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Opinion, Eighth District Court of Appeals A-1

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION

Since this Court's decision in State v. Calhoun (1999), 86 Ohio St.3d 279, there appears to be little chance of a trial judge granting a hearing on a petition to vacate filed pursuant to R.C. §2953.21. In Calhoun, this Court reiterated that a postconviction petition was a "collateral civil attack on the judgment." Id. 281. However, the rights of a petitioner were seemingly greatly curtailed by this decision. To date, only one capital postconviction has been granted. This state is relinquishing review of collateral matters to the federal courts.

Judges are now seemingly free to decide the merits of the credibility of witnesses who have never previously appeared before them. If the trial judge finds the exhibits attached to the petition to be lacking credibility, even where the claim would be valid if the document proved accurate, a hearing may now be denied. The Calhoun decision would seem to provide greater this greater and unbridled discretion to the trial judge in determining whether the appellant met his proof burden in filing the petition.

This Court also held that the summary judgment cases law in civil cases do not apply because the trial court "has presumably been presented with evidence sufficient to support the original entry of conviction." Calhoun, Id. 284. Thus, under certain conditions, a reviewing court may rule on the credibility of the affidavits attached.

Further interpretation of the Calhoun decision is necessary. The conditions necessary to hold a hearing are now being found in every instance. This state is abdicating collateral review to the federal courts. As it stands now, the decision has effectively ended evidentiary hearings in

postconviction cases.

STATEMENT OF THE CASE AND FACTS

The appellant Percy Hutton is under a sentence of death. This is the appeal of a successor postconviction. He has filed a habeas petition in the Northern District of Ohio to meet statute of limitations issues. That matter is on hold while Hutton exhausts matters that remain pending in state court.

Original Charges

Mr. Hutton has had a long and unusual litigation history in the Ohio courts, including a reversal for a new trial as the result of the original direct appeal by the this Court. The convictions and sentence of death were ultimately reinstated by this Court, although the procedure for doing so required well over a decade.

On October 16, 1985, a Cuyahoga County Grand Jury indicted the appellant Percy June Hutton for two counts of aggravated murder in violation of R.C. §2903.01. Both these counts included capital specifications pursuant to R.C. §2929.04(A)(5) (attempted multiple killings) and R.C. §2929.04(A)(7), (felony-murder).

The indictment also included two counts of kidnaping in violation of R.C. §2905.01 and one count of attempted murder in violation of R.C. §2923.02-2903.02. All counts included a firearm specification pursuant to R.C. §2929.71.

A jury trial began on January 13, 1986. The jury found Hutton guilty of all counts and the specifications.

The penalty phase began on February 5, 1986. The jury recommended a sentence of

death that same day. On February 7, 1986, the trial court accepted the jury's recommendation and sentenced Hutton to die in the electric chair. The trial court also sentenced Hutton to serve consecutive ten to twenty-five year sentences for the conviction of attempted murder. The kidnaping convictions were merged into the principal offense. This sentence is being served consecutively to a three-year enhancement for the use of a firearm during the commission of the offenses.

The trial court filed its findings in the opinion required by Ohio Revised Code §2929.03 (F) on February 26, 1986.

Direct Appeal History

Hutton filed timely Notice of Appeal. The Ohio Eighth District Court of Appeals reversed the convictions and ordered a new trial on April 28, 1988. Ohio v. Hutton, No. 51704, (Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, 1988 Ohio App. LEXIS 1697).

The state appealed the reversal. This Court accepted jurisdiction of the case. On February 6, 1990, that court reversed the Eighth District's decision and reinstated the convictions. Ohio v. Hutton (1990), 53 Ohio St.3d 36. The matter was remanded back to the appellate court for the purpose of requiring the appellate court to conduct the statutorily mandated independent review as to the appropriateness of the sentence and a proportionality review. The appellate court determined a sentence of death to be appropriate on February 1, 1991. Ohio v. Hutton, No. 51704, (Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, 72 Ohio App. 3d 348; 594 N.E.2d 692; 1991 Ohio App. LEXIS 142)

Hutton did not immediately appeal the sentence back to this Court. This was ostensibly

for two reasons. His direct appeal attorney, Floyd Oliver, died. A motion to appoint counsel for him was originally inexplicably denied by the appellate court. Ultimately, the appellate court did appoint counsel to have the sentence reviewed by the Ohio Supreme Court.

Prior to the appeal of the reinstatement of the death penalty back to this Court, the Cuyahoga County Public Defender Office filed an Application for Reopening or so-called Murnahan Motion in the court of appeals. The Eight District denied the application on March 20, 2000. (Reported at: 2000 Ohio App. LEXIS 1182)

Hutton simultaneously appealed the denial of the reopening motion with a delayed direct appeal of the Eighth District's determination that death was an appropriate sentence to the Ohio Supreme Court. The Ohio Supreme Court granted the discretionary appeal to re-open and to review the sentence. (Motion granted by State v. Hutton, 90 Ohio St. 3d 1441, 736 N.E.2d 903, 2000 Ohio LEXIS 2593 (2000)) The issues were reviewed on their merits by this Court, but the convictions and sentence of death were affirmed in State v. Hutton, 100 Ohio St. 3d 176, 2003 Ohio 5607, 2003 Ohio LEXIS 2816 (2003).

Postconviction Procedures

On September 11, 1996, Hutton filed a petition to vacate his convictions and/or sentence pursuant to O. R.C. §2953.21. An amended petition was filed on October 11, 1996. The trial court dismissed the petition on March 29, 1999. Hutton appealed the denial to the Eight District Court of Appeals. The matter was stayed by this Court pending the review of the above mentioned final review of the sentence of death and appeal of the application to re-open.

Upon the resolution of those issues by the this Court in June of 2003, the review of the denial of postconviction petition was re-instated. The court of appeals ultimately upheld the

denial of the petition in Ohio v. Hutton, No. 76348, (Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County , 2004 Ohio 3731; 2004 Ohio App. LEXIS 3356) on July 15, 2004. Hutton appeal this denial to this Court. That court refused to accept jurisdiction on December 15, 2004. Ohio v. Hutton, 2004 Ohio 6585, 2004 Ohio LEXIS 2978 (Ohio, Dec. 15, 2004)

Hutton filed leave to file a new trial motion and a second petition for postconviction relief on February 2, 2001. The trial court has yet to rule on the leave request for a new trial.

Present Case

The trial court denied the second postconviction petition, finding it improper under Ohio law. It is the denial of this request that forms the basis of this appeal. A timely Notice of Appeal was filed. This case was stayed pending this Court's decision on the Murnahan motion and the continuation of the direct appeal. The stay was lifted after the decision in that matter. On October 22, 2007, the Eighth District Court of Appeals affirmed the denial of the petition.

The facts will be further discussed in the following Propositions of Law.

ARGUMENT

Proposition of Law I:

The failure to investigate and interview witnesses constitutes ineffective assistance of counsel where the witness has knowledge of the actual innocence of the defendant.

The appellant was denied the effective assistance of counsel in the trial or guilt innocence determination phase as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v.

Washington (1984), 466 U.S. 668. The result of the proceeding was fundamentally unfair or unreliable.

Counsel failed to call co-defendant Bruce Laster to the witness stand. Mr. Laster, if he chose to waive his Fifth Amendment rights, would have testified as follows. The page designations all stem from Defense Exhibit A, that transcription of a recorded statement taken of Bruce Laster by investigator Thomas Pavlach.

According to Mr. Laster, he had spent the day of the shooting, September 16, 1985, painting with the appellant. (P.3) They painted late into the evening. Laster's sister, Celeste, the appellant's girlfriend at the time, was also present. Hutton and Laster's sister asked Bruce to spend the night so that they could finish the paint job in the morning. Bruce decided not to stay.

After finishing the job, the appellant drove Bruce to an apartment complex off of 55th Street. He told Bruce that he would soon return upon exiting a car. He returned forty minutes later with Simmons, Jr. Simmons, Jr. pulled a sawed-off shotgun out of his jumpsuit upon entering the car. Bruce asked him about the purpose of the jumpsuit. Simmons, Jr. responded that he intended on stealing a few cars later on that evening, so that he needed a weapon.

This was the location that the decent, Ricky Mitchell, used to live. The appellant and Simmons Jr. went inside Mitchell's house. Bruce stayed in the car.

At Mitchell's, the appellants asked about the infamous sewing machine. Mitchell gave the appellant the directions to the machine, near 30th Street, in Cleveland, Ohio.

They drove to an apartment complex. The appellant and Mitchell exited the car and went into the building. Bruce and Simmons went to sleep in the backseat. Bruce was awakened when he heard that two placing the sewing machine into the trunk. The appellant and Mitchell climbed

back into the car. Bruce asked the appellant to take him home. All four men remained in the car.

After leaving the apartment, they drove to 101st or 103rd Street and Ceder Road, where Simmons, Jr. saw an automobile that he wanted to steal. The appellant told him not to mess with it. They then continued to nearby alley, where appellant parked the car.

The appellant asked Bruce to stay with Mitchell while the appellant and Simmons, Jr. made "a run." The appellant returned in about 45 minutes. The appellant told them both that Simmons, Jr. was shot while he, Jr., tried to steal a car. The appellant told them that they had to find Simmons, Jr. so that they could take him to the hospital. The appellant guessed that Jr. may have gone to his mother's house.

Bruce climbed into the car with Mitchell and the appellant. They drove to Hutton's mother's house. Once they arrived, the appellant got into the car with the others. Bruce believed that he had been shot in the head although he did not see any blood. Simmons was angry at the appellant because he thought that the petitioner was going to "watch my back."

The appellant took Simmons, Jr. to the hospital. Neither the appellant, Mitchell nor Bruce wanted to go in as Simmons was shot as a result of committing a crime. They were all afraid that they would get "jammed" into a car theft offense.

At that time, Bruce told the others that he wanted the Simmons sawed-off shotgun out of the car. Mitchell said that they should take it to his house. There appeared to be no problems between the appellant and Mitchell at this time.

At Mitchell's house, they took the shotgun inside. Bruce believed that the appellant had the gun. When they came back out, Mitchell's girlfriend Irene (sic) (Eileen) Sweeny accompanied them. They had left the gun in Mitchell's house. Irene (sic) comes along for the

purpose of seeing if Simmons Jr. was alright. In fact, Irene did go into the hospital to check on Jr. 's condition.

The men dropped off Irene (Eileen) Sweeney at the hospital and parked across that street to wait for a couple of hours. No one had been using drugs. There was no acrimony between that appellant and Mitchell.

During the wait, they all went to sleep. Mitchell was in the front seat with the appellant waiting for Irene (Eileen) to return. Bruce wanted to go home. They decided to get some gas before returning to the hospital in the hopes that Ms. Sweeney would be finished with Siummons, Jr. Bruce fell back asleep, only to awaken at a gat station on 116tha and Shaker Blvd. woke Bruce and told him to get into the front seat.

Mitchell was no longer in the car. Bruce asked where Mitchell had gone. The appellant told him that:

I had dropped him off on 55th he said he wanted to get some guy. Get the guy back or something about stealing the car. I said 'I don't want nothing to do with that'

The appellant told him that Mitchell had instructed that they go back to the hospital to pick up Sweeney and to check on Simmons' condition. Bruce climbed back into the front seat. They stopped by Mitchell's house on the way. The appellant went inside of the house for a couple of minutes before picking up Sweeney at hospital. When asked where Mitchell had gone, the appellant provided her with the same answer that he ha given Bruce.

They decided to go back to Mitchell's house to wait for him. On the way, the appellant asked Sweeney for a sexual favor. Bruce thought that this was strange. She refused. Bruce thought that he might be interfering, so he got out of the car and began to walk.

Bruce walked that wrong direction. When he realized this, he turned around and began to retrace his steps. At this time, the appellant was driving by, so he picked up Bruce and took him home. Bruce did not notice anything unusual between the appellant and Sweeney. Sweeney asked the appellant to take her to her mother's house, which was somewhere near Miles Road. She first ran into Mitchell's house to grab a few things and returned to the car. The appellant then took her to her mother's house.

Before dropping her off, he asked Bruce to take the car to a gas station so that he could talk to Sweeney. Bruce did so. The appellant stood in the street with her and talked until Bruce returned. He then took her to her mother's house.

Bruce had no reason to believe or suspect that the appellant shot Simmons, Jr. or Mitchell. His statement directly refutes Simmons trial testimony, which supplied the only evidence that the appellant shot either party. He refused to cooperate with homicide detectives. The detectives had tried to place Bruce at the scene of both shootings. Bruce said that he was not. He did not provide a statement to the police.

The police told Bruce that he would not have been charged if he implicated the appellant. He refused. Bruce ultimately served approximately 12 years on a plea to a lesser offense.

Proposition of Law II:

A trial court must grant civil discovery to a petitioner who files pursuant to 2953.21 et seq. where the petitioner establishes a good faith basis for the need.

The appellant requested discovery to enable him to develop the record for the issues of his petition. The request was denied. The appellant was prejudiced because he is actually and legally innocent and, therefore, should not have been convicted of all elements of aggravated

murder, the death penalty specifications and the other felonies. Appellant Hutton required the use of discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, it was requested that the appellant be permitted to depose Detective Moore regarding his conversations with Bruce Laster for the purposes of determining what Moore knew in regard to Laster.

As a result of these actions, Appellant Hutton's rights were violated, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 5, 9, 16 and 20, Article I, of the Ohio Constitution.

Proposition of Law III:

The failure of the prosecutor to provide favorable evidence for the appellant violated the mandate of Brady v. Maryland.

The state failed to provide exculpatory evidence to the appellant at the time of trial . Cleveland homicide detectives had spoken to Bruce Laster and were aware that he was with the appellant on the night of the offense and did not have any knowledge of the appellant's involvement. In fact, the testimony of Mr. Laster would have directly impeached the testimony of Samuel Simmons Jr. The testimony would have absolved the appellant of the homicide. The content of Mr. Laster's statement to the homicide detectives was not supplied to the appellant.

Ohio Rule of Criminal Procedure 16(B)(1)(f) mandates that the prosecution reveal all exculpatory evidence to the defense. This rule is based upon United States Supreme Court case law which states that a criminal defendant is entitled to disclosure by the prosecution of all exculpatory evidence. Brady v. Maryland (1963) 373 U.S. 83. The standard of review for Brady

claims is whether there was a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. United States v. Bagley 473 U.S. 667, 682 (1985). The Bagley decision involved a failure by the government to inform the defense that some of the witnesses were being compensated commensurate with the value of their information.

As Samuel Simmons Jr. was the only witness claiming to have direct evidence of the appellant's guilt, the result of both there trial and the sentence would have been different.

Appellant Hutton required the use of discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, it was requested that the appellant be permitted to depose Detective Moore regarding his conversations with Bruce Laster for the purposes of determining what Moore knew in regard to Laster.

The failure to provide exculpatory evidence at trial deprived that appellant his rights under the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 5, 9, 16, and 20, Article I, of the Ohio Constitution for both the guilt non-guilt phase and the penalty phase of his trial.

Fourth Assignment of Error

The failure of the prosecutor to provide evidence of actual innocence violates the mandate of Napue v. Illinois (1959), 360 U.S. 264.

The state failed to provide exculpatory evidence to the appellant at eh time of trial. Cleveland homicide detectives had spoken to Bruce Laster and were aware that he was with the appellant on the night of the offense and did not have any knowledge of the appellants involvement. As this

failure was not due to simple neglect and appears to have been willful, a lesser standard is required for a reversal. Napue v. Illinois (1959), 360 U.S. 264.

The willful failure to provide exculpatory evidence at trial deprived the appellant his right under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 5, 9, 16 and 20, Article I, of the Ohio Constitution for both the guilt non-guilt phase and the penalty phase of his trial.

Fifth Assignment of Error

The appellant was denied effective assistance of counsel in the penalty phase of his capital trial.

The judgement and sentence against Appellant Hutton are void or voidable because he did not receive the effective assistance of all counsel during the penalty phase of his trial. Counsel fell far below a minimum standard of reasonable legal representation by numerous actions and failures to act in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

Counsel failed to call Bruce Laster as a witness at trial. Mr. Laster would have testified in great conflict with the state's key witness, Samuel Simmons, Jr. Counsel's performance here violated the standards set by the United States Supreme Court in Strickland v. Washington (1984).

Sixth Assignment of Error

The trial court erred in failing to conduct a hearing because the appellant is actually innocent of the offenses charged.

A petitioner in a collateral appeal may overcome a procedurally defaulted claim upon a showing of actual innocence. See Schlup v. Delo, 513 U.S. 298, 314-15, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995); Herrera v. Collins, 506 U.S. 390, 417, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993).

In assessing the adequacy of petitioner's showing, therefore, the trial court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." Schlup, 513 U.S. at 327-28. *see also* Gall v. Parker, 231 F.3d 265, 320 (6th Cir. 2000), *cert. denied*, 150 L. Ed. 2d 739, 121 S. Ct. 2577 (2001).

The state's case was based primarily upon the testimony of an admitted liar and thief and a grieving girlfriend/common law wife with baseless allegations of Rape(in which subsequent trial Hutton was acquitted), who claimed Hutton told her Mitchell was not coming back. There was no direct evidence that Hutton killed Mitchell. There further was no evidence of the circumstances of Mitchell's death. There was no evidence of when or why Mitchell was killed.

Seventh Assignment of Error

The trial court erred to the substantial prejudice of the appellant by summarily dismissing his post-conviction petition without affording him an evidentiary hearing or allowing discovery.

The trial court here dismissed the petition without allowing any development of the issues through discovery and/or an evidentiary hearing. This petition brings serious issues pertaining to the actual innocence of the Appellant-appellant Hutton. By failing to allow the innocence claim, in addition to the remainder of the other claims, to be addressed below, this state is again acquiescing its ability to determine the development and outcome of this matter to the federal court.

Because this was a second or successor petition, under Ohio law, R. C. §2953.23 applies. A review of this standard establishes the Hutton meets both tests of the statute. Under subsection (A)(2) of R. C. §2953.21, this is a death penalty situation and Hutton is establishing actual innocence. Either prong is sufficient to allow for the filing.

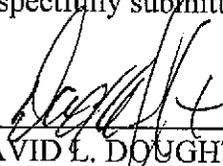
The petition included five claims for relief. Included were claims of ineffective assistance of counsel at during both phases of trial, the failure of the state to provide exculpatory evidence, The trial court did not grant any defense requests for experts, investigators or discovery to allow the appellant to develop his issues. The claims included Exhibits as documentary evidence that was not part of the record on the direct appeal.

On the basis of the foregoing, this Court should reverse the judgment of the trial court and remand the case with instructions to engage in an evidentiary hearing on the issues raised and documented in the petition.

CONCLUSION

Pursuant to the preceding Propositions of Law, the defendant-appellant, Percy Hutton, respectfully requests that this Honorable Court accept jurisdiction of this case and decide the issue on its merits.

Respectfully submitted,



DAVID L. DOUGHTEN
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon William D. Mason, Esq. Cuyahoga County Prosecutor, Justice Center-9th Floor, 1200 Ontario Street, Cleveland, Ohio, 44113 on this 24 day of November, 2007.



DAVID L. DOUGHTEN
Counsel for Appellant

APPENDIX

OCT 22 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 80763

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PERCY JUNE HUTTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-203416

BEFORE: Sweeney, P.J., Cooney, J., and Stewart, J.

RELEASED: October 11, 2007

JOURNALIZED: OCT 22 2007

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

OCT 11 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

FILED AND JOURNALIZED
PER APP. R. 22(E)

OCT 22 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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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).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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JAMES J. SWEENEY, P.J.:

Defendant-appellant, Percy June Hutton ("Hutton"), appeals the trial court's denial of his petition for postconviction relief. For the reasons that follow, we affirm the trial court's decision.

Hutton assigns seven assignments of error for our review, which state:

"I. The appellant was denied effective assistance of counsel at the culpability stage of the trial.

"II. The failure to provide discovery which would enable the appellant to have developed his claims is in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

"III. The failure of the prosecutor to provide favorable evidence for the appellant violated the mandate of *Brady v. Maryland*.

"IV. The failure of the prosecutor to provide evidence of actual innocence violates the mandate of *Napue v. Illinois* (1959), 360 U.S. 264.

"V. The appellant was denied effective assistance of counsel in the penalty phase of his capital trial.

"VI. The trial court erred in failing to conduct a hearing because the appellant is actually innocent of the offenses charged.

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“VII. The trial court erred to the substantial prejudice of the appellant by summarily dismissing his postconviction petition without affording him an evidentiary hearing or allowing discovery.”

Hutton was found guilty of aggravated murder, murder, and attempted murder. The convictions arose from Hutton shooting two victims, one of whom died, over an alleged theft of a sewing machine. Hutton received the death penalty. A complete recitation of the facts surrounding the case can be found in *State v. Hutton* (1990), 53 Ohio St.3d 36.

This is Hutton’s second petition for postconviction relief. The first petition was filed on September 11, 1996. It was denied by the trial court. We subsequently affirmed the decision of the trial court. *State v. Hutton*, Cuyahoga App. No. 76348, 2004-Ohio-3731. Hutton filed a second petition for postconviction relief on February 2, 2001, which the trial court denied in a 12-page opinion. It is this decision which is the subject of the instant appeal.

Timeliness of Petition

Am.Sub. S.B. 4 (“S.B. 4”), effective September 21, 1995, amended Ohio’s postconviction relief statute. S.B. 4 was codified in R.C. 2953.21. Prior to this amendment, the statute allowed the petitioner to file a postconviction petition “at any time” after his conviction. R.C. 2953.21(A)(2), as amended, now imposes certain time requirements for filing postconviction petitions.

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R.C. 2953.21(A)(2) requires:

“a petition *** shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.”

S.B. 4 also expressly states that the amended deadline would apply to persons convicted before its effective date. S.B. 4, Section 3 contains a provision which extends the time limit for filing postconviction petitions for defendants convicted prior to September 21, 1995. Section 3 states:

“A person who seeks postconviction relief pursuant to Sections 2953.21 through 2953.23 of the Revised Code with respect to a case in which sentence was imposed prior to the effective date of this act *** shall file a petition within the time required in division (A)(2) of Section 2953.21 of the Revised Code, as amended by this act, or within one year from the effective date of this act, whichever is later.”

We find that S.B. 4, Section 3, and amended R.C. 2953.21(A)(2) are applicable to Hutton as he was convicted in February 1986, prior to the effective

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date of S.B. 4. See *State v. Schulte* (1997), 118 Ohio App.3d 184; *State v. Jester*, Cuyahoga App. No. 83520, 2004-Ohio-3611; *State v. Halliwell* (July 29, 1999), Cuyahoga App. No. 75986. Under the above sections, Hutton was required to file his supplemental petition for postconviction relief by September 21, 1996, one year after the effective date of S.B. 4. However, the record reflects that Hutton did not file his petition until February 2, 2001, long after the expiration of the statutory deadline.

Even though his petition was untimely filed, the trial court could still entertain the petition under limited circumstances. Pursuant to R.C. 2953.23, the trial court may entertain a postconviction petition filed after the expiration of the deadlines set forth in R.C. 2953.21(A) if:

“(1) Either of the following applies:

“(a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

“(b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petitioner asserts a claim based on that right.

“(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted ***.”

Unless both of the above exceptions apply, the trial court has no jurisdiction to consider an untimely filed petition for postconviction relief. *State v. Elko*, Cuyahoga App. No. 88441, 2007-Ohio- 2638; *State v. Travis*, Cuyahoga App. No. 88636, 2007-Ohio-2379; *State v. Mayes*, Cuyahoga App. No. 88426, 2007-Ohio- 2374.

Hutton contends he was unavoidably prevented from timely discovering Laster’s statement to the police because the State committed a *Brady* violation by failing to inform him about Laster’s statement. Laster was a co-defendant of Hutton’s. Laster pled guilty to involuntary manslaughter and kidnapping for his part in the crimes.

A *Brady* violation occurs when the prosecution suppresses evidence requested by the accused that is material to the guilt or punishment of the accused. *Brady v. Maryland* (1963), 373 U.S. 83, syllabus, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Hutton, however, has not shown that the State withheld evidence from him. According to Hutton’s own petition and according to Laster’s interview, Laster refused to cooperate with homicide detectives. Cleveland

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police reports reveal that Laster refused to provide police with a statement. Based on these factors, the State was not in possession of discoverable evidence.

Hutton also contends Laster's testimony was not available until he agreed to come forward with the evidence and agreed to be interviewed by a private detective hired by Hutton. However, Hutton still waited to file his second petition based on this interview until almost a year and a half after the interview. The interview occurred on September 5, 1999, and Hutton filed his second petition on February 5, 2001.

There is also no evidence that Laster rejected previous attempts by Hutton to obtain his statement. Laster was incarcerated from 1985 until recently, therefore, Hutton was aware of Laster's whereabouts. There is no proof of his unavailability.

Moreover, even if Hutton did show Laster's statements were undiscoverable, he has failed to satisfy the second prong, which requires him to show by "clear and convincing evidence that, but for constitutional error at trial" or because this is a death penalty case, "constitutional error at the sentencing hearing," no "reasonable factfinder" would have found him guilty of the offenses he was convicted of, or found him eligible for the death penalty.

A review of Laster's interview reveals that Laster admitted he was drunk the evening of the murders; was asleep in the car during the time the first

victim was shot; and was not present when the other victim was shot. He also admitted he does not know what happened that night. Notably, he never stated that Hutton was innocent. The evidentiary value of this interview is negligible. It is quite reasonable that a jury still would have found Hutton guilty even if Laster had testified. Therefore, Hutton's lost opportunity to present this evidence did not deny his constitutional right to a fair trial. Thus, Hutton failed to satisfy the R.C. 2953.23 jurisdictional requirement of outcome-determinative constitutional error.

Accordingly, we conclude because the requirements of R.C. 2953.23 were not met, the trial court was without jurisdiction to entertain Laster's second petition for postconviction relief. Therefore, we affirm the trial court's denial of Hutton's petition, albeit on different grounds than those set forth by the trial court.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 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.

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James J. Sweeney

JAMES J. SWEENEY, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
MELODY J. STEWART, J., CONCUR

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