

STATE OF OHIO
Plaintiff-Appellee,

No. _____

vs.

On Appeal from the Fayette
County Court of Appeals
Twelfth Appellate District

TODD HUSTON
Defendant-Appellant.

Court of Appeals
Case No. CA2007-10-038

MEMORANDUM IN SUPPORT OF JURISIDICION OF APPELLANT TODD HUSTON

SUBMITTED BY:

TODD HUSTON
R.C.I. (519755)
P.O. Box 7010
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Chillicothe, Ohio
45601
Appellant, pro se

OPPOSING COUNSEL:

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Attorney for Appellee

FILED
JUL 01 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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JUDGMENT ENTRY TWELFTH APPELLATE DISTRICT *Case No. CA2007-10-038*

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R.C. § 2953.21

STATEMENT OF ASSIGNMENT OF ERRORS AND ISSUES PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR ONE: THE TRIAL COURT ERRED IN FAILING TO MAKE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO APPELLANT'S PETITION. (Reference: Judgment Entry Final Appealable Order filed October 8, 2007)

ISSUE PRESENTED FOR REVIEW: Was the trial court obligated to make findings of fact and conclusions of law? (Reference: Assignment of Error One)

ASSIGNMENT OF ERROR TWO: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S PETITION WHERE PETITION PRESENTED SUFFICIENT OPERATIVE FACTS AND EVIDENCE OUTSIDE THE RECORD TO ENTITLE APPELLANT TO RELIEF. (Reference: Judgment Entry, Id.)

ISSUE PRESENTED FOR REVIEW: Did Appellant provide sufficient evidence outside the record that would entitle him to relief, and should the trial court have at least conducted an evidentiary hearing based upon the affidavits submitted with the petition? (Reference: Assignment of Error Two)

ASSIGNMENT OF ERROR THREE: THE TRIAL COURT ERRED AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT DID NOT CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S PETITION AFTER APPELLANT PROVIDED EVIDENCE TO SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. (Reference: Judgment Entry, Id.)

ISSUE PRESENTED FOR REVIEW: Does refusing to hold an evidentiary hearing constitute prejudicial error when the evidence attached to petition that is outside the record demonstrates ineffective assistance of counsel?

STATEMENT OF THE CASE AND FACTS

Appellant was indicted and subsequently convicted for the the crime of Complicity to Felonious Assault. He was sentenced to serve three years in prison. After pursuing timely appeals, he filed his petition for post-conviction relief December 11, 2006. The court below made its Judgment Entry/Final Appealable Order on October 8, 2007. *Twelfth Appellate District Affirmed.*

LAW AND ARGUMENT

ASSIGNMENT OF ERROR ONE: THE TRIAL COURT ERRED IN FAILING TO MAKE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO APPELLANT'S PETITION.

The law in Ohio is well-settled on the fact that when a trial Court makes a ruling on a petition for post-conviction relief, it is obligated to make findings of fact and conclusions of law. A court errs, as did the court below, when it fails to meet this obligation. State v. Perry (1967), 10 Ohio St. 2d 175.

For the foregoing reason, Appellant asks this Court to *accept jurisdiction because trial courts continue to have jurisdiction over a Post-Conviction Petitions until it makes a findings of fact and conclusions of law. State v. Mapson (1982), 1 Ohio St. 3d 217. This Court needs to accept jurisdiction so it can be decided once and for ALL if trial courts are required to make a finding of facts and conclusions of law.*

ASSIGNMENT OF ERROR TWO: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S PETITION WHERE PETITION PRESENTED SUFFICIENT OPERATIVE FACTS AND EVIDENCE OUTSIDE THE RECORD TO ENTITLE APPELLANT TO RELIEF.

Consistent with State v. Jackson (1980), 64 Ohio St. 2d 107, Appellant submitted with his petition evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel. Not only did Appellant submit evidentiary materials, he also explained how these materials would change the outcome of his situation. The court below only opined that these materials were barred from being presented by the doctrine of res judicata. However, when a petitioner presents sufficient cogent evidence outside the record, res judicata is inapplicable. State v. Combs (1994), 100 Ohio App. 3d 90. The trial court's pro forma judgment entry is an abuse of discretion and this Court, after review of the documents attached to petition, that the trial court erred in this respect.

For the foregoing reason, Appellant asks this Court to *accept jurisdiction over this case.*

ASSIGNMENT OF ERROR THREE: THE TRIAL COURT ERRED AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT DID NOT CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S PETITION AFTER APPELLANT PROVIDED EVIDENCE TO SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant first points out that he has tried diligently to receive his copy of the transcripts, and as this Court is aware, transcripts are "records" within the meaning of Section 2953.21. State v. Howard (1983), 8 Ohio App. 3d 434. The fact that Appellant has been repeatedly denied his transcripts has undermined his post-conviction efforts and other discretionary appellate avenues. Howbeit, the evidentiary materials/documents attached to Appellant's petition prove counsel ineffectiveness. A post-conviction petitioner does not have to prove that he is entitled to relief in order to be granted an evidentiary hearing. Such a standard would render meaningless the evidentiary hearing mandated by R.C. 2953.21(E). The purpose of evidentiary hearings are to allow further factual development beyond what exists in the evidence provided with the petition.

As part of the court below's abuse of discretion, it also abused its discretion in denying leave for the amended petition which contained further evidentiary support despite the provision of R.C. 2953.21(F).

The evidentiary materials/documents prove that counsel for Appellant, inter alia, failed to subpoena and/or interview witnesses who would have proven at trial that Appellant could not have possibly been at the scene of the alleged crime, failed to investigate to find that Appellant had air-tight alibi, and failed in numerous other respects as proven in the evidentiary

materials attached to petition. The Ohio Supreme Court in State v. Milanovich (1975), 42 Ohio St. 2d 46, provided the standard for determining whether to grant an evidentiary hearing in a post-conviction action. The trial court's failure to grant Appellant a hearing consistent with R.C. 2953.21(E) is reversible error and denies Appellant due process.

The evidentiary documents attached to Appellant's petition are more than sufficient to establish that Appellant's counsel at trial was ineffective to satisfy the two-prong test outlined in Strickland v. Washington (1984), 466 U.S. 668, as said counsel rendered a deficient, non-strategic, performance, and but for the deficient performance, the outcome would have been different as counsel's failures, as stated above, prejudiced the outcome of Appellant's trial proceedings.

CONCLUSION

For the foregoing reasons, Appellant prays this Court will reverse the judgment of the trial court, as Appellant asks this Court to accept CONTINUING jurisdiction upon conclusion of any matter following Appellant's 26 (A) and/or Motion to Certify Conflict, if applicable.

Respectfully submitted,

Todd Huston

Todd Huston
P.O. Box 7010/519755
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed postage prepaid to David B. Bender, Fayette County Prosecuting Attorney, 110 East Court Street, Washington CH, Ohio 43160 this 27th day of June, 2008.

Todd Huston
Todd Huston

LARRY L. LONG
CLERK OF COURTS
FAYETTE COUNTY
MARTIN LUTHER KING, JR. BLDG.
CANTON, OHIO

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

2007 OCT -8 PM 2:42

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 05CRI0233
	:	
vs.	:	
	:	
TODD HUSTON,	:	<u>JUDGMENT ENTRY</u>
	:	<u>FINAL APPEALABLE ORDER</u>
Defendant.	:	

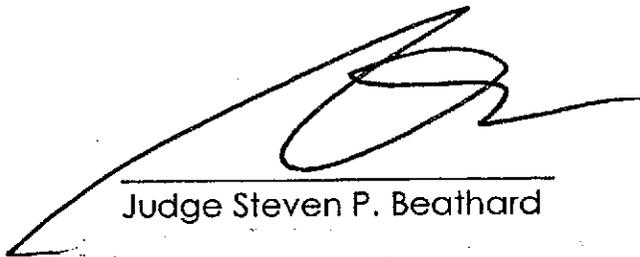
Defendant-Petitioner has filed for post-conviction relief pursuant to R.C. 2953.21. The petitioner sets out five claims of constitutional infringement of his rights and urges the Court to set aside the judgment of conviction resulting from the jury verdict.

The gravamen of each "claim" of petitioner is ineffective assistance of counsel. A timely appeal was taken by petitioner to the Court of Appeal for the Twelfth Appellate District, which affirmed the conviction by entry of August 13, 2007. In the direct appeal, three assignments of error were raised, none of which included ineffective assistance of trial counsel. Petitioner has now sought further relief in the appellate case by application of September 14, 2007. This pleading alleges ineffective assistance of appellate counsel, but again raises no issue regarding the lack of an ineffective assistance of trial counsel assignment of error.

The Court has reviewed and considered the petition, the supporting affidavits, the trial transcript and journal entries. Based upon this review, the Court finds no substantive grounds for relief. The issue of ineffective trial counsel assistance is barred by the doctrine of res judicata as this issue could have been raised upon direct appeal. The information contained in the affidavits filed with the petitioner contain only

COPY

information and potential evidence that was in existence and available for use at the time of trial and the direct appeal. Petition dismissed.



Judge Steven P. Beathard

To The Clerk:

Please issue a copy of the foregoing to the following by regular U.S. mail or by Court mailbox:

Attorney for Plaintiff: David Bender
Defendant: Todd Huston

Clerk

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

FILED
COURT OF APPEALS
FAYETTE CO., OHIO

MAY 20 2008

Larry L. Long
CLERK OF COURTS

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

TODD HUSTON,

Defendant-Appellant.

CASE NO. CA2007-10-038
(Accelerated Calendar)

JUDGMENT ENTRY

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 05CRI0233

{¶1} This cause is an accelerated appeal from the Fayette County Court of Common Pleas in which defendant-appellant, Todd Huston, challenges the trial court's decision denying his petition for postconviction relief.

{¶2} Appellant advances three assignments of error in support of his contention the trial court erred in denying his petition. All such assignments of error are overruled on the basis the trial court did not abuse its discretion in denying the petition, where the court found appellant's ineffective assistance of counsel claims could have been, but were not, raised on direct appeal, and that the information provided by appellant in his petition was in existence at the time of trial and the direct appeal to this court. *State v. Sims*, Clermont App. No. CA2005-08-077, 2006-Ohio-3091, ¶4, 5, 9, 10; *State ex rel.*

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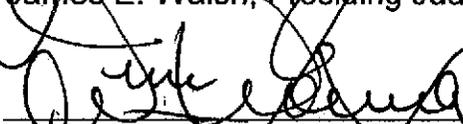
Carrion v. Harris (1988), 40 Ohio St.3d 19, 20; *State v. Hoover-Moore*, Franklin App. No. 07AP-788, 2008-Ohio-2020, ¶16-9; *State v. Perry* (1967), 10 Ohio St.2d 175, paragraphs seven, eight and nine of the syllabus.

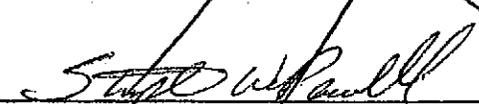
{¶13} The judgment of the trial court is hereby affirmed.

{¶14} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this judgment entry shall constitute the mandate pursuant to App.R. 27.

{¶15} Costs to be taxed in compliance with App.R. 24.


James E. Walsh, Presiding Judge


William W. Young, Judge


Stephen W. Powell, Judge