

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

State of Ohio

Court of Appeals No. L-15-1263

Appellee

Trial Court No. CR0200702164

v.

Thomas Zich

**DECISION AND JUDGMENT**

Appellant

Decided: February 3, 2017

\* \* \* \* \*

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

Deborah Kovac Rump and Martin E. Mohler, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶ 1} Appellant, Thomas Zich, appeals the judgment of the Lucas County Court of Common Pleas, denying his petition for postconviction relief and granting a motion for summary judgment filed by appellee, the state of Ohio. Finding no error, we affirm.

### **A. Facts and Procedural Background**

{¶ 2} On June 1, 2007, appellant was indicted on a charge of murder arising out of the death of his wife, Mary Jane Zich, whose body was found in Lucas County on December 18, 1991. Following pretrial discovery and motion practice, a multi-day jury trial commenced on June 9, 2009. At the conclusion of the trial, the jury found appellant guilty of murder in violation of R.C. 2903.02(A) and 2929.02, a felony of the first degree, and the trial court imposed a prison sentence of 15 years to life. Appellant then appealed his conviction to this court. Ultimately, we found no merit to appellant's arguments and, on December 16, 2011, issued our decision affirming his conviction. *State v. Zich*, 6th Dist. Lucas No. L-09-1184, 2011-Ohio-6505. The Supreme Court of Ohio subsequently declined to accept jurisdiction of appellant's discretionary appeal. *State v. Zich*, 131 Ohio St.3d 1510, 2012-Ohio-1710, 965 N.E.2d 311.

{¶ 3} While the appeal was pending in this court, appellant filed a petition for postconviction relief with the trial court. In his petition, appellant asserted the following claims: (1) actual innocence; (2) violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) right to present a defense; (4) violation of his Confrontation Clause rights; and (5) ineffective assistance of counsel. Additionally, appellant argued that Ohio's postconviction procedures under R.C. 2953.21 were unconstitutional.

{¶ 4} On June 15, 2012, the stated filed a motion for summary judgment on appellant's postconviction petition. After appellant responded and the state filed its reply, the trial court heard oral arguments on the question of whether it needed to hold an evidentiary hearing before ruling on the merits of appellant's postconviction petition.

Thereafter, on September 8, 2015, the court issued its decision on the state's motion for summary judgment and appellant's postconviction petition.

{¶ 5} Upon consideration, the trial court found appellant's arguments not well-taken, either because they were decided by this court on direct appeal and were therefore barred by res judicata, or because they failed on the merits. Consequently, the court found that appellant was not entitled to postconviction relief and granted the state's motion for summary judgment. Appellant's timely appeal followed.

### **B. Assignments of Error**

{¶ 6} On appeal, appellant assigns the following errors for our review:

ASSIGNMENT OF ERROR I: The use of res judicata is not only an improper use of the doctrine, but it unconstitutionally restricts Zich's access to have his conviction fully redressed in state court. The inadequate remedy at law provided by Ohio's post-conviction law violates his rights under the Fourteenth, Sixth and Eighth Amendments of the United States Constitution and Article I, Section 9, 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR II: The trial court erred by not addressing the issue of actual innocence and thereby violated Zich's 6th Amendment right to effective assistance of counsel as well as his Constitutional right to a fair trial. Further, the trial court incorrectly refused to hear the actual innocence claim which is also intertwined with his argument that the state committed violations of *Brady v. Maryland*. This

violates Zich's constitutional right to Due Process of Law as created by the Fourteenth Amendment.

ASSIGNMENT OF ERROR III: R.C. 2953.21 violates the Due Process Clause as well as the Fourteenth Amendment and Sixth and Eighth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution because it fails to give Zich an adequate collateral attack on his conviction.

## **II. Analysis**

### **A. Standard of Review**

{¶ 7} R.C. 2953.21(A)(1)(a) provides for postconviction relief. That section states, in pertinent part:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.

{¶ 8} A criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. R.C. 2953.21; *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999). According to R.C. 2953.21(C), a petitioner is entitled to a hearing when, upon review of the petition and the

record, the trial court finds that there are “substantive grounds for relief.” In making such a determination, the trial court must consider the petition and supporting affidavits as well as all of the files and records pertaining to the proceedings against the petitioner. R.C. 2953.21(C).

{¶ 9} A petition for postconviction relief under R.C. 2953.21 is a collateral civil attack on a criminal judgment, not an appeal of the judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). “It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record.” *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 Ohio App. LEXIS 6129 (Dec. 26, 2000). R.C. 2953.21 et seq. affords a prisoner postconviction relief “only if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph four of the syllabus. A postconviction petition does not provide a petitioner a second opportunity to litigate the conviction. *State v. Hessler*, 10th Dist. Franklin No. 01 AP-1011, 2002-Ohio-3321, ¶ 32.

{¶ 10} “The denial of a postconviction petition will not be overturned on appeal absent a finding of abuse of discretion.” *State v. Gonzales*, 6th Dist. Wood No. WD-09-078, 2010-Ohio-4703, ¶ 14, citing *State v. Williams*, 165 Ohio App.3d 594, 2006-Ohio-617, 847 N.E.2d 495, ¶ 20 (11th Dist.). An abuse of discretion connotes a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

## **B. Res Judicata**

{¶ 11} In his first assignment of error, appellant argues that the trial court erred in denying postconviction relief based upon res judicata. Appellant contends that the court's reliance on res judicata unconstitutionally restricted his access to postconviction relief in violation of the Constitutions of the United States and the State of Ohio.

{¶ 12} In *Perry, supra*, the Supreme Court of Ohio set forth the following res judicata rule as it pertains to postconviction petitions:

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 trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph nine of the syllabus.

{¶ 13} Here, appellant argues that the foregoing rule should not apply to his claims of ineffective assistance of trial counsel, because he supported his claims with evidence dehors the record. Alternatively, he contends that the application of the res judicata rule violates his constitutional rights because it leaves no meaningful opportunity for him to collaterally attack his conviction.

{¶ 14} At the outset, we note that the vast majority of appellant's ineffective assistance arguments were decided by the trial court on their merits. These arguments were not decided on res judicata grounds. In his petition for postconviction relief,

appellant argued that trial counsel failed to properly investigate the case or present a defense. Specifically, appellant asserted that trial counsel failed to develop the record concerning Mary Jane's history of drug abuse and reckless behavior in order to "raise reasonable doubt that there were many potential suspects in this case."

{¶ 15} Essentially, appellant urged that further development of the record by way of more effective cross-examination of the state's witnesses would have revealed several additional murder suspects. Appellant asserted that several witnesses told police in 1991 that Mary Jane was a "regular" at the Oak Street Tavern, a bar in Toledo and the site where Mary Jane's body was discovered. In support of his petition, appellant attached an affidavit of Toledo Police officer Michael Scott. Scott, who was assigned to patrol the area around the Oak Street Tavern at the time of the murder, stated that the Oak Street Tavern was regarded as the "site of considerable criminal activity," including "alcohol-related crimes, drug-related crimes and crimes of violence."

{¶ 16} Upon examination of appellant's argument, the trial court found that the evidence to which appellant referred in supporting his position did not establish trial counsel's deficient performance or prejudice appellant. By way of example, the trial court noted that Scott's affidavit merely established that the Oak Street Tavern was a high-crime establishment; Scott did not identify Mary Jane or state that she was involved in the criminal activity that occurred at the Oak Street Tavern. Moreover, the court found that there was no evidence that the substance abuse records to which appellant referred in supporting his argument actually existed. Rather, the trial court, referring to our prior decision on appellant's direct appeal, found that the testimony of several witnesses

demonstrated that Mary Jane did not appear under the influence of drugs in the months leading up to her death. As to appellant's various arguments concerning trial counsel's cross-examination of the state's witnesses, the court relied upon the Supreme Court of Ohio's decision in *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, and found that the scope of counsel's cross-examination was a matter of trial strategy and did not establish ineffective assistance of counsel.

{¶ 17} Appellant advanced several additional ineffective assistance arguments. None of these arguments, save one, were decided on res judicata grounds. The only argument that was rejected by way of res judicata was appellant's argument that trial counsel was ineffective for failing to secure grand jury records.

{¶ 18} Relevant here, appellant previously raised this same claim of ineffective assistance of trial counsel before this court in his direct appeal. *State v. Zich*, 6th Dist. Lucas No. L-09-1184, 2011-Ohio-6505, ¶ 124-142. Regarding his ineffective assistance claim, appellant argued, inter alia, that trial counsel was ineffective for failing to seek access to the grand jury transcripts. *Id.* at ¶ 136. We rejected this argument, stating:

In making this argument, appellant expressly makes the presumption that the indictment was based upon testimony provided by [Mary Jane's daughter,] Desiree. The argument rests on the assumption that the testimony by Desiree was impermissible, because she was very young at the time of her mother's death. We note that appellant, in making this argument, fails to support it with any legal analysis.



Moreover, appellant's argument assumes that a question about the quality of the evidence offered to the grand jury justifies disclosure of proceedings. The Supreme Court of Ohio, however, has held that "[g]rand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts \* \* \* unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus.

\* \* \*

Inasmuch as neither federal nor state law supports disclosure of transcripts based on speculation that the grand jury heard incompetent evidence, we find that trial counsel's failure to file a motion for disclosure premised on such speculation did not constitute error. *Id.* at ¶ 136-139.

{¶ 19} In light of our prior resolution of appellant's ineffective assistance argument concerning the grand jury records in this case, the trial court found that appellant was barred by the doctrine of res judicata from raising such argument in his petition for postconviction relief. Because we find that this argument is identical to the argument we rejected in *Zich, supra*, we find no error in the trial court's application of res judicata. *See State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus (stating that res judicata bars a defendant from raising and litigating any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial or on a direct appeal).

{¶ 20} Accordingly, appellant’s first assignment of error is not well-taken.

### **C. Actual Innocence**

{¶ 21} In his second assignment of error, appellant argues that the trial court violated his due process rights by not addressing his claim of actual innocence, which he contends was intertwined with his argument that the state committed violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Appellant argues that preventing him from raising his actual innocence claim in the postconviction context “raises both procedural and substantive due process issues.” Appellant asserts that Ohio’s postconviction procedure unfairly deprives him of his liberty. Further, he urges that Ohio has abused its power.

{¶ 22} We recently addressed the issue of actual innocence in the postconviction context. In *State v. Willis*, 6th Dist. Lucas No. L-15-1098, 2016-Ohio-335, ¶ 19, we held that actual innocence is not a cognizable claim for postconviction relief. In reaching our conclusion, we relied upon the United States Supreme Court’s decision in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In that case, the Supreme Court held that “a claim of ‘actual innocence’ is not itself a constitutional claim.” *Id.* at 404. “[A] claim of ‘actual innocence’ is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” Nevertheless, the court was willing to “assume, for the sake of argument in deciding [the] case, that a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a

defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.” *Id.*

{¶ 23} Courts have interpreted *Herrera* to stand for the proposition that a petitioner is not entitled to postconviction relief without a showing of a violation of rights that were constitutional in dimension, which occurred at the time that the petitioner was tried and convicted. *State v. Campbell*, 1st Dist. Hamilton No. C-950746, 1997 Ohio App. LEXIS 11 (Jan. 8, 1997); *State v. Bound*, 5th Dist. Guernsey No. 04 CA 8, 2004-Ohio-7097; *State v. Watson*, 126 Ohio App.3d 316, 323, 710 N.E.2d 340 (12th Dist.1998); *State v. Loza*, 12th Dist. Butler No. CA96-10-214, 1997 Ohio App. LEXIS 4574 (Oct. 13, 1997). In *Watson, supra*, the court reasoned: “[S]ince the United States Supreme Court has not recognized actual innocence as a constitutional right, we also refuse to judicially create such a constitutional right.” *Watson* at 323.

{¶ 24} In light of the United States Supreme Court’s decision in *Herrera*, we find no merit to appellant’s due process arguments regarding his claims of actual innocence. Appellant argues that the interpretation of *Herrera* articulated above is incomplete in light of Congress’s enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the changes that statute brought to federal habeas procedures. However, the United States Supreme Court has examined constitutional arguments involving actual innocence claims post-AEDPA and has refused to adopt appellant’s position. *See McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931, 185 L.Ed.2d 1019 (2013) (noting the fact that the Supreme Court “[has] not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence”). Moreover,

we reject appellant's assertion that his actual innocence claims should proceed because they are "intertwined" with his argument that the state committed *Brady* violations. Indeed, appellant's *Brady* arguments were already decided by this court in his direct appeal and are, therefore, barred by res judicata.

{¶ 25} Accordingly, appellant's second assignment of error is not well-taken.

#### **D. Constitutionality of R.C. 2953.21**

{¶ 26} In his third assignment of error, appellant argues that R.C. 2953.21 fails to afford him an adequate collateral attack on his conviction and, therefore, violates his constitutional rights under the United States Constitution and the Constitution of the State of Ohio.

"[S]tatutes enjoy a strong presumption of constitutionality." *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998). "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. All doubts regarding the validity of a statute "are to be resolved in favor of the statute." *State v. Gill*, 63 Ohio St.3d 53, 55, 584 N.E.2d 1200 (1992). The party seeking to have the statute declared unconstitutional bears the burden of proving beyond a reasonable doubt that the statute and a constitutional provision are incompatible. *State v. Warner*, 55 Ohio St.3d 31, 43-45, 564 N.E.2d 18 (1990).

{¶ 27} Here, appellant cites to several cases from the United States Court of Appeals for the Sixth Circuit allegedly “expressing frustration that Ohio’s post-conviction law does not provide adequate relief as directed by the United States Supreme Court.” Notably, appellant does not assert that the Sixth Circuit actually deemed R.C. 2953.21 to be unconstitutional. Moreover, in *State v. Lewis*, 8th Dist. Cuyahoga No. 73736, 1998 Ohio App. LEXIS 5777 (Dec. 3, 1998), the court examined this same argument and concluded:

The Sixth Circuit Court of Appeals’ dissatisfaction with Ohio’s post-conviction relief process and the *Perry* decision does not require us to hold the post-conviction relief process invalid. *Perry* remains good law in this State. See *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996). Furthermore, the post-conviction relief process has been held to be constitutionally sound. See *State v. Sklenar*, 71 Ohio App.3d 444, 594 N.E.2d 88 (9th Dist.1991). *Id.* at \*11.

{¶ 28} In considering appellant’s constitutional arguments, we are mindful of several Ohio appellate courts that have already rejected such arguments. See *State v. Cassano*, 5th Dist. Richland No. 12CA55, 2013-Ohio-1783, ¶ 32; *State v. La Mar*, 4th Dist. Lawrence No. 98 CA 23, 2000 Ohio App. LEXIS 1211 (Mar. 17, 2000); *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 Ohio App. LEXIS 6129 (Dec. 26, 2000). Further, we note the fact that there is no constitutional right to postconviction state collateral review, even in death penalty cases. *Steffen, supra*, 70 Ohio St.3d at 410,

639 N.E.2d 67, citing *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

{¶ 29} In light of the considerable case law upholding the constitutionality of Ohio's postconviction procedure set forth in R.C. 2953.21, we find appellant's constitutional argument unavailing. Accordingly, appellant's third assignment of error not well-taken.

### III. Conclusion

{¶ 30} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant 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.

Stephen A. Yarbrough, J.

James D. Jensen, P.J.

CONCUR.

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JUDGE

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