

IN THE SUPREME COURT OF OHIO

LEWIS R. FOX,
Appellant,

vs.

State of Ohio
Appellee

21-0037

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

Court of Appeals
Case No. 19AP-677
(C.P.C No. 15CR-5585)

MEMORANDUM IN SUPPORT OF
JURISDICTION OF APPELLANT LEWIS R. FOX

Lewis R. Fox, # 733-986
P.O. Box 540
St. Clairsville, OH 43950

Pro se (Appellant) Lewis R. Fox 12-29-2020

Franklin County Prosecutor
373 South High St.
Columbus, OH 43215

Counsel for Appellee

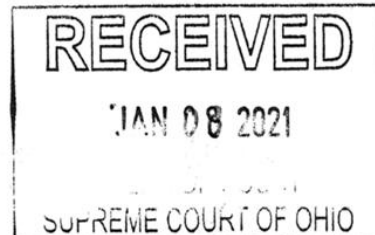
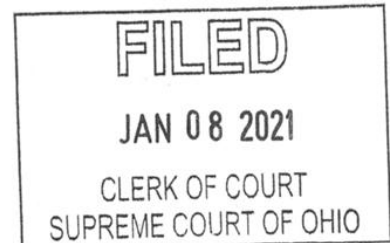


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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents two critical issues: 1) Whether a trial counsel is to be considered incompetent when s/he fails to consult the criminal defendant, that they represent, about their financial adequacies to afford expert witnesses; and, 2) whether the application of res judicata can(not) be applied to a criminal defendant's postconviction petition when the evidence is outside the record.

In this case, the court of appeals has failed to acknowledge (in a letter from trial counsel addressed to this appellant) that specifically stated, "We did not discuss an expert for ... your case. Experts generally cost significant amounts of money, and ... this was not an option in this case." Moreover, the lower court has relied on subsequential hindsight testimony of this appellant in support of its denial of a pretrial determined trial counsel error. Finally, the court of appeals affirmed the trial court's application of res judicata for the same above reasons where appellant's only proof of incompetence is from a post-trial letter.

The court of appeals decision threatens the State and federal constitutional rights of "competent," guaranteed counsel especially afforded to criminal defendants.

Finally, this case involves a substantial constitutional question that, prior to this case, has not been raised in any lower court nor addressed by this Honorable Court where a trial counsel candidly and admittingly incompetent pretrial behavior was discussed or ruled upon.

This cause should further pique this Honorable Court's interest to review this case based on whether pretrial counsel's responsibilities can be overcome by his/her trial actions, i.e., by forcing a criminal defendant to testify when more credible "expert" testimony was available, but was not pursued because of trial counsel's capricious decision not to.

Contrarily to the holding within Strickland v. Washington, 466 U.S. 668 (1984), the lower court's interpretation of Strickland allows a trial counsel to overcome his deficient pretrial performance simply by putting his client on the stand.

If allowed to stand, the decision of the court of appeals would allow future trial counsels to proceed to trial without investigating the costs nor the benefits of expert witnesses' testimonies without first consulting with their client's financial abilities to do so. Furthermore, it shows the societal injustices/improprieties of the rich entitlements versus that of the poorer criminal defendant's abilities to afford the right to a fair trial and his right to compulsory process for obtaining witnesses in his favor.

In sum, this case involves an ineffective assistance of trial counsel claim for his failure to consult, pretrial, with his client's ability to afford and obtain expert, exculpatory witnesses for trial.

This court must grant jurisdiction to hear this case and review the erroneous decision of the lower court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from the attempt of appellant Lewis R. Fox to overturn his postconviction petition and criminal conviction and sentencing.

The Franklin County Common Pleas Court via a jury trial found appellant guilty of two counts of felonious assault with gun specifications.

Appellant raised seven separate ineffective assistance of trial counsel claims in a postconviction petition -- only two of those claims are being furthered; specifically, trial counsel 1) failed to investigate; and, 2) failed to call expert witnesses.

The trial court applied *res judicata* denying relief (Case No. 15CR-5585, Franklin County Common Pleas).

Appellant timely appealed the trial court's decision to the Tenth District Appellate Court.

In denying petitioner's postconviction appeal, the court of appeals erred in its ruling, because the court has subsequently relied on the testimony of this appellant when such trial counsel error occurred pre-trial and was incurable by latter trial counsel actions.

In support of its position on these issues, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Trial counsel is considered incompetent when s/he fails to consult the criminal defendant about their financial adequacies to afford expert witnesses.

Matters dealing with trial counsel being constitutionally ineffective is guided by the United States Supreme Court precedent of Strickland v. Washington, 466 U.S. 668 (1984)

A defendant claiming ineffective assistance of counsel must identify specific acts or omissions of counsel that are alleged not to be within the realm of professional judgment. Strickland at 690. A defendant is entitled to a new trial if he can show 1) that trial counsel's performance was deficient; and, 2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. Strickland at 687.

The petitioner also "bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by

counsel's ineffectiveness." State v. Calhoun, 86 Ohio St. 3d 279, 283 (1999).

In support of this appellant's original petition, he submitted various documents. One of these documents was a letter addressed to appellant after the trial, in which, trial counsel admitted, candidly, in not pursuing expert witnesses based on his own capricious decision that appellant could not afford such expert witnesses. Trial counsel also admitted that "[they] did not discuss an expert" in his case because "experts generally cost significant amounts of money."

Appellant asserts that such deficient performance prejudiced appellant for multiple reasons: Appellant was forced to testify; he was denied the credibility value of an expert witness(es) versus that of the self-indulgence of his own testimonial; he was also denied the pretrial factual findings that is required before an attorney can make any reasonable strategy choices against pursuing a certain line of investigation, i.e., to recommend appellant to take the proffered plea deal (or to renegotiate a more favorable plea deal) or prepare for trial.

The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. Williams v. Taylor, 529 U.S. 362, 396-7 (2000).

Any sensible person knows that an expert witness is more credible than that of a criminal defendant testifying on his own behalf.

From the record, we know various testimonies heard anywhere from one to four gun shots; however, only two cartridges were spent, and only one bullet wound resulted, and no bullets were recovered.

Without appellant's testimony, the importance of a pretrial investigation rears its ugly head. Forensic technologists, ballistic experts, etc. could have determined whether or not one or two shots were actually fired. Moreover, forensics could have determined what position appellant was in when the gun was discharged, what the trajectory of the bullet was, where the bullet ended up -- recreating a visual reproduction of the crime scene -- rendering every aspect of appellant's testimonial unnecessary.

Other experts, not to be comprehensive, could have been the medical doctor and physical therapist

Whom diagnosed and assisted appellant's hand/arm nerve damage and extensive therapy treatment by offering veracity and credibility to appellant's testimony (or omitting appellant's testimony). While stipulation of the medical doctor whom diagnosed the trajectory of the wound of Miss Griffin was beneficial, in part; it left many unanswered questions, such as, was the wound serious or life-threatening, was the stay at the hospital a requirement or a recommendation, and such testimony could have helped reconstruct a visual reproduction of the crime scene. Because trial counsel allowed the medical doctor not to testify, it was more harmful than beneficial to this appellant.

While the letter mentions the use of a private investigator, it is also clear that the use of the private investigator was limited in scope. S/he could have done preliminary investigations providing trial counsel direction on his course of pretrial investigations, such as, interviewing potential witnesses, locating video cameras that may have covered the crime scene, identify other expert / potential witnesses and so on.

Not once did the trial counsel ask this appellant about his financial abilities to afford or the costs

to obtain such expert witnesses -- giving appellant the choice to accept or decline, by providing what such potential expert witnesses could have provided.

The court of appeals decision was objectively unreasonable. They analyzed what effect the expert witnesses or investigation could have provided other than appellant's testimony or others during trial. Such decision requires appellant to be an expert in each of these disciplines of expertise (of which take many years of formal education, training, and/or other experiences.) Such bar is extremely too high -- appellant is not any of the above mentioned experts -- he does not know of all the questions that should have been asked, let alone the ones that could have been asked.

The court of appeals neglected appellant's obvious claim that trial counsel failed to perform an investigation and obtain expert witnesses because he thought appellant could not afford them.

Appellant asserts that he has been unable to locate any cases within the State of Ohio where a trial counsel admitted to such pitiful pretrial performance constitutionally guaranteed, prejudicing

him of the right to compulsory processes/exculpatory witnesses in his favor. Appellant ask that this Honorable Court to grant jurisdiction to review this proposition of law.

Proposition of Law No. II: The application of res judicata cannot be applied to a criminal defendant's postconviction petition when the evidence is outside the record.

Postconviction relief is a means to reach the constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues not contained in the record. State v. Murphy, 2000 Ohio App. LEXIS 6129.

Without trial counsel's letter, nothing in the record would have shown this or any other court that counsel failed to investigate or attempt to obtain expert or other potential witnesses simply because trial counsel did not think appellant could afford any witnesses to testify on this appellant's behalf. As counsel stated, "[he and appellant] did not discuss an expert." This is clearly deficient performance -- without this letter, counsel's actions could have been declared trial strategy.

Conclusion

For the reasons discussed above, this case involves matters of public and great general interest, and a substantial constitutional question. This appellant requests that this Court accept jurisdiction in this case and appoint counsel on appellant's behalf so that these important issues presented will be reviewed on the merits.

Respectfully submitted,

Lewis R. Fox

Lewis R. Fox, #733-986

Pro Se

Certificate of Service

I certify that a copy of this memorandum was sent by ordinary U.S. mail to the Franklin County Prosecutor on 29 day of December 2020.

Lewis R. Fox

Lewis R. Fox, #733-986

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Pro Se

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|----------------------|---|------------------------|
| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | No. 19AP-677 |
| v. | : | (C.P.C. No. 15CR-5585) |
| | : | |
| Lewis R. Fox, | : | (ACCELERATED CALENDAR) |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 3, 2020

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Daniel J. Stanley*, for appellee.

On brief: *Lewis R. Fox*, pro se.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Defendant-appellant, Lewis R. Fox, appeals the September 5, 2019 decision of the Franklin County Court of Common Pleas denying his timely petition for postconviction relief without a hearing.

{¶ 2} Fox was indicted on November 13, 2015, with two counts of felonious assault in violation of R.C. 2903.11, each with three-year firearm specifications. Following a jury trial in January 2017, Fox was found guilty on all counts and sentenced to a total term of ten years incarceration. This court affirmed his conviction and the Supreme Court of Ohio did not accept jurisdiction over his case. *See State v. Fox*, 10th Dist. 17AP-295, 2018-Ohio-501, *discretionary appeal not allowed*, 152 Ohio St.3d 1484, 2018-Ohio-1990.

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{¶ 3} In its opinion affirming his conviction on direct appeal, this court summarized the evidence presented at Fox's trial:

Mary Griffin testified as follows. During the evening of October 29, 2015, Mary Griffin and her grandmother, Mary Robinson, drove to Elaine Robinson's residence. When they arrived, Elaine opened the door and they all talked, with Mary Griffin and Mary Robinson standing just outside the front door. At some point, Fox came down from the upstairs of the residence, and "some words were exchanged" between Mary Griffin and Fox. Fox called Mary Griffin and Mary Robinson "bitch[es]," and said if they "didn't move off his porch that he was going to shoot" them. Fox was only a few feet away from Mary Griffin as they verbally confronted each other. Mary Griffin heard two or three gunshots and then realized she had been shot in her upper thigh. Mary Griffin did not see the firearm in Fox's hand prior to hearing the gunshots, but she observed Fox raise his arm when the shots were fired. Fox had pointed the gun at Mary Griffin's leg. Mary Griffin denied lunging at or touching Fox before the shooting. Mary Robinson was standing close behind Mary Griffin at the time of the shooting.

Mary Robinson testified as follows. On the day of the shooting, she and Mary Griffin intended to pick up Elaine Robinson from her home because she was having problems with her boyfriend, Fox. After they arrived at Elaine's residence, Elaine told them that Fox would not let her go with them. Elaine called for Fox, and when he descended the stairs he was angry and possibly drunk. Fox said, "I'm sick of you bitches." Mary Robinson saw Fox's right "hand coming up," and then she heard one or two gunshots. Fox was pointing the weapon at Mary Griffin. Prior to the weapon being discharged, Mary Robinson did not see Mary Griffin touch Fox in any manner, but they were in close proximity to each other. Mary Robinson was within arm's reach of Mary Griffin when Fox fired the shots. Fox "didn't make any threats * * * He just shot [Mary Griffin]." No bullet struck Mary Robinson.

Elaine Robinson, who was called as a witness on Fox's behalf, testified as follows. Fox and Elaine were living together on the day of the shooting. On that day, Mary Griffin and Mary Robinson arrived at Elaine and Fox's residence upset because of statements Fox had made regarding Mary Robinson. Elaine called for Fox and told him that "Mary and them are at the door." Fox came down the stairs and to the front door. Elaine

did not see Fox carrying a weapon until she heard two gunshots. Fox did not point the weapon at anyone. When Fox fired the weapon, he was falling backward in response to Mary Griffin moving her hands toward Fox. Elaine characterized the shooting as being an accidental consequence of Fox stumbling backward. Elaine also testified that she told the police after the shooting that Fox shot downward at the porch to scare away Mary Griffin and Mary Robinson.

Fox testified on his own behalf. At approximately 8:00 p.m. on the day of the shooting, Fox was upstairs at his residence when he heard loud voices downstairs. Fox heard someone screaming in anger and then heard Elaine call for him in a distressed manner. Because he was concerned that there was an intruder in the house, he grabbed a gun from his bedroom closet and brought it with him down the stairs. Holding the gun hidden behind his leg with his finger on the trigger, Fox stood in the doorway to the home and told Mary Griffin and Mary Robinson that they needed to leave. Mary Griffin then "lunged" at him like she was going to grab him. Fox testified that he accidentally shot the firearm twice. Fox "stumbled back * * * and the firearm just discharged." He "even [saw] the [* * * 5] fire shoot out twice, shot twice." He did not either raise the gun or shoot at the ground on purpose. After the weapon fired twice, Fox dropped it on a chair inside the house. When asked how the firearm discharged, Fox explained, "I guess I squeezed the trigger or something. You know how you're - - an excited moment. I mean, it surprised me."

After the shooting, and based on information Fox provided, police recovered a five-shot revolver in the kitchen of Elaine and Fox's residence. Two of the rounds were spent, and the other three were unfired. Columbus Division of Police Detective Steven Miller, who interviewed Fox on the night of the shooting, testified that the gun recovered from the scene of the shooting was a "double-action" firearm. For this type of firearm, the hammer must be pulled back with a squeeze or pull of the trigger in order to fire each bullet. The parties stipulated that Mary Griffin sustained an injury consistent with a single gunshot that entered her right thigh and exited her right buttock at a down to up trajectory.

Id. at ¶ 3-8.

{¶ 4} While his direct appeal was pending in this court, Fox filed a pro se postconviction petition arguing that his trial counsel was ineffective, based on (1) trial

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counsel's alleged failure to advise Fox to accept a proffered plea agreement, (2) trial counsel's alleged failure to investigate the scene of the crime for additional bullet-trajectory evidence, (3) trial counsel's alleged failure to properly prepare Elaine Robinson to testify, (4) trial counsel's alleged failure to investigate Fox's claim of disability in his hand and arm, (5) trial counsel's alleged failure to call the doctors who examined his hand and arm and who examined and treated Mary Griffin's injuries as witnesses, (6) trial counsel's alleged failure to call a private investigator as a witness, (7) trial counsel's alleged failure to call a ballistics expert as a witness, (8) trial counsel's alleged failure to call a "gun expert" as a witness, (9) trial counsel's alleged failure to present evidence of the lesser-included offense of reckless assault, (10) trial counsel's alleged failure to play additional recorded witness interviews at trial, and (11) trial counsel's alleged failure to preserve Fox's right to a speedy trial. Fox did not attach any evidence or affidavits to his petition, but alongside his petition he filed a motion for appointment of counsel, as well as a motion for expert assistance, and attached to his motion for expert assistance he included a copy of a police report, letters he received from his trial counsel and appellate counsel, a copy of a photograph of himself and Elaine Robinson, and three hand-drawn maps of the scene of the shooting and surrounding areas. He did not, however, submit any witness affidavits or proposed experts or attach any expert reports but, instead, repeatedly asserted in both his petition and his motions that evidence to support his postconviction claims "is not attached because petitioner needs the assistance of an attorney, investigator, and/or assistance of this Honorable Court to produce the evidence."

{¶ 5} The state filed a timely answer and motion to dismiss Fox's postconviction petition, but the trial court held its decision on the petition in abeyance until this court and

the Supreme Court of Ohio determined the merits of Fox's direct appeal. On September 5, 2019, the trial court denied Fox's petition without a hearing:

Upon careful review of defendant's petition and the record in this matter, the Court finds defendant's petition lacks evidence that a constitutional error occurred that would support the Court's finding that defendant's conviction was void or voidable. The correspondence from defendant's trial counsel and appellate counsel do not advance defendant's claims of ineffective assistance. To the contrary, trial counsel's letter actually refutes defendant's position. The other evidence submitted by defendant; namely, the police report and drawings of the crime scene, likewise, do not support defendant's position of ineffective assistance of counsel or other constitutional error. Finally, the record is replete with speedy-trial waivers containing defendant's signature. Without evidence containing sufficient operative facts that demonstrate defendant's constitutional rights were violated, the Court finds defendant's motion is without merit.

Decision and Entry at 5. Fox has appealed to this court, and now asserts three assignments of error with the trial court's decision:

[I.] The trial court abused its discretion when it dismissed appellant's post-conviction [sic] petition based upon: A) "The court [found] defendant's petition lacks evidence that a constitutional error occurred;" [sic] and, (2) "[D]efendant's petition [was] barred by the application of res judicata."

[II.] The trial court abused its discretion when it failed to hold an evidentiary hearing on appellant's post conviction [sic] petition.

[III.] Appellant's conviction and sentence is voidable because appellant was denied the effective assistance of trial counsel in violation of his rights under the Sixth Amendment of the United States Constitution.

{¶ 6} R.C. 2953.21(A)(1)(a) authorizes a person who has been convicted of a criminal offense "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 * * * [to] file a petition in the court that imposed sentence,

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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." "[A] petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment." *State v. Sidibeh*, 10th Dist. No. 12AP-498, 2013-Ohio-2309, at ¶ 8, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). Postconviction relief " 'is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record.' " *Id.*, quoting *State v. Murphy*, 10th Dist. No. 00AP-233, 2000 Ohio App. LEXIS 6129 (Dec. 26, 2000).

{¶ 7} A petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *Sidibeh* at ¶ 13, citing *State v. Jackson*, 64 Ohio St.2d 107, 110-13 (1980). To warrant an evidentiary hearing, the petitioner bears the initial burden of providing evidence demonstrating a cognizable claim of constitutional error. *Id.*, citing R.C. 2953.21(C); *Hessler* at ¶ 24. Prior to granting a hearing on a petition for postconviction relief, the trial court must determine if substantive grounds for relief exist—specifically, whether the petition sets forth enough facts to support a claim of a constitutional issue. *State v. Kapper*, 5 Ohio St.3d 36 (1983). The trial court may deny a postconviction petition without an evidentiary hearing "if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief." *Sidibeh* at ¶ 13, citing *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus.

{¶ 8} Fox's petition asserts the general claim that his counsel was constitutionally ineffective. "To prevail on his claim, appellant must demonstrate: (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's

errors prejudiced defendant, depriving her of a trial whose result is reliable." *State v. Clinkscale*, 10th Dist. No. 11AP-980, 2012-Ohio-2868, ¶ 22, citing, e.g., *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner "bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *State v. Calhoun*, 86 Ohio St.3d 279, 283 (1999). A defendant claiming ineffective assistance of counsel must identify specific acts or omissions of counsel that are alleged not to be within the realm of reasonable professional judgment. *Strickland* at 690. And "[t]here is a strong presumption that licensed attorneys are competent and that the challenged action is the product of sound trial strategy." *State v. Nichols*, 116 Ohio App.3d 759, 764 (1996). In order for a claim of ineffective assistance to be successful, the court must find that the challenged acts or omissions were "outside the wide range of professionally competent assistance," *Strickland* at 690, and also that defendant was prejudiced thereby.

{¶ 9} Finally, the doctrine of res judicata places a significant restriction on the availability of postconviction relief, since it bars a convicted defendant from presenting " '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 or conviction, or on an appeal from that judgment.' " *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. We have also observed that res judicata "implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 27.

{¶ 10} Appellate courts are extremely deferential to trial court decisions regarding postconviction relief. A reviewing court will not overrule the trial court's finding on a

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petition for postconviction relief if the decision is supported by "competent and credible evidence." *Sidibeh* at ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58. And appellate courts should not overturn a trial court's denial of postconviction relief unless an abuse of discretion has occurred. *Gondor* at ¶ 60. An abuse of discretion occurs when a trial court's determination is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 11} In sum, prior to dismissing Fox's petition without a hearing, the trial court was required to determine that the evidentiary materials submitted with the petition for postconviction relief did not provide or allege sufficient operative facts to indicate that Fox's trial counsel was deficient and that Fox was prejudiced by this deficiency. *See, e.g., State v. Mengistu*, 10th Dist. 03AP-1202, 2004-Ohio-3596, ¶ 14. And if the trial court did not abuse its discretion in making this determination, its judgment should be affirmed.

{¶ 12} We also have little difficulty reaching the conclusion that the trial court's decision to dismiss the petition was within its discretion. The trial court's decision evaluated the record, as well as Fox's petition and evidentiary materials, and concluded that there were insufficient facts presented to support his claims. We have similarly reviewed the record and postconviction evidence submitted, and observe: (1) that Fox rejected the proffered plea agreement on the record following a detailed back-and-forth discussion with the trial court, *see* Decision at 2-3; (2) that Fox's petition contained no evidence other than bare allegations to support its claims that trial counsel had failed to adequately investigate the crime scene; (3) that defendant and the state had entered into a stipulation at trial regarding the trajectory of the bullet; (4) that there was no clear basis to suggest that counsel's witness preparation of Elaine Robinson was inadequate; (5) that Fox's testimony was sufficient to establish his claims of injury and to support his claim of accidental weapon

discharge; (6) that there is no evidence to suggest that Fox was prejudiced by the decision to forego calling Mary Griffin's doctor as a witness since the bullet's trajectory through her right thigh and buttock is undisputed; (7) that Fox wholly failed to show how he was prejudiced by trial counsel's alleged failure to hire a private investigator; (8) that Fox failed to demonstrate how a ballistics expert would have benefited his defense; (9) that Fox's own testimony rendered any "gun expert" unnecessary; (10) that a jury instruction for misdemeanor reckless assault would have been inconsistent with Fox's own testimony and accident defense; (11) that counsel's decisions regarding the presentation of evidence were within the realm of a sound trial strategy; and (12) that Fox consented to and approved each continuance entry and waiver of his right to speedy trial on the record.

{¶ 13} In short, we believe that the trial court correctly evaluated the evidentiary materials with which it had been provided. When viewed in light of the evidence presented at trial, we cannot say that the trial court abused its discretion in determining that Fox failed to present "evidence containing sufficient operative facts that demonstrate [Fox's] constitutional rights were violated," Decision at 5, and disposing of his petition without a hearing. For all these reasons, Fox's three assignments of error are overruled, and the judgment of the trial court dismissing his postconviction petition is affirmed.

Judgment affirmed.

DORRIAN and BRUNNER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

| | | |
|----------------------|---|--|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 19AP-677 (C.P.C. No. 15CR-5585) |
| Lewis R. Fox, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellant. | : | |

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 3, 2020, appellant's three assignments of error are overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Any outstanding appellate court costs shall be assessed to appellant.

BEATTY BLUNT, DORRIAN, & BRUNNER, JJ.

/S/ JUDGE
Judge Laurel Beatty Blunt

Tenth District Court of Appeals

Date: 12-04-2020
Case Title: STATE OF OHIO -VS- LEWIS R FOX
Case Number: 19AP000677
Type: JEJ - JUDGMENT ENTRY

So Ordered

Laurel Beatty Blunt



/s/ Judge Laurel Beatty Blunt