

STATE OF OHIO
COUNTY OF CUYAHOGA

) IN THE COURT OF COMMON PLEAS
) SS.
) CR. 184772

)
)
) **FINDINGS OF FACT AND**
) **CONCLUSIONS OF LAW AND**
) **JUDGMENT ENTRY**
)

STATE OF OHIO, Plaintiff

Vs.

WILLIE LEE JESTER, Defendant

Kathleen Ann Sutula, J:

IT IS ORDERED AS FOLLOWS:

Defendant Willie Lee Jester (hereinafter “Petitioner”) filed a petition for post-conviction relief pursuant to Ohio Revised Code Section 2953.21, *et seq.*, on September 30, 1988. Petitioner claims in his petition that he was denied effective assistance of counsel at both trial and on appeal. Petitioner further alleges that his case suffered from several other defects at the guilt and penalty phase, and those defects constitute reversible error.

Upon review of the petition, taken in conjunction with the file and records related to the proceedings involved, this Court issues the following Findings of Fact and Conclusions of Law.

I. Findings of Fact

1. On August 12, 1983, the Cuyahoga County Grand Jury charged Petitioner with one count of Aggravated Murder, O.R.C. §2903.01(B), and two counts of Aggravated Robbery, O.R.C. §2911.01.

2. Count One contained five specifications: (1) the offense was committed for the purpose of evading detection for another offense¹; (2) the offense was committed while committing or attempting to commit Aggravated Robbery²; (3) the victim was a peace officer engaged at the time in the scope of his duties³; (4) the offender knew that the victim was a peace officer, and it was the offender's specific purpose to kill a peace officer⁴; and (5) the offender used a firearm to commit the offense.⁵

3. The Aggravated Robbery counts each contained a gun specification.

4. Petitioner's first jury trial began on January 9, 1984.

5. The jury returned a guilty verdict, on all counts, on February 8, 1984.

6. Due to juror misconduct, however, the Court declared a mistrial.

7. Petitioner's second jury trial commenced on June 11, 1984, before the Honorable Simon L. Leis, Jr. (sitting on assignment).

8. On July 1, 1984, the jury found Petitioner guilty of Aggravated Murder and specifications one, two, and five.

9. The jury also returned guilty verdicts on both counts of Aggravated Robbery and the related firearm specifications.

10. On July 3, 1984, the jury recommended that Petitioner receive a death sentence.

11. Ten days later, on July 13, 1984, Petitioner was sentenced to death on the Aggravated Murder charge, with no incarceration for the firearm specification. In addition to receiving the death penalty, Petitioner was sentenced to a term of

¹ O.R.C. §2929.04(A)(3)

² O.R.C. §2929.04(A)(7)

³ O.R.C. §2929.04(A)(6)

⁴ O.R.C. §2929.04(A)(6)

⁵ O.R.C. §2941.141

incarceration of ten to twenty-five years on each count of Aggravated Robbery, sentences to run consecutively. Petitioner was also sentenced to three years of actual incarceration, likewise consecutive, on the firearm specifications of counts two and three.

12. On July 26, 1984, the Court filed its opinion with the Eighth District Court of Appeals and the Ohio Supreme Court.

13. On appeal, Petitioner was appointed different counsel than those who represented him at trial.

14. The Eighth District Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Jester* (September 16, 1985), Cuyahoga App. No. 49065.

15. On appeal to the Ohio Supreme Court, Petitioner again was appointed new counsel to represent him.

16. The Ohio Supreme Court affirmed Petitioner's conviction and sentence. *State v. Jester* (1987), 32 Ohio St.3d 147.

17. In its opinion, the Ohio Supreme Court stated the facts as found at trial. This Court accepts the Supreme Court's iteration of those facts. See *Jester*, 32 Ohio St.3d 147.

18. Petitioner subsequently filed a Petition for Writ of Certiorari in the U.S. Supreme Court, but the Supreme Court denied certiorari on January 25, 1988. *Jester v. Ohio* (1988), 485 U.S. 972.

19. Petitioner then filed this Petition to Vacate or Set Aside Judgment and/or Sentence, presently before the Court, on September 30, 1988.

20. Governor Richard Celeste, on January 10, 1991, commuted Petitioner's death sentence to life imprisonment.

II. Conclusions of Law

A. Ineffective Assistance of Trial Counsel⁶

Petitioner seeks relief on the basis of alleged errors made by his trial counsel. Those errors, Petitioner argues, void his conviction and sentence pursuant to O.R.C. §2953.21.

On his direct appeal to the Eighth District, different counsel represented Petitioner. While Petitioner's claim for ineffective assistance of trial counsel could have been raised at this time, Petitioner failed to do so.

Under the precedents established by Ohio case law, it is fundamental that a petitioner may not raise in a post conviction proceeding issues that could have been raised on direct appeal. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96, reaffirming *State v. Perry* (1967), 10 Ohio St.2d 175.

As such, the Ohio Supreme Court's decision in *State v. Cole* (1982), 2 Ohio St.3d 112, still remains good law. In the syllabus of that case, the Supreme Court explicitly stated that when a "defendant represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction [*sic*] relief." *Cole*, 2 Ohio St.3d at 112, syllabus.

⁶ Claims 1, 2, 2(A), 2(B), 2(C), 2(D), 2(E), and 3.

In this case, since Petitioner had different counsel at both the trial and appellate levels yet failed to raise the claim of ineffective assistance of counsel, claims 1, 2, 2(A), 2(B), 2(C), 2(D), 2(E), and 3 are denied on the basis of *res judicata*.

B. Ineffective Assistance of Appellate Counsel⁷

In addition to claiming ineffective assistance of trial counsel, Petitioner asserts that his appellate counsel similarly was ineffective. Once again, the Ohio Supreme Court has addressed this very issue. According to the Supreme Court, “[c]laims of ineffective assistance of appellant counsel are not cognizable in post-conviction proceedings pursuant to R.C. 2953.21.” *State v. Murnahan* (1996), 63 Ohio St.3d 60, paragraph one of the syllabus. The proper procedure for Petitioner to follow was to move the Eighth District Court of Appeals for reconsideration or file a direct appeal to the Supreme Court. *Id.*, 63 Ohio St.3d 60, paragraph two of the syllabus.

This Court, therefore, lacks jurisdiction to consider Petitioner’s claims for ineffective assistance of appellate counsel. Claims 5 and 6, are without merit.

C. Juror Affidavits⁸

In his petition, Petitioner relies on affidavits acquired from six panel members of his jury, as well as an alternate juror who did not deliberate with the rest of the panel.

Initially, the Court notes that the it does not have “to accept as true any affidavits submitted in a petition for postconviction relief, but may weigh the credibility of the postconviction relief affidavits.” *State v. McCoy* (March 2, 1998), Clermont App. Nos. CA97-03-027 & CA97-03-032, unreported, following *State v. Moore* (1994), 99 Ohio

⁷ Claims 5 and 6.

⁸ Utilized in claims 4, 7, and 13.

App.3d 748. The Court, however, does not even have to go this far as the affidavits were obtained improperly.

Rule 22(E) of the Cuyahoga County Court of Common Pleas does not permit an attorney connected with a trial, nor any agents acting for him, to interview or question a juror about the jury's deliberations or verdict absent leave of court. Since the affidavits supplied in connection with the petition were not obtained in accordance with Local Rule 22(E), they are improperly brought before the Court.

Even assuming *arguendo* that the Court could consider the credibility of the juror affidavits, they are inadmissible pursuant to Ohio Rule of Evidence 606(B). Rule 606(B) provides in pertinent part that a juror may not testify as to the jury's deliberations with the exception that the juror may testify as to whether any extraneous or outside influence swayed the jury. This exception exists, however, only when there is independent evidence of that outside influence. Even more importantly with respect to the case before the Court is that Rule 606(B) precludes any affidavits "concerning a matter about which [a juror] would be precluded from testifying..." Ohio Evid.R. 606(B).

Courts have long followed the edicts of this evidentiary rule, and even the Supreme Court of the United States has recognized the principle that testimony from jurors cannot be used to impeach a jury verdict. *Tanner v. United States* (1987), 483 U.S. 107, 117. As such, Petitioner's use of juror affidavits is improper, and the Court will not consider them. *Tasin v. SIFCO Industries, Inc.* (1990), 50 Ohio St.3d 102.⁹

D. Ohio's Death Penalty

⁹ Despite the fact that Claims 4, 7, and 13 have an improper basis, the Court also notes that there is no evidence or record of any juror misconduct in this case.

Petitioner's ninth claim of relief is grounded upon the premise that Ohio's death penalty scheme "fails to genuinely narrow the class of offender subject to the death penalty." *Lowenfield v. Phelps* (1988), 484 U.S. 231. In *Lowenfield*, the Supreme Court held that the structure of a death penalty scheme can be narrowed by either (1) narrowing the definition of capital crimes, or (2) broadly defining capital crimes and permitting the aggravating circumstances at the penalty phase. *Id.*, 484 U.S. at 246.

Subsequent to the above criteria, the Ohio Supreme Court held that Ohio's structuring of capital crimes was of the second kind mentioned by the *Lowenfield* Court. As such, Ohio's death penalty passes constitutional muster. *State v. Henderson* (1988), 39 Ohio St.3d 24. Since former Governor Celeste, however, commuted Petitioner's death sentence, the Court deems those issues raised in the petition relating to the death penalty as moot.

Furthermore, the additional matters Petitioner raises in his eighth, ninth, tenth, and eleventh claims for relief, concern issues that have been, could have been, or should have been raised prior to judgment or on direct appeal. As a result, Petitioner is prohibited from re-litigating them in his petition. Those claims, therefore, are without merit.

Petitioner also complains, in his twelfth claim for relief, that the Ohio Supreme Court refused his request for a continuance of the stay of execution which had been granted in the present case in order to permit Petitioner to pursue post-conviction relief. As mentioned above, the issues relating to Petitioner's death sentence are deemed moot, as he is no longer subject to execution by the State.¹⁰

¹⁰ Even if Petitioner were subject to the death penalty, this Court certainly does not have jurisdiction to review the actions of the Ohio Supreme Court and then find those decisions void.

E. Cumulative Effect of Alleged Errors

In his thirteenth claim for relief, Petitioner contends that the cumulative effect of the errors alleged in the petition is so substantial that a reasonable doubt exists that a jury would reach the identical conclusion (i.e., a guilty verdict) absent those errors. Once again, however, Petitioner has failed to demonstrate that any errors actually exist. The thirteenth claim, therefore, is without merit.

III. Conclusion

It is, therefore, ORDERED, ADJUDGED, and DECREED:

For the reasons previously stated, the Court finds that there are no substantial grounds for post-conviction relief. In accordance with Ohio Revised Code Section 2953.21, the Court must dismiss the petition. The Petition for Post-Conviction Relief is hereby denied.

DATE: September ____, 2003

KATHLEEN ANN SUTULA, JUDGE

State v. Mitchell (Cuyahoga 1988), 53 Ohio App.3d 117, 118. Even if the Court were to entertain Petitioner's complaints concerning the Supreme Court's denial of a continuance, there is no evidence that the Supreme Court's decision prejudiced Petitioner. Petitioner has not created any issues of genuine, material fact, nor that he could discover such issues upon further investigation. Since the petition is found wanting in this regard, the petition has to be dismissed. *State v. Milanovich* (1975), 42 Ohio St.2d 46.

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via fax and regular U.S. mail on this _____ day of September, 2003, to the following:

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