[Cite as *State v. Henry*, 2010-Ohio-1446.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-178**
- vs -	:	
LISA J. HENRY,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 06 CR 000656.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Margaret E. Amer Robey, Robey & Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Lisa J. Henry, appeals from the November 20, 2008 judgment entry of the Lake County Court of Common Pleas, denying without a hearing her postconviction petition to set aside judgment and sentence.

{¶2} The following procedural history and factual background were taken from appellant's first appeal, *State v. Henry*, 11th Dist. No. 2007-L-142, 2009-Ohio-1138.

{¶3} On October 25, 2006, appellant was indicted by the Lake County Grand Jury on six counts: count one, aggravated arson, a felony of the first degree, in violation of R.C. 2909.02(A)(1); count two, aggravated murder, in violation of R.C. 2903.01(A); count three, murder, in violation of R.C. 2903.02(B); and counts four, five, and six, endangering children, misdemeanors of the first degree, in violation of R.C. 2919.22(A). On October 27, 2006, appellant filed a waiver of her right to be present at the arraignment and the trial court entered a not guilty plea on her behalf.

{¶4} On November 15, 2006, appellant filed a waiver of her right to a speedy trial, withdrew her former not guilty plea, and entered a plea of not guilty by reason of insanity to all charges in the indictment. In its November 27, 2006 judgment entry, the trial court appointed the Adult Probation Department to carefully examine appellant pursuant to R.C. 2945.39 and 2945.371 on the issues of competency and sanity.

{¶5} On February 1, 2007, appellee, the state of Ohio, filed a motion for a psychological evaluation pursuant to R.C. 2945.371, which was granted by the trial court the following day.

{¶6} A competency hearing was held on April 4, 2007. Pursuant to its April 13, 2007 judgment entry, the trial court found appellant competent to stand trial.

{¶7} On July 13, 2007, appellant withdrew her plea of not guilty by reason of insanity to counts two through six, and entered a plea of not guilty as to those counts. Appellant's plea with respect to count one, however, remained as not guilty by reason of insanity.

{¶8} A jury trial commenced on July 16, 2007.

{¶9} At the trial, the facts revealed that eleven people lived in the Henry residence on Parmly Road in Perry Township, Lake County, Ohio. Appellant and her husband, John Henry ("John"), were the heads of the household. Their three children, John Jr., Crystal, and Michael all resided with them. John Jr. was married and he and his wife, Jennifer, lived at the home with their four children. Also, Crystal, who was in the process of separating from her husband, Joseph Schuldheis ("Joe"), had a child who lived at the residence.

{¶10} Appellant's and John's child, Michael, who was twenty-six years old at the time of the incident at issue, had cerebral palsy and was mainly confined to his bedroom where he slept on the floor on an air mattress. Michael had the ability to crawl and make noises but could not walk, sit up or talk on his own.

{¶11} Out of all of the adults in the Henry household, appellant was the only one that did not have a job. She was responsible for getting the older children off to school as well as caring for her three young granddaughters and Michael. Appellant was a good homemaker and took care of the other family members as well.

{¶12} Joe testified for the state that because of the marital problems he and Crystal had, she moved back into her parents' home. Joe and Crystal argued frequently. The night before the incident, Joe called the Henry residence repeatedly and made threats to Crystal. According to Joe, he told Crystal that a complaint should be made to Human Services regarding the poor manner in which Michael was being treated.

{¶13} On the morning of September 13, 2006, the working adults left for their jobs and appellant got the older kids off to catch the school bus. John, while at work at

Mentor Lumber, received a phone call from appellant to hurry home before it was too late. John testified for appellant that he raced back to find his house ablaze. He tried to enter Michael's bedroom, which was in the center of the home, but the heat and smoke were too intense. The bathroom door was locked, so John kicked it in to find appellant lifeless in the bathtub. John called 9-1-1. He carried appellant out and was also able to retrieve the three young granddaughters from the house to safety.

{¶14} At approximately 9:30 a.m., the Lake County Sheriff's Department ("LCSD") and the Perry Fire Department ("PFD") were dispatched to the residence. Firefighters attempted firefighting and rescue efforts and paramedics assisted appellant, who had cuts on the tops of both her hands which were bleeding. Patrick Fuerst, a lieutenant with the PFD, testified for the state that appellant said she wanted to die and wanted her and Michael to be with her deceased mother.

{¶15} Appellant was taken to the hospital where she was treated for wounds to the top of her hands and suffered a severed tendon. She was released shortly after treatment, and taken to the LCSD where she was interviewed. Scott Stranahan ("Detective Stranahan"), a detective with the LCSD, testified for the state that appellant told him and other deputies that she wanted to be in heaven with her mother.

{¶16} Efforts to rescue Michael were unsuccessful. Michael's corpse was ultimately found three to four feet from the bedroom door under debris. Detective Stranahan and Chuck Hanni ("Hanni"), an arson investigator with the Ohio State Fire Marshall's Office, testified for the state that Michael appeared to have been lying on a blanket, there was a comforter by his side, and newspapers were piled along the side of

his body. Also, a gas can was in Michael's vicinity and an odor of accelerant was detected.

{¶17} Michael Reed, a lieutenant with the LCSD, testified for the state that an initial walk through of the residence after the fire had been suppressed revealed an apparent suicide note written by appellant. At that time, the LCSD contacted the Lake County Prosecutor's Office to obtain a search warrant.

{¶18} According to Hanni, during the initial walk through, he observed a line of demarcation which indicated how far the soot and gases had banked down before the fire was extinguished. Hanni indicated that a gas can was found near Michael's body, along with the remains of a comforter, portions of a blanket which were partially underneath him, and some newspapers stacked along his left side. Hanni was able to detect an odor of accelerant on the newspapers found alongside Michael's body. From his observations, Hanni determined that the fire originated in Michael's bedroom on the floor level near the lower half of his body, which was evidenced from the bloom pattern on the ceiling. Hanni testified that when Michael's body was placed in a body bag, he noticed a foam cone in his mouth.

{¶19} Upon obtaining a search warrant, the LCSD recovered a gas can, an apparent suicide note, a blanket, comforter, newspapers which surrounded Michael's body, a playpen and swing, blood evidence, a sharp blade found near the bathtub, and appellant's clothing. Accelerants were later found on the newspapers, blankets, and gas can.

{¶20} On the day following the incident, Dr. William Bligh-Glover ("Dr. Bligh-Glover"), Lake County Forensic Pathologist, testified for the state that he performed an

autopsy on Michael's body. According to Dr. Bligh-Glover, Michael's remains were completely covered with soot and there were extensive third and fourth degree burns over seventy percent of his body. Michael's lower legs were completely destroyed by the fire. Internal examination of his upper airways revealed a grayish color including the area in his trachea which would normally be pink. He found no sign of disease or illness. Dr. Bligh-Glover opined that Michael died of asphyxiation due to his involvement in a flash fire, and that his windpipe was damaged by superheated gases below the vocal chords indicating that he inhaled those gases. The official cause of death was determined to be homicidal violence. Dr. Bligh-Glover stressed that there was simply nothing to indicate that Michael died from natural causes. He stated that many things can cause a foam cone, but ultimately it is caused from damage to the airways when fluid that keeps the cells wet leaks out and air passes over the fluid so that it whips into a froth. Dr. Bligh-Glover said that a person must be living to form a foam cone. Presence of the foam cone was additional evidence leading him to believe that Michael was alive at the time of the fire.

{¶21} On cross-examination, Dr. Bligh-Glover agreed that elevated carbon monoxide levels and soot in the airway are the time-honored scientific findings used to determine if someone was alive during a fire, but while acknowledging that that is most often the case, stated that it is not always the case. He indicated the difference was that Michael died in a flash fire.

{¶22} Dr. Heather Nielson Raaf ("Dr. Raaf"), retired Chief Deputy Coroner with the Cuyahoga County Coroner's Office, testified for the state that she reviewed Dr. Bligh-Glover's autopsy findings as well as all of the photographs and investigations.

She agreed that as a result of those findings, Michael did not die of natural causes. Dr. Raaf found the foam cone significant and concurred with Dr. Bligh-Glover that it occurs in a living person who is sometimes in a fire. She explained that a foam cone occurs when someone is actively dying. Dr. Raaf opined that Michael died very quickly due to lack of oxygen. She stated there was no evidence that Michael died of a seizure or pneumonia.

{¶23} Dr. Charles Yowler, Director of the Burn Unit at MetroHealth Medical Center in Cleveland, Ohio, testified for appellant that it was his opinion that the finding of normal carbon monoxide levels and lack of soot below the vocal chords was not consistent with Michael being alive at the time of the fire.

{¶24} Dr. James Dibdin ("Dr. Dibdin"), who is licensed in California and certified in anatomic and forensic pathology, testified for appellant that it was his opinion that Michael died of a seizure and a fatty liver. Dr. Dibdin believed that Michael was not alive at the time of the fire due to the normal carbon monoxide levels and lack of soot in his airways.

{¶25} According to appellant, at first, she had little recollection on the morning of the incident. However, some of her memories had come back. For instance, appellant recalled going into Michael's bedroom, finding his body cold, and later waking up in the hospital. She had no recollection of writing a suicide note or starting the fire.

{¶26} Dr. Phillip Resnick ("Dr. Resnick"), who is board certified in forensic psychiatry, testified for appellant that he interviewed her and several of her family members days and months following the incident. A few days after the incident, Dr. Resnick stated that appellant did not remember much regarding that morning, and he

found her amnesia to be genuine. Months later, he indicated that appellant regained part of her memory and remembered finding Michael dead that morning, but did not remember writing a suicide note or starting the fire. Dr. Resnick opined that appellant was suffering from a severe mental disease at the time of the incident which was a major depressive episode with dissociative features.

{¶27} Dr. Jeff Rindsberg ("Dr. Rindsberg"), a state rebuttal witness with the Lake County Probation Department, testified that he believed appellant suffered from major depressive disorder. However, he opined that it was not a severe mental disease and it did not bear on her ability to know right from wrong. Dr. Rindsberg stated that appellant had no traits or features associated with dissociative conditions.

{¶28} Finally, Dr. James Eisenberg ("Dr. Eisenberg"), a state rebuttal witness engaged in the field of forensic psychology, testified that he believed appellant was depressed and suffered from dissociative features, but that she knew the wrongfulness of her actions. Dr. Eisenberg stated that no one could have an opinion as to appellant's mental state at the time because of her amnesia.

{¶29} On July 25, 2007, following the trial, the jury returned a verdict finding appellant guilty on all charges in the indictment. The trial court deferred sentencing until a later date and referred the matter to the Adult Probation Department for a presentence investigation and report as well as an updated psychological evaluation.

{¶30} On August 3, 2007, appellant filed a motion for new trial pursuant to Crim.R. 33. The state filed a response on August 10, 2007.

{¶31} Pursuant to its August 20, 2007 judgment entry, the trial court denied appellant's motion for new trial.

{¶32} A sentencing hearing was held on August 22, 2007. Pursuant to its August 22, 2007 judgment entry, the trial court sentenced appellant to three years in prison on count one; life imprisonment with parole eligibility after serving twenty years of mandatory imprisonment on count two; count three merged into count two for purposes of sentencing; six months on count four; six months on count five; and six months on count six. The trial court indicated that count one is to run consecutive to count two, and counts four, five, and six are to run concurrent with each other and with count two, for a total term of twenty-three years to life in prison. Appellant was given three hundred forty-four days of credit for time already served. The trial court notified appellant that post release control is mandatory for five years.

{¶33} It is from the foregoing August 20, 2007 and August 22, 2007 judgment entries that appellant filed her first appeal, Case No. 2007-L-142. On March 13, 2009, this court affirmed the judgment of the trial court. *State v. Henry*, 11th Dist. No. 2007-L-142, 2009-Ohio-1138.

{¶34} While that appeal was pending, appellant filed a postconviction petition to vacate or set aside the judgment and sentence on June 13, 2008. On August 7, 2008, the state filed an answer to appellant's petition for postconviction relief and a motion to dismiss.

{¶35} Pursuant to its November 20, 2008 judgment entry, the trial court granted the state's motion to dismiss and denied without a hearing appellant's petition for postconviction relief. It is from that judgment that appellant filed the present appeal, asserting the following assignments of error for our review:

{¶36} "[1.] BECAUSE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MRS. HENRY'S SECOND AND THIRD GROUNDS FOR RELIEF, ITS JUDGMENT ENTRY IS NOT A FINAL AND APPEALABLE ORDER.

{¶37} "[2.] THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING APPELLANT'S POST-CONVICTION PETITION WITHOUT A HEARING."

{¶38} In her first assignment of error, appellant argues that the trial court's judgment entry is not a final appealable order because the trial court failed to make findings of fact and conclusions of law with respect to her second and third grounds for relief.

{¶39} A decision or order dismissing a petition for postconviction relief is not a final appealable order until the trial court files the requisite findings of fact and conclusions of law. See *State v. Lester* (1975), 41 Ohio St.2d 51, 55. When a trial court dismisses a postconviction relief petition without holding an evidentiary hearing, it must enter findings of fact and conclusions of law. R.C. 2953.21(C). "While a trial court need not discuss every issue that the petitioner raises or engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law, its findings must be sufficiently comprehensive and pertinent to the issues to form a basis upon which the evidence supports the conclusion." *State v. McKnight*, 4th Dist. No. 06CA645, 2006-Ohio-7104, at ¶5, citing *State v. Calhoun* (1999), 86 Ohio St.3d 279, 291-292.

{¶40} In the case at bar, in support of her postconviction petition, appellant asserted that (1) she was denied her right to the effective assistance of counsel under the Sixth and Fourteenth Amendments; (2) she was denied her right to remain silent

and not to incriminate herself as guaranteed by the Fifth and Fourteenth Amendments; (3) she was denied her right to be free from warrantless searches and seizures as guaranteed by the Fourth and Fourteenth Amendments; (4) she was denied her right to confront the witnesses against her in violation of the Sixth and Fourteenth Amendments; and (5) she was denied her right to a fair trial and due process free from prosecutorial misconduct as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

{¶41} Here, the trial court issued findings of fact and conclusions of law on November 20, 2008. The trial court began by pointing out appellant's five claims which she asserted in her petition for postconviction relief. A review of the trial court's entry, which is over six pages in length, reveals that appellant's second and third issues were indirectly addressed under appellant's first issue dealing with ineffective assistance of counsel. In fact, appellant herself blended the arguments contained in her first three issues in her petition for postconviction relief. For example, under her second issue, appellant asserted that her counsel was ineffective by failing to move to suppress her statement made to detectives. Under her third issue, appellant maintained that her counsel was ineffective by failing to move to suppress evidence seized during an alleged unlawful search. Thus, the trial court's three page discussion of appellant's first three issues contained under the umbrella of "ineffective assistance of counsel" was sufficient pursuant to *Calhoun*, supra. The trial court's November 20, 2008 entry is a final appealable order.

{¶42} Appellant's first assignment of error is without merit.

{¶43} In her second assignment of error, appellant contends that the trial court abused its discretion by dismissing her postconviction petition without a hearing. She

presents four issues: (1) the trial court abused its discretion in finding that the petition stated no substantive ground for relief; (2) the trial court abused its discretion by finding the affidavits supporting the postconviction petition lacked credibility; (3) the trial court abused its discretion by finding that the issue of the defense attorney's failure to file motions to suppress was res judicata; and (4) the trial court abused its discretion by finding that the issue of appellant's right to confront witnesses against her was res judicata.

{¶44} For ease of discussion, we will address appellant's four issues under her second assignment of error together.

{¶45} R.C. 2953.21 provides in part:

{¶46} "(A)(1)(a) Any person who has been convicted of a criminal offense *** and who claims 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 *** may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. ***

{¶47} "***

{¶48} "(E) Unless 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. ***

{¶49} "***

{¶50} "(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. ***"

{¶51} The foregoing statute "'does not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required.'" *State v. Scheidel,* 11th Dist. No. 2004-A-0055, 2006-Ohio-198, at ¶11, quoting *State v. Jackson* (1980), 64 Ohio St.2d 107, 110. In cases where no hearing was held, an appellate court reviews the trial court's decision to grant or deny a petition for postconviction relief de novo. *State v. Gatchel*, 11th Dist. No. 2007-L-036, 2008-Ohio-1029, at ¶26, citing *State v. Jordan,* 11th Dist. No. 2006-T-0087, 2007-Ohio-1067, at ¶8.

{¶52} With regard to res judicata, this court stated the following in *Gatchel*, supra, at ¶27-28:

{¶53} "'"Under the doctrine of *res judicata,* a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial,* which resulted in that judgment of conviction, *or on an appeal* from that judgment.'" (Emphasis in original). *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95 ***, quoting *State v. Perry* (1967), 10 Ohio St.2d 175 ***, paragraph nine of the syllabus.

{¶54} "'For a defendant to avoid dismissal of the petition by res judicata, the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court's record, and it must not be evidence that existed or was available for use at the time of trial. (***) "To overcome the res judicata bar, evidence

offered dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon the information in the original record.'" *State v. Adams,* 11th Dist. No. 2003-T-0064, 2005-Ohio-348, at ¶39, quoting *State v. Lawson* (1995), 103 Ohio App.3d 307, 315 ***." (Parallel citations omitted.)

{¶55} In the instant matter, if appellant is to overcome the overruling of her motion based on res judicata, she must adduce evidence outside the record that demonstrates that she could not have appealed the constitutional claims based upon information already in the record. Here, appellant points to nothing credible outside the record that would entitle her to relief under R.C. 2953.21.

{¶56} In support of her petition for postconviction relief, appellant offered a number of affidavits. We note that not all affidavits accompanying a petition for postconviction relief entitle a defendant to an evidentiary hearing, even assuming the truthfulness of their content. *State v. Davis*, 11th Dist. No. 2003-P-0077, 2004-Ohio-6684, at ¶30, citing *Calhoun*, supra, at 284. Many of the affidavits submitted by appellant here were from either herself or her immediate family. The trial judge who heard all of the testimony at trial and ruled on the motion for new trial was also the judge considering the petition. Also, many of the affidavits relied on hearsay.

{¶57} We conclude that the trial court correctly denied appellant's petition for postconviction relief without a hearing due to the absence of sufficient operative facts to establish grounds for relief. Since the remaining issues were either raised or could have been raised on direct appeal, res judicata bars their consideration now. See

Jordan, supra, at ¶15.[1]

{¶58} Appellant's second assignment of error is without merit.

{¶59} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

1. This court addressed appellant's claim regarding ineffective assistance of counsel in the context of failing to file a motion to suppress in *Henry*, supra, at ¶71-75. Also, we addressed appellant's allegation with respect to ineffective assistance of counsel in the context of failing to confront witnesses against her at trial in *Henry*, supra, at ¶86-91.