

NO. 07-2231

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 80763

STATE OF OHIO,

Plaintiff-Appellee

-vs-

PERCY HUTTON,

Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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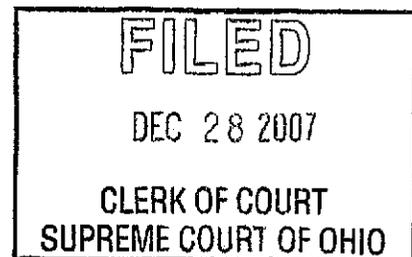


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WHY THIS COURT SHOULD NOT ACCEPT JURISDICTION

Ohio law relevant to this case is well established and was properly applied by the appellate court. No substantial constitutional question and no matter of public or great general interest is presented, therefore, this Court should not accept jurisdiction.

STATEMENT OF THE FACTS

The facts of this case as stated by this Supreme Court in *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 342 are:

On Friday, September 13, or Saturday, September 14, 1985, Percy "June" Hutton confronted Samuel Simmons, Jr. outside Simmons's home and accused him of stealing a sewing machine belonging to Hutton. Claiming that he had seen Simmons's friend Derek "Ricky" Mitchell trying to sell the machine, Hutton demanded that Simmons give the machine back immediately. Simmons suggested that Hutton "go talk to Ricky."

When Mitchell arrived, Hutton went upstairs with him. When they came back down, according to Simmons, Hutton said that "it wasn't what he was looking for and if he found out we had anything to do with what was missing or stolen he was going to kill us."

The following Monday morning, September 16, Hutton went back to Simmons's home at about 12:00 a.m. and asked him to work on a car. Hutton and Simmons got into Hutton's car, where Bruce Laster was waiting for them. When he got in, Simmons saw a .22 caliber rifle on the back seat. Hutton drove them to Mitchell's house saying, "I want to talk to you and Ricky, man." When they arrived, Simmons told Mitchell that "June wanted to talk to him."

After accusing Mitchell of stealing tires from Hutton's back yard, Hutton demanded the return of his sewing machine, in which he had hidden \$750. Mitchell denied taking the machine. Hutton insisted that Mitchell had tried to sell the machine to a Mr. Evans and demanded that Mitchell come with him to Evans's house. According to Simmons, Hutton said: " * * * If Evans said you ain't the one who tried to sell him the sewing machine, * * * I will apologize. If he say you tried to sell the sewing machine, that mean I'm f---ing you up. * * * "

Mitchell and Simmons got into the car. Hutton pointed the rifle at Simmons's side and said that he didn't appreciate Simmons and others breaking into his sister's house.

Instead of going to Evans's house, Hutton drove to a parking lot behind a bus depot on 93rd Street. He ordered Mitchell out of the car. Mitchell and Hutton walked away from the car so that Simmons could not hear their conversation, but he saw Hutton put a pearl-handled, nickel-plated, .22 caliber automatic pistol to Mitchell's head.

Hutton and Mitchell returned to the car. Following Mitchell's directions, Hutton drove to a building on 30th Street. Hutton and Mitchell went inside for a few minutes and emerged with a white sewing machine case.

Hutton drove to his mother's house, took the case inside, and returned to the car. Hutton drove a short distance and parked in an alley next to a brown El Dorado. Simmons got out. Hutton moved his car to the other end of the street. He then walked back to the El Dorado.

Simmons got behind the wheel as Hutton "went under the hood" and said, "Try to start it." He then walked back to Simmons and shot him twice in the head.

Simmons, unable to move, lay partly in and partly out of the car and cried for help. No one responded. He managed to get up and stagger to two nearby houses to seek aid. Hutton found him pounding on the back door of the second house and told him to get into the car. Telling Mitchell that someone had shot Simmons, Hutton then drove Simmons to St. Luke's Hospital.

At the hospital, Simmons asked Mitchell to go inside with him. Mitchell refused and said they were going to get the person "that did this to you." Simmons then got out of the car and went into the hospital by himself.

At 2:30 a.m., Mitchell, Hutton, and Laster returned to Mitchell's apartment. They woke Mitchell's alleged common-law wife, Eileen Sweeney, and, taking her to the hospital, they dropped her off and left. Sweeney went in to visit Simmons. Telling her that Hutton had shot him, Simmons sent her to warn Mitchell to get out of the car. She went outside, but the car had gone. She never saw Mitchell again.

Half an hour later, Hutton and Laster returned to the hospital. Hutton told Sweeney that Mitchell was home and offered to take her there. Instead, Hutton took Sweeney to a park, where he raped her vaginally and orally. Hutton had a small handgun with a white handle and a silver-colored barrel. During the rape, Hutton advised Sweeney to "forget about" Mitchell because "Ricky wasn't coming back."

After the rape, Hutton took Sweeney home. The door to the apartment had been damaged and the apartment was in disarray. Mitchell was not there. Too "scared and nervous" to drive, Sweeney accepted Hutton's offer to drive her to the home of Mitchell's sister LaWanda. Hutton accompanied Sweeney into LaWanda Mitchell's house. Sweeney testified that "[H]e told me, Ricky wasn't coming back, and if I told[,] someone would be looking for me."

On September 30, a decomposing corpse was found near the intersection of East 88th Street and St. Catherine Avenue, Cleveland. A large tire lay on the corpse. The autopsy disclosed that the body was Derek Mitchell's, and that Mitchell had been shot to death. Two bullets were recovered. A firearms expert identified them as .22 caliber long rifle ammunition that could have been fired from either a rifle or a handgun. The bullets that killed Mitchell had the same class characteristics as a bullet that had been removed from Simmons's head, but the expert could not tell whether all three had been fired from the same gun.

Hutton was indicted on two counts of murdering Derek Mitchell. The first count charged that he committed the murder with prior calculation and design. The second charged him with murdering Mitchell while committing, attempting, or fleeing the commission or attempted commission of kidnapping. Each murder count carried one firearm specification, R.C. 2929.71(A), and two capital specifications: a course-of-conduct specification, R.C. 2929.04(A)(5), and a felony-murder specification of kidnapping, R.C. 2929.04(A)(7). Hutton was also indicted for kidnapping Mitchell and Simmons, and for the attempted murder of Simmons. Each count carried a firearm specification.

Hutton's defense was that Mitchell was not killed on September 16, but at some later time when Hutton was in Indianapolis. Denise Richardson testified that she saw Mitchell alive and spoke to him at about 3:00 p.m. on September 17, 1985, the day after the state claimed Mitchell was murdered. According to Hutton, he was in

Indianapolis at the time Richardson spoke to Mitchell and stayed there until October 3, except for two brief visits to Cleveland on September 21 and 28. An employee of the Fall Creek branch of the Indianapolis YMCA saw Hutton there sometime after 4:00 p.m. on September 17. She testified that he paid rent covering the period September 17 to October 3.

Id. at 37-39 (footnote omitted).

STATEMENT OF THE CASE

The State does not object to Defendant-Appellant Percy June Hutton's statement of the case.

Relative to the instant appeal, Hutton filed his second petition for post-conviction relief in the trial court. The State responded with a motion to dismiss on August 24, 2001. The trial court granted the State's motion to dismiss and denied Hutton relief. Findings of fact and conclusions of law were filed on January 3, 2002. Hutton appealed that decision to the Eighth District Court of Appeals, which affirmed the trial court's denial of post-conviction relief. *State v. Hutton*, Cuyahoga App. No. 80763, 2007-Ohio-5443. Hutton now seeks further review by this Honorable Court. The State's argument in opposition follows.

LAW AND ARGUMENT.

Proposition of Law No. I:

The defendant was not deprived of the effective assistance of counsel during the guilt phase of his trial.

Proposition of Law No. V:

The defendant was not deprived of the effective assistance of counsel during the penalty phase of his trial.

As Hutton's first and fifth propositions of law pertain to alleged ineffective assistance of counsel, and because the trial court considered the allegations together in its findings, the State responds to them in concert.

The trial court did not abuse its discretion in denying Hutton's second petition for post-conviction relief without a hearing. In relation to Hutton's first and fifth propositions of law, the trial court did not commit an abuse of discretion in denying Hutton post-conviction relief based on his claims of ineffective assistance of counsel at the culpability and penalty stages of trial.

In *State v. Gondor*, 112 Ohio St.3d 377, 860 N.E.2d 77, 2006-Ohio-6679 this Supreme Court set forth the standard for review that appellate courts should apply when considering the denial of petition for post-conviction relief filed under R.C. § 2953.21. The *Gondor* Court stated, "We hold that a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id.* at ¶ 58. Further, an abuse of discretion connotes more than an error made in judgment or law, but rather it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. Moreover, a trial court properly dismisses a petition for postconviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, at paragraph two of the syllabus.

In this case, the trial court's decision to deny post-conviction relief without a hearing was neither unreasonable nor arbitrary. The trial court considered Hutton's allegations of ineffective assistance in failing to call co-defendant Bruce Laster at trial. The trial court found,

Presuming Bruce Laster would have testified according to the document appended to the instant petition, as Hutton represents, Bruce Laster would have first told the jury that he was drunk on the night of these crimes. (Defense Exhibit "A" Direct

Examination of Bruce Laster, pg.5). Second, Laster would have testified that he was sleeping or not with Hutton during critical stages of the night when Hutton had the opportunity to commit the crimes. (*Id.* At 10, 16, 17, 19, 23, 24). And third, he would have testified that he did not know who shot Simmons or Mitchell because he was not at the scene of the crime. (*Id.* At 31).

(Exhibit 2, p. 5.) The trial court's decision was well reasoned and was supported by competent and credible evidence. Therefore it was properly upheld.

Upon review the Eighth District Court of Appeals determined,

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.

State v. Hutton, Cuyahoga App. No. 80763, 2007-Ohio-5443, ¶¶ 29-30. As Ohio law relevant to this case has been properly applied, further review is not warranted.

Proposition of Law No. II:

The defendant was not entitled to discovery in post-conviction proceedings.

The trial court did not abuse its discretion in denying Hutton's second petition for post-conviction relief without a hearing. In relation to Hutton's second proposition of law, the trial court did not commit an abuse of discretion in denying Hutton relief based on his claims of an unconstitutional lack of discovery in post-conviction proceedings.

The trial court reviewed Hutton's claims that he was entitled to discovery and that he is actually innocent and found,

Petitioner's second claim for relief is a general and conclusory allegation that courts have consistently rejected as insufficient to justify relief or a hearing. See, *Rivera v. United States* (C.A. 9, 1964), 318 F.2d 606; see *State v. Williams* (1991), 74 Ohio App.3d 686. Further, petitioner has not provided any evidence of his 'factual or actual innocence' that supports voiding his convictions. Defense Exhibit 'A', even if it is from Bruce Laster and believed to be true, does not prove Hutton's innocence. Laster never states that petitioner is innocent or that he knows petitioner did not commit these crimes. No other evidence is provided. Petitioner also requests discovery with respect to this claim, specifically, to conduct depositions and a production of the homicide file to 'determine if additional exculpatory evidence exists.' (Petition at 9). There is no requirement of civil discovery in conviction proceedings.

As the trial court's decision was articulate and sound and because it was supported by thorough analysis of the evidence and applicable law, it was properly upheld. The trial court's denial of post-conviction relief was not unreasonable nor was it unconscionable. Moreover, as the Eighth District determined on appeal, Hutton failed to meet the jurisdictional requirements of the statute and therefore was not entitled to post-conviction relief. As Ohio law relevant to this case has been properly applied, further review is not warranted.

Proposition of Law No. III:

The defendant did not substantiate his claim of a violation of *Brady v. Maryland*.

Proposition of Law No. IV:

The defendant did not substantiate his claim of a violation of *Napue v. Illinois*.

As Hutton's third and fourth propositions of law both allege that the State withheld evidence, and because the trial court considered the allegations together in its findings, the State responds to them in concert.

Again, the trial court did not abuse its discretion in denying Hutton's second petition for post-conviction relief without a hearing. In relation to Hutton's third and fourth propositions of law, the trial court did not commit an abuse of discretion in denying Hutton post-conviction relief based on his claims of the State's withholding of evidence.

The trial court analyzed Hutton's claims in light of the evidence submitted and the record of his case and concluded, "petitioner has not shown that the State withheld any evidence from him" and, "Based on the above statements of Bruce Laster, the State has not withheld discovery from Petitioners prior to trial." And, in fact the purported testimony of Bruce Laster indicates that he made no statement to police. Id.

The trial court's denial of post-conviction relief relevant to these third and fourth propositions of law could not be found unreasonable. Further, the Eighth District's decision to affirm the trial court's decision based on jurisdictional grounds was appropriate. As Ohio law relevant to this case has been properly applied, further review is not warranted.

Proposition of Law No. VI:

The defendant failed to substantiate his claim of actual innocence.

Proposition of Law No. VII:

The defendant was not entitled to an evidentiary hearing on his petition for post-conviction relief.

As Hutton's sixth and seventh propositions of law both allege that Hutton was entitled to a hearing on his second post-conviction petition, the State responds to them in concert. The trial court did not commit an abuse of discretion in denying Hutton's second petition for post-conviction relief without a hearing.

The trial court thoroughly considered Hutton's request for a hearing before concluding that a hearing on the successive post-conviction petition was not warranted. Ultimately, the trial court granted the State's motion to dismiss the petition without a hearing.

This Supreme Court has determined that a hearing simply is not automatic upon the filing of a petition for post-conviction relief. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905. Indeed, the trial court referred to *Calhoun* and applied its holding to Hutton's petition.

While Hutton may disagree with the decision, he did not prove that it constituted an abuse of discretion on the part of the trial court. Rather, the findings of the trial court are supported by competent and credible evidence and demonstrate the court's application of relevant law to the facts. Further, the Eighth District's decision to affirm the trial court's decision based on jurisdictional grounds was appropriate under R.C. § 2953.23. As Ohio law relevant to this case has been properly applied, further review is not warranted.

CONCLUSION.

Defendant-Appellant Percy June Hutton has failed to demonstrate to this Honorable Court that his case presents a substantial constitutional question or a matter of public or great general interest. Thus, the State of Ohio respectfully requests this Court deny jurisdiction.

Respectfully submitted,

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SERVICE

A true and accurate copy of the foregoing Memorandum Opposing Jurisdiction was sent by regular United States mail this 27th day of December 2007 to:

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