

[Cite as *State v. Hicks*, 2006-Ohio-798.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 86334

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
WILLIE HICKS,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 23, 2006
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court
	:	Case No. CR-427689
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor MATTHEW E. MEYER Assistant County Prosecutor 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	WILLIE HICKS, pro se Inmate No. 454-930 Trumbull Correctional Inst. P.O. Box 901

Leavittsburg, OH 44430-0901

MARY EILEEN KILBANE, J.:

{¶ 1} Willie Hicks appeals from an order of the trial court that denied his petition for postconviction relief. He claims that the trial court violated his due process rights and deprived him of effective assistance of counsel when it overruled his petition and found that it was barred by the doctrine of res judicata. We affirm.

{¶ 2} The record reveals that Hicks was indicted in September 2002 on a single count of murder, in violation of R.C. 2903.02, carrying both one- and three-year firearm specifications. Following Hicks' waiver of his right to a jury trial, the case proceeded to a bench trial and Hicks was subsequently found guilty on the sole count of murder and on the merged firearm specifications.¹

{¶ 3} At the subsequent sentencing hearing, defense counsel advised the court that the presentence investigation report ("PSI") contained information that he was unaware of prior to trial, despite several discovery requests. He claimed that the PSI contained statements from an East Cleveland councilwoman who told the investigating detective that "she had information from a

¹A full recitation of the facts is available in *State v. Hicks* (Oct. 11, 2004), Cuyahoga App. No. 83981, 2004-Ohio-5223, *Hicks I*.

reliable source that two boys were 'robbing the dope boys' on Chapman." The PSI also contained a statement from the detective that he had been contacted by a confidential reliable informant ("CRI") who told him that, "two males were involved in this murder, and one of the men was Main Man, a.k.a. Jake Harris [a witness who had testified on behalf of the State]."

{¶ 4} The court took note of this argument and then proceeded immediately to sentencing. Hicks received a term of fifteen years to life on the murder charge and a merged, consecutive three-year term on the firearm specifications.

{¶ 5} In August 2004, while his direct appeal was pending, Hicks filed a petition for postconviction relief under R.C. 2953.21, claiming that he was denied due process when his request for disclosure of exculpatory evidence was denied. In October 2004, this court affirmed Hicks' conviction.² The trial court then denied Hicks' petition in April 2005, finding that it was barred by res judicata. Hicks appeals from this order in a single assignment of error which states:

"THE TRIAL COURT ERRED IN VIOLATION OF MR. HICKS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN IT OVERRULED THE PETITION FOR POST-CONVICTION RELIEF SOLELY ON GROUNDS THAT THE ALLEGATIONS CONTAINED THEREIN WERE BARRED BY THE DOCTRINE OF RES JUDICATA."

{¶ 6} In his petition for postconviction relief, Hicks claimed

²*Hicks I*, supra.

that the prosecutor failed "to provide exculpatory evidence as well as evidence tending to impeach credibility of state's eyewitness."

In response to this claim, the trial court noted in its journal entry that the sentencing transcript clearly contained trial counsel's assertions that he was unaware of the alleged exculpatory evidence contained in the PSI. (Tr. 494-496.) Based on this information, the court found that this issue could have, and should have, been raised on Hicks' direct appeal and therefore denied the claim as res judicata.

{¶ 7} As held by the Ohio Supreme Court, if an alleged constitutional error could have been raised and fully litigated on direct appeal, the issue is res judicata and may not be litigated in a postconviction proceeding. *State v. Perry* (1967), 10 Ohio St.2d 175, 179. If, however, the alleged constitutional error is supported by evidence outside the record as well as evidence appearing in the record and, thus, could not have been fully litigated on direct appeal, the issue is not subject to the doctrine of res judicata. *State v. Smith* (1985), 125 Ohio App.3d 342, 348. We find that the alleged error in the instant case should have been raised on direct appeal.

{¶ 8} The statements contained in the PSI regarding both the councilwoman's and the CRI's statements were raised during the sentencing phase of trial and, therefore, could have been an issue in Hicks' direct appeal. Trial counsel even went so far as to

advise the trial court that this exact issue would be appealed and requested that the public defender's office be appointed. (Tr. 496). A further review of both the record and Hicks' postconviction petition shows that the statements made by trial counsel at both the sentencing hearing and in the affidavit supporting postconviction relief contain nearly identical facts, lending further credence to the assertion that no new evidence outside the record existed which prevented the issue from being raised on direct appeal.

{¶ 9} Although Hicks additionally asserts that the court erred in failing to conduct a hearing prior to denying his petition, in this instance, the trial court was not required to conduct such a hearing. As the Supreme Court held in *State v. Jackson* (1980), 64 Ohio St.2d 107, 109-110, "R.C. 2953.21 requires the trial court to consider the allegations of the petition for postconviction relief and the particular facts upon which the petitioner bases his claim; if, upon such consideration, the trial court finds no grounds for a hearing, the court is required to make and file findings of fact and conclusions of law as to the reasons for dismissal and as to the grounds for relief relied upon in the petition."

{¶ 10} For these reasons, Hicks' sole assignment of error lacks merit.

{¶ 11} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE
PRESIDING JUDGE

MICHAEL J. CORRIGAN, J., CONCURS

CHRISTINE T. McMONAGLE, J. DISSENTS (SEE SEPARATE
DISSENTING OPINION ATTACHED).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with

supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86334

STATE OF OHIO,	:	
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Plaintiff-Appellee	:	D I S S E N T I N G
	:	
v.	:	O P I N I O N
	:	
WILLIE HICKS,	:	
	:	
Defendant-Appellant	:	

DATE: FEBRUARY 23, 2006

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 12} Respectfully, I dissent. I would hold that the trial court erred in denying appellant's petition for post-conviction relief on the basis of res judicata.

{¶ 13} "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 of conviction, or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, and reaffirmed in *State v. Szefcyk* (1996), 77 Ohio St.3d 93. In light of this doctrine, a defendant cannot raise an issue in a petition for post conviction relief if he or she could have raised the issue at trial and challenged any adverse findings on direct appeal. *State v. Reynolds* (1997), 79 Ohio St.3d 158.

{¶ 14} At sentencing, defense counsel informed the trial judge that he had reviewed the presentence investigation report that morning and discovered, for the first time, allegedly exculpatory information that there may have been two males involved in the murder for which appellant was convicted, and that this information had not been provided to him by the prosecutor, despite his discovery requests. Specifically, counsel told the judge that the report contained information that an East Cleveland councilwoman had spoken with the East Cleveland police and told them that she had information from a reliable source that two males had been robbing "dope boys" and may have had something to do with the murder. In addition, the presentence investigation report stated that a confidential reliable informant had told one of the detectives that he knew the street names of the two men involved in the murder as "Man Man" and "Lil Wil." The report also stated that the police had been approached by another witness who said he could

identify the two males involved in the homicide as Jake Harris, also known as "Man Man" and appellant, also known as "Lil Wil."³ Finally, defense counsel told the judge that the report contained information that Ronnie McClutchen, a deceased ex-football player for the National Football League, had met with appellant the evening of the murder and told him that he would loan him \$250 to cover money appellant had lost while gambling with the victim earlier in the day. Defense counsel informed the trial judge that none of this information had been provided to him by the prosecutor. Defense counsel made no motion nor did he request any relief from the court at that time. The trial judge did not respond to defense counsel's statements and proceeded to sentencing.

{¶ 15} The majority erroneously concludes that defense counsel's unsworn statements to the judge during appellant's sentencing were sufficient to create evidence and hence a litigated and appealable issue and, therefore, that appellant's petition for post conviction relief was barred by the doctrine of res judicata. It is axiomatic, however, that unsworn statements of counsel are never evidence, regardless of whether they are made during trial or, as the majority characterizes it, "during the sentencing phase of

³The significance of this was that "Man Man" testified as a witness against appellant in the trial, stating that he saw appellant run from the building after the shooting, and in no-way implicating himself in the homicide.

trial." The mere fact that defense counsel told the trial judge at sentencing that it appeared that the prosecutor may have withheld exculpatory evidence does not transform counsel's assertions into "evidence" in the trial record sufficient to support a direct appeal.

{¶ 16} Likewise, the fact that the presentence investigation report is contained in the trial court record is not sufficient, in this case, to transform the possibility that the prosecutor failed to turn over exculpatory evidence into an appealable issue. As with counsel's assertions to the trial judge, none of the statements in the presentence investigation report about what the police were told are evidence; they are merely the double hearsay (and in one case triple hearsay) assertions of others to the probation officer who compiled the report. The only thing the report contains are "clues" to where evidence *might* be found to support appellant's contention that the prosecutor *may* have had possession of exculpatory information but did not provide such information to appellant. Any such evidence is necessarily outside the trial record and, therefore, the issue could not have been raised on direct appeal.

{¶ 17} The majority also erroneously concludes that because the issue was mentioned "during the sentencing phase of trial," it somehow became an appealable issue for direct appeal. The doctrine of res judicata bars a defendant from raising, in a petition for

post conviction relief, issues that were or could have been raised "at the trial." There was no *trial* of this issue, however. A trial is "a judicial examination and determination of issues between parties to an action." Black's Law Dictionary, 5th Ed. Here, the issue was mentioned during sentencing, but there was no determination or ruling by the trial judge regarding defense counsel's expressed concern that the prosecutor might have withheld evidence. And there was no request by counsel for such a determination. Moreover, a sentencing is not a trial; a sentencing is held only after a trial is concluded and a verdict has been rendered.

{¶ 18} Finally, the majority's conclusion that defense counsel's statement that he would "appeal" somehow made the issue appealable is simply wrong, and further constitutes a misreading of counsel's statement. In context, it is clear that defense counsel stated that he would appeal the **verdict of guilty** in the case; not the specific issue of failure to produce exculpatory evidence. Upon that issue, counsel requested no relief, and the court made no ruling.

{¶ 19} It is clear to me that the first inkling that the defense had that there might be exculpatory evidence in this case came after the trial. That defense counsel's suspicions were raised with the court in a colloquy at sentencing is irrelevant to the inquiry. There is absolutely no evidence beyond counsel's

articulated suspicions in the record in support of this issue. There is no doubt in my mind that had appellate counsel attempted to raise this issue (in the state it was at sentencing) on direct appeal, this court would have given the issue short-shrift as there is absolutely no evidence whatsoever in the record that would support such an argument.

{¶ 20} The post conviction relief process, as a collateral civil attack on a criminal judgment, is a means to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues. *State v. Conway*, Franklin App. NO. 05AP-76, 2005-Ohio-6377, at ¶9; *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233. Thus, a petition for post conviction relief may defeat the res judicata bar if its claims are based on evidence outside the record. *State v. Cole* (1982), 2 Ohio St.3d 112, 113-114.

{¶ 21} Here, the transcript of sentencing allows us to be privy to defense counsel's discovery that there may be exculpatory evidence extant in the case. The transcript of sentencing however, contains no evidence itself, and could never support a direct appeal of the issue.

{¶ 22} I do not decide here the merits of appellant's petition for post-conviction relief. It may well be that defendant can prove nothing of what was hinted-at in the presentence investigation report. It may be that this evidence, if proved, is

immaterial. It may be that the evidence is material, but not of a nature to call into doubt the verdict. Nonetheless, the doctrine of **res judicata** does not bar this petition for post conviction relief.