

Not Reported in N.E.2d, 1995 WL 418683 (Ohio App. 11 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

STATE of Ohio, Plaintiff-Appellee,
v.
Danny Lee HILL, Defendant-Appellant.

CASE NO. 94-T-5116
June 16, 1995.

[Dennis Watkins](#) and [Paul Croushore](#), Columbus, OH.

Patrick F. McCarthy, Warren, OH.

OPINION

[FORD](#), P.J.

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_____(Cite as: 1995 WL 418683, *1 (Ohio App. 11 Dist.))_____

Appellant, Danny Lee Hill, is before this court appealing the trial court's decision denying his post-conviction relief petition. Appellant was found guilty of aggravated murder with specifications, kidnaping, rape, aggravated arson, and felonious sexual penetration. The three-judge panel imposed the death penalty and, also, sentenced appellant to various terms of incarceration for the other offenses. On appeal, this court affirmed the trial court's decision in [State v. Hill \(Nov. 27, 1989\), Trumbull App. Nos. 3720 and 3745](#), unreported ("Hill I"). The Supreme Court of Ohio affirmed these decisions in [State v. Hill \(1992\), 64 Ohio St.3d 313](#) ("Hill II").

Subsequently, appellant filed a post-conviction relief petition with the trial court. Appellee responded to the application by filing a motion for judgment pursuant to [R.C. 2953.21\(C\)](#). The court, without conducting a hearing, denied appellant's petition and filed findings of fact and conclusions of law. Appellant timely perfected this appeal, raising the following assignments of error:

"1. The trial court erred to the prejudice of petitioner-appellant in overruling his petition as to the claims for relief and for so ruling without holding an evidentiary hearing (Findings 5-18).

"2. The trial court erred to the prejudice of petitioner-appellant in denying petitioner clarification of and subsequently ruling upon the state's 'motion for judgment pursuant to [R.C. 2953.21\(C\)](#)' (Journal entry of June 29, 1994).

"3. The trial court erred to the prejudice of petitioner in denying the petitioner access to physical evidence for testing which evidence was critical to the conviction and the testing of which may reveal the petitioner's actual innocence (Entry of June 30, 1994)."

In the first assignment, appellant alleges that the court erred by not holding an evidentiary hearing prior to denying his petition. He presents sixteen sub-arguments in support of this assigned error. However after reviewing each, we do not perceive error.

[R.C. 2953.21](#) provides in part:

“(C) Before granting a hearing, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript. * * *

“(D) Within ten days after the docketing of the petition, * * * the prosecuting attorney shall respond by answer or motion. * * *

“(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 * * *.”

Initially it should be noted that [R.C. 2953.21\(C\) and \(E\)](#) permit the court to dispose of a petition for relief without a hearing. The statute provides that the court “ *shall determine whether there are substantive grounds for relief*” and must have a hearing “[*u*] *nless the petition and the files and records of the case show the petitioner is not entitled to relief* * * *.” (Emphasis added.) [R.C. 2953.21\(C\) and \(E\)](#).

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Therefore, if the court can resolve the averments contained within the petitioner’s request based upon the material contained within the petition, and the files and records, it may properly dismiss the matter without conducting a hearing. [State v. Milanovich \(1975\), 42 Ohio St.2d 46](#).

Furthermore, while reviewing a motion for post-conviction relief, the court may apply the doctrine of *res judicata*. “[T]his court has found *res judicata* to be a proper basis upon which to dismiss without hearing an [R.C. 2953.21](#) petition. [State v. Perry \(1967\), 10 Ohio St.2d 175](#) * * *.” [State v. Cole \(1982\), 2 Ohio St.3d 112](#). Moreover, application of *res judicata* is appropriate for issues which could have been raised on direct appeal. [Id. at 114](#).

“Under the doctrine of *res judicata*, a final judgement 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 trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgement.” (Emphasis *sic.*) *Perry*, paragraph nine of the syllabus.

In applying *Perry*, this court noted: “[c]ertainly, as the issues involve evidence *dehors* the trial record, they should have been raised originally by way of a petition for post conviction relief. But as the issues were raised, and were finally adjudged, they may not be relitigated.” [State v. Tomey \(Dec. 17, 1993\), Trumbull App. No. 92-T4678](#), unreported, 8. Additionally, if the allegations do not raise sufficient operative facts to warrant an evidentiary hearing, the court may summarily dispose of the matter. See [State v. Kilbreath \(Aug. 23, 1993\), Stark App. No. CA-9187](#), unreported, 5.

In the first sub-argument, appellant alleges that his convictions were void or voidable because the three-judge panel did not indicate whether it unanimously found appellant to be the principal or whether it unanimously found the murder to be committed with prior calculation and design. Appellant postulates that such an omission constitutes error, but he does not provide any citation to authority which supports this proposition nor does he advance any reasoning to advocate this premise. Furthermore, as this matter was tried to a three-judge panel rather than to a jury, “unless

the record clearly shows otherwise, this court will assume regularity and/or lack of prejudicial error” by the tribunal. *Hill I*, at 38; See, also, [State v. White \(1968\), 15 Ohio St.2d 146, 151](#). Finally, as this issue could have been raised during the first appeal, appellant is precluded from presenting it now, and the trial court properly concluded that this issue was barred by *res judicata*. *Perry; Cole*.

In the second sub-argument, appellant claims that he was entitled to an evidentiary hearing on the issue of whether the appellee improperly withheld evidence from him. This issue was addressed previously by this court and, therefore, was properly dismissed by the trial court under the principle of *res judicata*. As noted in *Hill I*, appellant was afforded the opportunity to continue the matter to prepare for the witnesses, but his counsel declined the trial court's offer and we, therefore, concluded that the trial court did not error. *Hill I* at 49. Furthermore, this court opined that “[a]ppellant failed to show that the state did not make a good faith effort to supply all [discovery materials] to him [prior to the start of the trial].” *Id.* At 50. Similarly, this issue was addressed by the Supreme Court of Ohio which overruled appellant's claimed error on this issue. *Hill II* at 327-328. Pursuant to *Perry* and *Cole*, the trial court properly dismissed appellant's claim.

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In the third sub-argument appellant alleges that he was entitled to an evidentiary hearing on the issue of whether the trial court considered non-statutory “aggravating factors.” Specifically, he claims that the court, in imposing the death penalty, relied upon improper remarks of the prosecutor. As noted previously, this matter was tried to a three-judge panel rather than to a jury, and “unless the record clearly shows otherwise, this court will assume regularity and/or lack of prejudicial error” by the tribunal. *Hill I*, at 38; *White* at 51. Additionally, we dismissed appellant's claims regarding alleged prosecutorial misconduct in appellant's ninth sub-argument *infra*. Nothing in the record reflects any irregularity. As such, the trial court was not obligated to hold an evidentiary hearing on this issue. Furthermore, while not specifically raised on appeal, this court concluded that the trial court's discussion of the nature and circumstances of the offense was acceptable when considering the aggravating circumstances.

“However, the trial court's analysis of the aggravating circumstances weighed against the mitigating factors support its conclusion. The court indicated it considered the underlying facts of each of the specifications in the weighing process. * * * All are appropriately considered by the court and are against the fabric of mitigation.” *Hill I* at 71.

Additionally, this argument has been rejected by the Supreme Court of Ohio in [State v. Moreland \(1990\), 50 Ohio St.3d 58,69](#). Finally, this issue could have been raised on direct appeal. Appellant's failure to do so permits summary adjudication by the trial court under *res judicata*. *Perry; Cole*.

In the fourth sub-argument appellant claims that the trial court should have taken evidence to determine whether the court failed to consider all of the mitigating factors. This issue was raised initially by appellant in the first appeal. This court rejected appellant's claim stating “[R.C. 2929.04\(B\)](#) allows for the consideration of several mitigating factors, including ‘any factors that are relevant to the issue of whether the defendant should be sentenced to death.’ 2929.04(B)(f).” *Hill I* at 66. This court noted that trial courts are not obligated to expressly identify every mitigating factor considered as “[t]o permit [a reversal because the trial court did not list each item of mitigation which it considered] would open the door for reversal of every [death] sentence because the courts fail to list and discount every possible mitigating factor. This is clearly unreasonable.” *Id.* at 64-65. Furthermore, this court rejected appellant's contention that the death penalty “sentencing scheme requires mandatory imposition of the death penalty * * *.” *Id.* at 68. These same postulates were likewise rejected by the Supreme Court of Ohio. *Hill II* at 333-334. As such, the trial court properly dismissed these claims under the doctrine of *res judicata*. *Perry; Cole*.

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In the fifth sub-argument, appellant alleges that the court should have granted a hearing on the matter concerning whether the trial court was prejudiced by media attention. However, as noted, this court will presume regularity and/or lack of prejudicial error unless the record clearly shows otherwise. *Hill I*, at 38; *White* at 51. Nothing in the record reflects any irregularity. Thus, the trial court was not obligated to hold an evidential hearing on this issue. Furthermore, this issue could have been raised on direct appeal. Appellant's failure to do so permits summary adjudication by the trial court under *res judicata*. *Perry; Cole*.

In the sixth sub-argument, appellant alleges that the court should have held an evidential hearing regarding the constitutionality of the death penalty statute. As this issue had been addressed by this court in *Hill I*, where we noted "[appellant's constitutional challenges] have been previously addressed and rejected by the Ohio Supreme Court and/or the United States Supreme Court," the trial court properly dismissed the matter under *res judicata*. *Hill I* at 66. Similarly, the Supreme Court of Ohio, on review of this court's decision, likewise denied appellant's alleged error. *Hill II* at 334. Therefore, summary disposition of this claim by the trial court, sans a hearing, was not erroneous. *Perry; Cole*.

In the seventh sub-argument, appellant claims the court should have held a hearing regarding appellant's alleged incompetence. We thoroughly reviewed the allegations of appellant's claimed mental incapacity in *Hill I*.

"Appellant, in the case at bar, admittedly suffers from some metal retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. * * *

"However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multifaceted exposure appellant has had with the state's criminal justice system. The evidential table in this case also demonstrates that appellant exhibited a functional capacity to understand [his *Miranda*] rights, including the right to appointed counsel. * * *

"Moreover, the behavior of the appellant during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. Appellant possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, appellant qualified and corrected the police officers's [*sic*] misstatements of the factual scenario which he had related to them. He was also able to follow 'verbal conceiving,' displaying an understanding of the officers [*sic*] direction of questioning and the dialogue utilized during the interrogation." *Hill I* at 15-16.

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The Supreme Court of Ohio also rejected this argument. "Based upon [[Colorado v. Connelly \(1986\), 479 U.S. 157](#) * * *], this court's ruling in [State v. Jenkins \(1984\), 15 Ohio St.3d 164](#) * * * and his prior dealings with the Criminal process as a juvenile, defendant's mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." (Parallel citations omitted.) *Hill II* at 318. The trial court, therefore, properly dismissed this claim under *res judicata*. *Perry; Cole*.

In the eighth sub-argument, appellant alleges he should have been accorded an evidential hearing on the issue of ineffective assistance of counsel. The affidavit submitted by appellant is general in nature, and it fails to address the specific instances of trial counsel's ineffectiveness alleged by appellant. Furthermore, this issue had been addressed by this court when we noted: "[i]n other words, the record fails to demonstrate where appellant was expressly prejudiced by the

alleged omissions and/or commissions of trial counsel.” *Hill I* at 54. The Supreme Court of Ohio likewise dismissed appellant’s claim. “In applying the [Strickland \[v. Washington \(1984\), 466 U.S. 668\]](#) standard to the seven instances of ineffective assistance of counsel, and upon reviewing the instances both individually and collectively, we find no prejudice to defendant that compels a reversal of his conviction.” *Hill II* at 331. Therefore, the trial court properly dismissed the matter under *res judicata*. *Perry; Cole*.

In his ninth sub-argument, appellant requested a hearing on the issue of alleged prosecutorial misconduct. We rejected this argument in our decision in the first appeal. We noted in our conclusion on this assignment that “the trial was conducted before a three judge panel and not a jury, and the record fails to disclose any prejudice.” *Hill I* at 52. The Supreme Court of Ohio likewise rejected this argument. “[W]e find that neither prejudicial error nor plain error * * * is present in the context in which the comments by the prosecution were made.” (Citations omitted.) *Hill II* at 330. Since this issue had been previously addressed, the trial court properly dismissed it without a hearing. *Perry; Cole; Milanovic*.

In the tenth sub-assignment appellant claims that he was prejudiced by the failure to record all proceedings, and the that trial court should not have dismissed this claim without conducting an evidential hearing on this issue. This claim could have been raised on direct appeal. There is nothing in the record which discloses a reason why this issue could not have been brought previously. Appellant’s failure to do so bars relitigation of it now under *Cole* and *Perry*. Therefore the trial court was able to dismiss this claim in a cursory fashion. *Perry; Cole; Milanovic*.

In the eleventh sub-assignment, appellant claims that he was entitled to a hearing on the issue of whether this court properly reviewed the matter before imposing the death penalty. As this issue has been addressed by the Supreme Court of Ohio, the trial court properly dismissed this matter without holding an evidentiary hearing on this subject. *Hill II* at 336; *accord Perry; Cole*. Furthermore, it is beyond the purview of the trial court to determine whether this court performed its statutory obligations correctly.

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In the twelfth sub-argument, appellant claims that the death penalty is violative of international law and the United States Constitution. These materials were in existence prior to appellant’s initial trial, and nothing shows appellant could not have raised these issues on direct appeal. Furthermore, appellant does not cite any authority to support his contention. As such, the court properly dismissed the matter under *res judicata*. *Perry; Cole; Milanovic*.

In the thirteenth sub-argument, appellant seeks an evidential hearing regarding the mandatory nature of the death penalty scheme. However, this issue had been previously addressed. We dismissed appellant’s contention that “the court is ‘bound by the weighing process and (is) prohibited from deciding whether nevertheless the death penalty is inappropriate.’” *Hill I* at 62. Likewise the Supreme Court of Ohio rejected this argument the first time it was presented to the court by appellant. *Hill II* at 333. The trial court, therefore, properly dismissed appellant’s claim on this issue. *Perry; Cole*.

In the fourteenth sub-argument, appellant claims entitlement to an evidential hearing regarding the court’s failure to record the grand jury proceedings. Appellant does not present any material to demonstrate that he could not have raised this issue on direct appeal. This failure precludes him from raising this issue for the first time at this stage of the proceedings. As such, the court properly dismissed this claim. *Perry; Cole; Milanovic*.

In the fifteenth sub-argument, appellant claims that he was not afforded a fair and impartial review of the death sentence. However, as this issue has been addressed by the Supreme Court of Ohio, the trial court properly dismissed it. See [State v. Jenkins \(1984\), 15 Ohio St.3d 164](#), and

[State v. Poindexter \(1988\), 36 Ohio St.3d 1](#). As these same claims have been fully addressed previously, the trial court properly disposed of the issue in a summary fashion. *Perry; Cole*.

In the sixteenth sub-assignment, appellant alleges that he should have been granted an evidential hearing. However, as all issues were previously addressed by this court and/or the Supreme Court of Ohio or were not properly presented to the trial court with appropriate evidential submissions, the court properly denied appellant's request for a hearing. [R.C. 2953.21\(C\) and \(E\)](#); *Perry; Cole; Milanovic*. Appellant's first assignment is overruled.

In the second assignment, appellant alleges that the court improperly granted appellee's motion without ruling upon appellant's motion for clarification. Specifically, appellant alleges that since appellee neither admitted nor denied the averments in the petition, the court was not permitted to dismiss appellant's petition. We disagree.

[R.C. 2953.21\(D\)](#) permits the appellee to respond by either “*answer or motion*.” It does not specify that the motion be one for summary judgment. Indeed, the language employed clearly permits a pre-answer motion such as a motion to dismiss. Therefore, the court was free to consider appellee's motion. Upon consideration of this pleading, the trial court properly reviewed the material before it. The court then provided a detailed analysis supporting its reasoning for dismissing appellant's petition. Our review does not disclose any error by the court committed by the trial court in its reasoning. The second assignment is without merit.

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In the third assignment of error, appellant takes issue with the trial court's denial of his motion to re-examine the physical evidence. However, appellant does not present any authority to support this proposition. In addition, in [State v. Smith \(1986\), 30 Ohio App.3d 138](#), the court held that the defendant does not have a right to conduct discovery in a post-conviction relief proceeding. We are not presented with any argument to depart from this conclusion. This assignment is overruled.

For the foregoing reasons, the decision of the trial court is affirmed.

[CHRISTLEY](#), J., CACIOPPO, J., Ret., Ninth Appellate District, sitting by assignment, concur.

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