider as a successor petition the result would not have changed.

{¶18} As we noted in disposition of appellant’s appeal from the denial of the PCR petition, “A prospective juror is not automatically disqualified by the fact that he or she is related to a law enforcement officer. *State v. Murphy*, 91 Ohio St.3d 516, 528, 2001-Ohio-112, 747 N.E.2d 765, 785. See, also Crim. R. 24(B) (Listing ground for challenge for cause).

{¶19} “Juror Fitch indicated that he could be fair and impartial to both sides. (1T. at 232-235). Based upon our review of the record of the voir dire conducted, we find the record does not support the conclusion that, because he may have been related to a law enforcement officer, counsel's failure to discover this fact fell below an objective standard of reasonableness. Appellant has also failed to show that the outcome of her trial would have been different had counsel been aware of this information.” *State v. Mills*, Tuscarawas App. No. 2008 AP 09 00512 at ¶ 121-122.

{¶20} We, therefore, hold that the trial court did not err in dismissing appellant's motion for reconsideration without an evidentiary hearing.

{¶21} Appellant's sole assignment of error is overruled.

{¶22} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

MARSHA J. MILLS

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2008 AP 08 0061

For the reasons stated in our accompanying Memorandum-Opinion, The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY