

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1125

Appellee

Trial Court No. CR06-3208

v.

Gregory Horner

DECISION AND JUDGMENT

Appellant

Decided: April 17, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and David F. Cooper,
Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the denial of his petition for postconviction relief by the
Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} The facts of this matter are more fully explained in our consideration of appellant's case on direct appeal. *State v. Horner*, 6th Dist. No. L-07-1224, 2008-Ohio-6169.

{¶ 3} Appellant, Gregory Horner, and an accomplice lured a trio of Michigan auto buyers to an East Toledo motel, ostensibly to purchase a rare vehicle with cash. When the three arrived, appellant and his accomplice set upon them, beating them, taking their firearms and stealing their money.

{¶ 4} Appellant and his accomplice were eventually named in a six count indictment, charging them each with three counts of aggravated robbery and three counts of felonious assault, each with a firearm specification. Both initially pled not guilty, but, following plea negotiations, agreed to withdraw their not guilty pleas and plead no contest to three counts of aggravated robbery and two counts of felonious assault with attendant weapons specifications. The state agreed to dismiss one count of felonious assault and its specification and to recommend that both appellant and his accomplice receive terms of incarceration of no more than ten years.

{¶ 5} Following a joint plea hearing, the court accepted the pleas of both men and found both guilty. At sentencing, the court elected not to follow the prosecution's sentencing recommendation and sentenced appellant's accomplice to a 12 year prison term. When appellant appeared for sentencing, his counsel advised the court that appellant had terminated counsel's services and wished to withdraw his plea. The court granted appellant a continuance to obtain new counsel.

{¶ 6} Appellant obtained new counsel and moved to vacate his prior plea. On May 31, 2007, the court held a hearing on appellant's motion. At the hearing, appellant testified that when he entered his plea he believed that his counsel was "working out some type of understanding behind closed doors, so to speak" to reward him for information he had provided to Wood County investigators about a cold case homicide. Appellant testified that he decided to withdraw his plea when it became clear that Lucas County prosecutors would not cooperate in such an arrangement. The trial court denied appellant's motion to vacate and sentenced him to an 11 year prison term.

{¶ 7} Appellant appealed, asserting as error the trial court's denial of his motion to withdraw his plea and ineffective assistance of trial counsel for failing to negotiate a promise for a reduced sentence and for failing to call his original trial counsel or Wood County investigators at the hearing on his motion to withdraw his plea. We affirmed appellant's conviction in all respects. *Horner*, 2008-Ohio-6169, ¶ 21.

{¶ 8} Concurrent with his direct appeal, appellant filed a petition for postconviction relief. In his petition, appellant argued that his trial counsel was ineffective for failing to negotiate an agreement for a more lenient sentence before appellant provided information to Wood County and that his sentence should be set aside because the prosecutor presented information minimizing his value as an informant in the Wood County case with untrue statements. Supporting his petition, appellant submitted his own affidavit and that of his present counsel. Appellant reiterated his account of providing aid in the Wood County case. Appellant's counsel averred that he spoke with

the Wood County investigator who said that "* * * half of the information provided by [appellant] could not be corroborated and was of no value, but half of the information was substantial and was useful."

{¶ 9} The trial court dismissed appellant's petition, finding it barred by the doctrine of *res judicata*. From this judgment, appellant now brings this appeal, setting forth the following two assignments of error:

{¶ 10} "Assignment of Error I: It constituted error to find that petitioner's Sixth Amendment claims of ineffective assistance of counsel are barred by the doctrine of *res judicata*."

{¶ 11} "Assignment of Error II: It violated defendant's rights to due process of law to deny him an opportunity to fully and fairly litigate his Sixth Amendment claims."

{¶ 12} "A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen* (1994), 70 Ohio St.3d 399, 410; *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49. As a result, the doctrine of *res judicata* applies. *Res judicata* bars any claim that was or could have been raised at trial or on direct appeal. *Id.*

{¶ 13} Moreover, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. R.C. 2953.21, *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282, 1999-Ohio-102. Before granting an evidentiary hearing on the petition, the trial court shall determine, pursuant to R.C. 2953.21(C), whether there are substantive grounds for relief, i.e., whether there are

grounds to believe that "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A). In making such a determination, the trial court shall consider the petition and supporting affidavits as well as all of the files and records pertaining to the proceedings against the petitioner. R.C. 2953.21(C). A trial court's denial of a postconviction relief petition without a hearing must be reviewed on an abuse of discretion standard. *State v. Watson* (1998), 126 Ohio App. 3d 316, 324. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219.

{¶ 14} In his first assignment of error, appellant insists that the trial court should not have applied the doctrine of res judicata to bar his claim of ineffective assistance of counsel. This assertion cannot be sustained.

{¶ 15} Not only did appellant raise ineffective assistance of counsel as an assigned error in his direct appeal, he specifically argued that his counsel was ineffective for failing to obtain a promise of a reduced sentence prior to his plea. 2008-Ohio-6169 at ¶ 15. This is the same issue he advanced as grounds for postconviction relief. We rejected this assertion in the direct appeal. *Id.* at ¶ 16.

{¶ 16} The only thing de hors the original record that appellant brings to the postconviction proceeding is the affidavit of his appellate counsel who attributes to the Wood County investigator a statement that half of appellant's information was useful.

This, appellant suggests, is at odds with what the prosecutor stated at the hearing on his motion to withdraw his plea. Appellant insists that the prosecutor stated during cross examination at the hearing on the motion to withdraw his plea that his information was of no value, a statement appellant characterizes as "not true."

{¶ 17} Appellant does not cite us to a specific page or line of the transcript of the motion to withdraw hearing for the point at which the prosecutor asserted appellant's aid to Wood County investigators was valueless. We have carefully reviewed the entire transcript of this hearing and fail to find any statement by the prosecution which could in any way be construed as the assertion appellant claims. Indeed, our review of the entire record reveals nothing that was raised on postconviction that was not fairly before the court originally. Consequently, the claim appellant raised was decided on direct appeal and the trial court properly applied the doctrine of res judicata to bar its re-litigation. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 18} Appellant, in his second assignment of error, essentially complains that the trial court abused its discretion in denying him an evidentiary hearing on his petition for post conviction relief. Since appellant raised nothing new or of material value in his petition, the court was well within its discretion in denying him a hearing. *State v. Crowder* (1991), 60 Ohio St.3d 151, 153. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.