ORIGINAL

SUPREME COURT OF OHIO

STATE OF OHIO Appellee, -vs- LAWRENCE A. RATLEFF Appellant,	SUPREME COURT NO. 14-1190 APPEAL CASE NO. 14-14-01 THIRD DISTRICT COURT OF APPEALS, UNION COUNTY, OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION
DEFENDANT-APPELLANT, PRO SE

Lawrence A. Ratleff, A678-639
Chillicothe Correctional Inst
P.O. Box 5500
Chillicothe, Ohio 45601

Defendant-Appellant, Pro Se

FILED
JUL 14 2014
CLERK OF COURT
SUPREME COURT OF OHIO

David W. Phillips
Prosecuting Attorney
Justice Center
221 W. 5th Street
Marysville, Ohio 43040

Plaintiff-Appellee

RECEIVED
JUL 14 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF AUTHORITIES

	PAGE
State v. Allen, (1988), Ohio App. Lexis 2414 June 4, 1998)	4
State v. Diviak, (1998) Ohio App. Lexis 97-CA-111 WL. 277684, at 1.	4
State v. Hunt, (1984), 20 Ohio App.3d. 310, 311 486 N.E.2d 108	4
State v. Locke, (1996), Ohio App. Lexis 2171 App. No. No. L-95-305, 1996, WL. 277684	4
State v. Matton, (1996) 8 Ohio App.2d 65-66, 220 N.E.2d 708	4
State v. Lester, (1975), 41 Ohio St.2d 51, 70 O.O. 2d 150, 322 N.E.2d 656	5
State v. Mason (1982), 1 Ohio St.2d 217, 219 1 OBR 240, 242, 438 N.E.2d 910. 912.	5

OHIO REVISED CODE SECTION

R.C. 2953.21(D)(C).....3,4,6
R.C. 2953.21(E).....4,

TABLE OF CONTENTS

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

..... PAGE

STATEMENTS OF THE CASE.....1

STATEMENT OF THE FACTS.....2

PROPOSITION OF LAW NUMBER (ONE).....3

WHETHER OR NOT THE APPELLATE COURT COMMITTED REVERSAL ERROR FOR AFFIRMING APPELLANT'S APPEAL WHEN THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF R.C. 2953.21(C), WHICH REQUIRES THE COURT TO MAKE AND FILE WRITTEN FINDINGS OF FACTS AND CONCLUSION OF LAW WHEN DISMISSING A PETITION FOR POSTCONVICTION RELIEF, OR TO HOLD A HEARING ON THE PETITION.

PROPOSITION OF LAW NUMBER (TWO).....6

THE COURT OF APPEALS ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY ITS DECISION IN FINDINGS THAT THE LOWER COURT ENTER FINDINGS OF FACTS AND CONCLUSION OF LAW IN ITS JUDGMENT ENTRY DISMISSING APPELLANT'S PETITION.

CERTIFICATE OF SERVICE.....8

APPENDIX.....

Opinion of the Union County Court of Appeals, entered on June 2, 2014.

APPELLANT'S SWORN AFFIDAVIT OF VERITY
APPELLANT'S AFFIDAVIT OF INDIGENCY

NOTICE OF APPEAL

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

This case is of great general interest because the trial court must strictly comply with R.C. 2953.21(C) when dismissing a petition for postconviction relief.

Facts, Findings and Conclusion of Law are essential to a defendant's case, as the findings of the court apprise the defendant of the grounds for the courts judgment and enable the appellate court to properly determine the appeal. Without the facts, findings and conclusion of law, the defendant knows nothing no more thasn than that his appeal has been dismissed.

The proposition of law before this Court is very relatively simply, and that is, the appellate court committed reverable errors when failing to remand appellant's appeal back before the trial court to issue facts, findings and conclusion of law. This matter needs urgently corrected by this court.

STATEMENT OF THE CASE

Appellant was indicted on a seven counts indictment in Union County, of drug-related offenses. Appellant's trial counsel did not file any pre-trial motions, specically a suppression motion to challenge the venue and jurisdiction in appellant's case. The jury commenced on March 12, 2013, and proceeded through the first day. Six witnesses were called (T.p 11). The morning of the second day of trial the court was informed that appellant wished to change his plea based upon counsel's advice to two counts and the state would dismiss the remaining five counts (T.pp 1,32).

Prior to the actual plea colloquy, the court addressed Appellant and inquired of him as to his understanding that the jury was seated and could proceed with the trial and he did not have to plead guilty at that time and appellant replied "I know this, but". (T.p 12). The court did not inquire any further about appellant's but'. After more statements from the court about the presence of the jury and the fact that appellant could continue, appellant inquired of his counsel and a discussion was had but came out as **inaudible** and could not be transcribed (T.p 13). The appellant makes the statement :I understant.

After admonitions, the court asked appellant, Are you certain that you want to proceed today to change your plea"?, and appellant responded, "I have no choice. Yes, sir (T.p. 27). The court went on to say, You do have a choice, Mr. Ratleff, and appellant responded, "I'll proceed.

The court finished out the plea colloquy and went directly to sentencing and accepted the agreed sentence recommendation in full and ordered the same sentence.

STATEMENT OF THE FACTS

Officer Craig Comstock of the Logan County Joint Task Force, applied to the Court for an order authorizing the installation and use of an electronic tracking device (GPS) to be placed on a motor vehicle the appellant was operating. Officer Comstock, suspected appellant and several other individuals of trafficking in drugs and engaged in a pattern of corrupt activities. Officer Comstock, beleived appellant was carrying narcotics in the vehicle and travelling through Union County to distribute the drugs for sell.

Union County Sheriff's Department and Drug Task Force had no knowledge of drugs being sold or transported through Union County other than the information Union County received from Logan County law enforcements officers. Based upon that information. Union County law enforcement officers stopped the vehicle appellant was operating and conducted a search of the car and appellant's person. No drugs were found on the appellant person or in his possession. Appellant was then cited a traffic violation by Union County and released.

Based upon further information and an investigation by Logan County, appellant was arrested and charged by Union County and convicted of the offenses named in his indictment. **Venue** and **Jurisdiction** was not properly established in Union County as appellant committed no violation in that County. The proper County to establish venue and jurisdiction was Logan County.

PROPOSITION OF LAW NUMBER (ONE).

WHETHER OR NOT THE APPELLATE COURT COMMITTED REVERSAL ERROR FOR AFFIRMING APPELLANT'S APPEAL WHEN THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF **R.C. 2953.21(C)**, WHICH REQUIRES THE COURT TO MAKE AND FILE WRITTEN FINDINGS OF FACTS AND CONCLUSION OF LAW WHEN DISMISSING A PETITION FOR POSTCONVICTION RELIEF, OR TO HOLD A HEARING ON THE PETITION.

The trial Court in this instant matter failed to make findings of facts and conclusion of law dismissing appellant's petition for post-conviction relief pursuant to **R.C. 2953.21.**

On July 31, 2013, while appellant's appeal was pending in the Ohio Third District Court of Appeal, in Case No 14-13-10. Appellant filed a petition in the Union County Court of Common Pleas for postconviction relief, claiming that his trial counsel was ineffective.

Appellant alleged in his petition that the Union County Court of Common Pleas lacked subject matter jurisdiction and venue to try his case in Union County and that the proper jurisdiction and venue lies in Logan County. The State pursuant to **R.C. 2953.21(D)**, failed to respond by answer or motion to petitioner's petition for postconviction relief, and appellant moved for summary judgment in his favor. The trial court on December 16, 2013, dismissed appellant's petition without a hearing, making any findings of facts and conclusion of law.

R.C. 2953.21(C), provides:

> The Court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. If, the Court dismisses the petition, it shall make and file facts and findings of law with respect to such dismissal.

R.C. 2953.21(E), provides:

> Unless the petition and files and record of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if an direct appeal of the case is pending. The court shall consider in addition to the petition...(emphasis added).

Ohio courts opinions have consistently intepreted the term "consider" as it is used in **R.C. 2953.21(C)**, to mean "review" or "examine". See, e.g. **State v. Hunt**, (1984), 20 Ohio App.3d 310, 311, 486 N.E.2d 108; **State v. Allen**, (1988) Ohio App. Lexis 2414 (June 4, 1998), **State v. Locke**, (1996), Ohio App. Lexis 2171 App. NO. L-95-305, 1996, WL. 277684, at 1.

A failure of the court to conduct such a review denies the petitioner due ¥process. **State v. Diviak**, (1998) Ohio App. Lexis 97-CA-111, WL. 277684, at 1.

Here in the present case, the trial judge cannot rely on personal memory, but must actually consider the issues raised in the petition in the context of the officials record of the case. **State v. Matton**, (1996) 8 Ohio App.2d 65-66, 220 N.E.2d 708.

Findings of Facts and Conclusion of Law are mandatory under R.C **2953.21.** If, the trial Court dismisses a petition forms for post-conviction relief. The obvious reasons for requiring findings of facts and conclusion of law, are to apprise the petitioner of the grounds for the judgment of the trial court and to enable the appellate court to properly determine the appeal in such a case.

The exercise of findings of facts and conclusion of law are essential in order to present an appeal. Without the facts and findings, a petitioner knows no more than that, he lost, and hence, is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge, in the case at present, failure to make the requisite findings, prevents any meaningful judicial review, for it is the findings and the conclusion which an appellate court review for error. **State v. Lester** (1975), 41 Ohio St.2d 51, 70 O.O. 2d 150, 322 N.E.2d 656. (paragraph two of the syllabus), also see **State v. Mpson,** (1982), 1 Ohio St.2d 217, 219 1 OBR, 240, 242, 438 N.E.2d 910, 912.

It was virtually impossible for the trial court to evaluate the potential merit of petitioner's petition for postconviction relief of his claims without a review of the files and records pertaining to his case. Because the trial court did not conduct such a review, and failed to make the necessary facts and findings, appellant's case must be **remanded** back to the trial court for facts, findings and conclusion of law, or appellant discharged from incarceration based upon the merits of his claims stated in his petitioner for postconviction relief.

PROPOSITION OF LAW NUMBER (TWO).

THE COURT OF APPEALS ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY ITS DECISION IN FINDINGS THAT THE LOWER COURT ENTER FINDINGS OF FACTS AND CONCLUSION OF LAW IN ITS JUDGMENT ENTRY DISMISSING APPELLANT'S PETITION.

The appellate court alleged in its judgment entry rendered on June 2, 2014, that the trial Court enter findings of fact and conclusion of law. The trial Court in its entry only stated that the trial court lacked subject matter jurisdiction to consider the appellant's petition for postconviction relief during the pendency of appellant's direct appeal. Appellant's direct appeal concern issues of appellant's claims of ineffective assistance of counsel in regards to issue that was a matter of the trial courts records, and not issue relating to appellant petition.

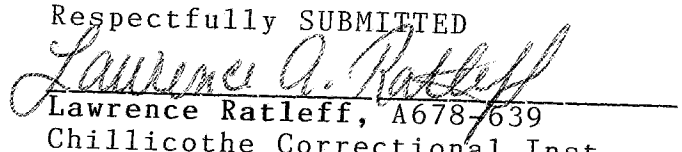
R.C. 2953.21(C) provides that the trial court shall consider a petition that is timely filed under division (A)(2) of that section even if a direct appeal of the judgment is pending. If, the trial court dismisses the petition, it shall make and file facts and findings of law with respect to such dismissal. In the present case, the trial court did not make the necessary facts, findings and conclusion of law but merely stated thast that the Court lacked subject matter jurisdiction. The trial Court decision of its entry does not explain the analysis of appellant's petition for dismissal.

The appellate court avoided the issue of appellant's appeal dismissing his appeal based upon issue that was already properly before the appellate court in a seperate appeal that does not concern issue of appellant's present appeal.

The trial Court in appellant's petition for postconviction relief failed to address the issue of subject matter jurisdiction as it pertains to Union County venue and the venue of Logan County which was the constitutional violation on appeal. Facts and Findings and Conclusion of Law was not made concerning those claims.

For the foregoing reasons appellant issue and claims must be **remanded** back to the trial Court to make the necessary facts and findings and conclusion of law on appellant's subject matter jurisdiction claim.

Respectfully SUBMITTED



Lawrence Ratleff, A678-639
Chillicothe Correctional Inst
P.O. Box 5500
Chillicothe, Ohio 45601

PROOF OF CERTIFICATION

I, Lawrence A. Ratleff, hereby certify that a true and exact copy of the foregoing **Memorandum In Support of Jurisdiction** has been addressed to David W. Phillips, Union County Prosecuting Attorney at 221 W. 5th Street by regular U.S. postage on this 7th day of ~~June~~ July, 2014.

Lawrence A. Ratleff

COURT OF APPEALS
UNION COUNTY
2014 JUN -2 PM 2:23
Teresa A. Nickell
CLERK

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPLELLEE,

v.

LAWRENCE ALVIN RATLEFF, JR.,

DEFENDANT-APPELLANT.

CASE NO. 14-14-01

JUDGMENT ENTRY

This appeal, having been placed on the regular calendar, is sua sponte being assigned and considered on the accelerated calendar pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Defendant-Appellant, Lawrence Ratleff, Jr., appeals the decision of the Court of Common Pleas of Union County dismissing his petition for post-conviction relief without a hearing. On appeal, Ratleff argues that the trial court erred when it did not hold a hearing on his petition. For the reasons that follow, we affirm the trial court's judgment.

On November 13, 2012, Ratleff was indicted on one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) & (B)(1), a felony of the first degree; two counts of possession of heroin in violation of R.C. 2925.11(A) & (C)(6)(d), felonies of the second degree; two counts of trafficking in heroin in violation of R.C. 2925.03(A)(2) & (C)(6)(e), felonies of the second degree; and two counts of possessing criminal tools in violation of R.C. 2923.24(A) & (C), felonies of the fifth degree.

A trial in this matter commenced on March 12, 2013, and the State offered testimony from six witnesses. On March 13, 2013, as the result of a plea agreement, Ratleff pleaded guilty to the two counts of trafficking in heroin and the other counts were dismissed. The trial court accepted a joint sentencing recommendation and sentenced Ratleff to four years imprisonment on each count, to run consecutive to one another.

On April 9, 2013, Ratleff appealed his conviction to this court. Ratleff's appellate counsel, after finding no meritorious ground for appeal, submitted a motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967). In her *Anders* brief, the sole potential assignment of error was that Ratleff had been denied effective assistance of counsel. Ratleff was informed of his counsel's request and was afforded time to file a supplemental brief in support of his appeal. Ratleff submitted a brief pro se, arguing that he was denied effective assistance of

counsel and that the trial court erred in imposing consecutive sentences. This court, after reviewing the record, found "no arguable issue in this appeal and declare it wholly frivolous," granted counsel's motion to withdraw, and dismissed the appeal. (Docket No. 70, appellate judgment entry, p. 4).

During the pendency of his direct appeal, Ratleff filed a petition for post-conviction relief with the trial court on April 17, 2013. In a May 13, 2013 judgment entry, the trial court dismissed the petition as moot, finding that it had "been divested of jurisdiction as of the date of Defendant's notice of appeal, April 9, 2013." (Docket No. 62, p. 1). On September 3, 2013, Ratleff again filed a petition for post-conviction relief with the trial court. In his petition he argued that his counsel was ineffective for both failing to file a motion to suppress and for failing to object to the trial court's jurisdiction and venue.[1] On December 16, 2013, the trial court dismissed Ratleff's motion, finding that it "was divested of jurisdiction as of the date of Defendant's notice of appeal, April 9, 2013, and that Defendant's appeal was not dismissed until December 4, 2013. Therefore, it is ORDERED that Defendant's motions were **moot** as filed due to the then pending appeal of the instant matter." (Emphasis sic.) (Docket No. 71, p. 1).

[1] Ratleff, in his brief, states that his petition for post-conviction relief "asserted * * * that the trial court lacked subject matter jurisdiction and venue to try him in Union County." (Appellant's Br. p. 3). However, while the petition alleges that Ratleff's trial counsel was ineffective for failing to object to venue, the allegation that the trial court lacked jurisdiction and venue was not asserted as a separate and distinct ground for relief. Indeed, the entering of a guilty plea precludes any challenge to the factual issue of proper venue. *State v. McCartney*, 55 Ohio App.3d 170, 170 (9th Dist.1988).

Ratleff timely filed this appeal, presenting the following assignment of error for our review.

Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR FOR ITS FAILURE TO FOLLOW THE MANDATE OF R.C. 2953.21(C), WHICH REQUIRES THE COURT TO EITHER MAKE AND FILE WRITTEN FINDINGS OF FACTS AND CONCLUSION [sic] OF LAW WHEN DISMISSING A PETITION FOR POSTCONVICTION RELIEF, OR TO HOLD A HEARING ON THE PETITION.

In his sole assignment of error, Ratleff argues that the trial court erred by dismissing his petition for post-conviction relief without a hearing. We disagree.

A trial court's decision to dismiss a petition for post-conviction relief without a hearing is reviewed for an abuse of discretion. *State v. Howald*, 3d Dist. Union No. 14-08-23, 2008-Ohio-5404, ¶ 12. A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.). When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

As an initial matter, we note that the trial court did enter findings of fact and conclusions of law in its judgment entry dismissing Ratleff's petition. As findings of fact, the entry recites the dates of the filings of the direct appeal and

the petition for post-conviction relief. As for its conclusions of law, the entry states that the trial court lacked subject matter jurisdiction to consider the petition during the pendency of the direct appeal. However, this finding was incorrect. R.C. 2953.21(E) states that "[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending." As this court has stated,

> a trial court and an appellate court have concurrent jurisdiction to review a judgment and conviction. Specifically contemplated by App.R. 6 is the trial court's ability to rule on a petition for post-conviction relief while a direct appeal of the judgment imposing his conviction and sentence is pending before the appellate court.

State v. Holdcroft, 3d Dist. Wyandot No. 16-10-04, 2010-Ohio-6262, ¶ 18. As a result, the trial court's reason for dismissing Ratleff's petition for post-conviction relief without a hearing was erroneous.

However, this does not end our analysis. Any error that "does not affect substantial rights shall be disregarded" as harmless. Crim.R. 52. As the Ohio Supreme Court has noted, "a reviewing court is not authorized to reverse a correct trial judgment merely because erroneous reasons were assigned as a basis therefor." *Myers v. Garson*, 66 Ohio St.3d 610, 614-615 (1993). Thus, the dismissal of a post-conviction relief petition without a hearing should be affirmed if it is otherwise proper, albeit for reasons different than those utilized by the trial

court. *See Holdcroft* at ¶ 21 (improperly dismissing for lack of jurisdiction was harmless error where no appealable order had yet been filed); *see also In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008-Ohio-5771, ¶ 41 (failing to give due deference to affidavits when dismissing petition was harmless error where no substantive grounds for relief existed); *State v. Stedman*, 8th Dist. Cuyahoga No. 83531, 2004-Ohio-3298, ¶ 15, 33 (improperly dismissing petition for untimeliness was harmless error where there were no substantive grounds for relief); *State v. Myers*, 2d Dist. Clark No. 2002-CA-73, 2003-Ohio-915, ¶ 5 (improperly dismissing for lack of jurisdiction was harmless error where petition was untimely filed).

A trial court may dismiss a petition for post-conviction relief without a hearing when the claims are barred by res judicata. *State v. Cole*, 2 Ohio St.3d 112, 113 (1982). However, res judicata does not bar a claim of ineffective assistance of counsel in a petition for post-conviction relief that is sufficiently supported by evidence outside of the record, as such evidence could not have been considered on appeal. *See State v. Cunningham*, 3d Dist. Allen No. 1-04-19, 2004-Ohio-5892, ¶ 16; *State v. Scott-Hoover*, 3d Dist. Crawford No. 3-04-11, 2004-Ohio-4804, ¶ 21. Further, where the petitioner was represented by the same counsel at both the trial and appellate levels, res judicata does not bar a claim of ineffective assistance of counsel in a petition for post-conviction relief, as

attorneys cannot be expected to argue their own incompetence. *Howald*, 2008-Ohio-5404 at ¶ 21. Nonetheless, where the petitioner was represented by new counsel on appeal, "any claim of ineffective assistance of counsel which could fairly have been determined without resort to evidence dehors the record had to be brought on direct appeal or it was forever waived." *Scott-Hoover* at ¶ 19.

Ratleff's claims of ineffective assistance of counsel in his petition for post-conviction relief do not rely on evidence outside the record. Further, Ratleff received new counsel for his direct appeal. While that counsel ultimately filed an *Anders* brief requesting to withdraw, the brief contained, as the sole potential assignment of error, a claim of ineffective assistance of counsel. Moreover, Ratleff's pro se brief argued that his trial counsel was ineffective. This court considered the *Anders* brief, Ratleff's pro se brief, and the entire record, and found that there was no merit to Ratleff's assertion that he was denied effective assistance of counsel. Ratleff's claims of ineffective assistance of counsel are not supported by evidence outside the record and they were raised by new counsel on direct appeal; therefore, they are barred by res judicata.

Consequently, we find that the trial court did not abuse its discretion and we overrule Ratleff's sole assignment of error.

Accordingly, for the aforementioned reasons, it is the order of this court that the Judgment Entry of the Court of Common Pleas of Union County be, and