

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 17CA21
v.	:	
Trevor A. Teets,	:	<u>DECISION AND JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 12/04/2018

APPEARANCES:

Kort Gatterdam and Erik P. Henry, CARPENTER LIPPS & LELAND LLP, Columbus, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Jayme Hartley Fountain, Pickaway County Assistant Prosecutor, Circleville, Ohio, for appellee.

Brown, P.J.*

{¶ 1} Defendant-appellant, Trevor A. Teets, appeals from a judgment of the Pickaway County Court of Common Pleas denying his petition for post-conviction relief without a hearing. For the reasons that follow, we affirm.

{¶ 2} Following a jury trial, appellant was convicted of one count of murder, in violation of R.C. 2903.02(A), with a firearm specification; one count of involuntary manslaughter, in violation on R.C. 2903.04(B), with a firearm specification; and one count of domestic violence, in violation of R.C. 2919.25(A). The trial court merged the involuntary manslaughter and domestic violence counts with the murder count, and sentenced appellant to a total prison term of 18 years to life.

{¶ 3} This court affirmed appellant's convictions in *State v. Teets*, 4th Dist. No. 16CA3, 2017-Ohio-7372. *Teets* contains a detailed recitation of the facts and evidence produced at trial. See *id.* at ¶ 2-18.

{¶ 4} The evidence demonstrated the victim, Alicia Salyers, was appellant's ex-girlfriend. Salyers had previously lived with appellant at his apartment. On the afternoon of February 1, 2015, Salyers arrived at appellant's apartment to "drop[] off rent money because she was still on the lease and giv[e] [appellant] a key back." (Tr. Vol. I at 130.) Appellant, appellant's brother Colin Teets, and appellant's friend Ariana Smith, were also present at the apartment when Salyers arrived. Smith testified at trial stating that, when appellant and Salyers began discussing Salyers paying rent and returning her key, Smith went outside to check the oil in her car. About ten minutes after Smith exited the apartment, she saw appellant walk out of the house holding a shotgun. Appellant walked over to Salyers' car and began striking Salyers' car window with the butt of the shotgun.

{¶ 5} Salyers came out of the apartment "right after" appellant. (Tr. Vol. I at 135.) Salyers walked past appellant and stood so she was a couple of feet away from appellant, facing both appellant and the apartment. As Smith started to walk toward appellant and Salyers, she "heard the gun go off." (Tr. Vol. I at 117.) Smith did not see the gun go off and did not see appellant transfer the gun or lift it to shoot. Smith noted appellant "had the gun," but explained she "didn't see his hands." (Tr. Vol. I at 139.)

{¶ 6} After the gun went off, Smith saw Salyers fall to the ground. Appellant "backed up a little bit and he dropped the gun and he went back into his apartment." (Tr. Vol. I at 118.) Smith called 911. In response to the 911 operator's question of "[w]ho shot

who," Smith replied "[t]hey were fighting and he shot her." (Tr. Vol. I at 122.) Salyers died from a gunshot wound to the head.

{¶ 7} Following the incident, appellant called the "regular non emergency phone line" for the Pickaway County Communications Center. (Tr. Vol. I at 212.) Appellant informed that dispatcher he had "just killed somebody," explaining he got into a fight with his ex-girlfriend, she "pushed [him] to the edge and [he] snapped." (Tr. Vol. I at 213.) Appellant told the dispatcher, "[s]he's dead. I shot her in the head." (Tr. Vol. I at 215.) When the first police officer arrived on the scene, appellant walked up to the officer and "held his hands straight out in front of him, put his wrists together and stated, 'take me to prison, I killed her.' " (Tr. Vol. I at 152.)

{¶ 8} Although the coroner testified during the state's case-in-chief, the defense called the coroner to again testify during defendant's case-in-chief. The coroner explained that the shotgun pellets "went from the front of [Salyers'] face out the back, and then left to right" and in an upward direction. The coroner affirmed that such findings were "consistent with a shot from somewhere below." (Tr. Vol. II at 230.) The coroner further confirmed that Salyers had abrasions, lacerations, and soot deposits on her left hand which were consistent with shotgun pellet damage.

{¶ 9} In closing, defense counsel argued that the "angles, the wound, the closeness of the weapon, the marks on the left hand, the * * * exit from the house, who went out, [and] who followed," all demonstrated the lack of appellant's intent to kill Salyers. (Tr. Vol. II at 248.) Defense counsel noted that "nobody saw the shot," and argued his belief that Salyers was "reaching for that gun trying to grab the gun away from" appellant when it discharged. (Tr. Vol. II at 246.)

{¶ 10} On April 19, 2017, appellant filed a timely petition for post-conviction relief. Appellant argued in the petition that his trial counsel rendered constitutionally ineffective assistance of counsel by failing to call two witnesses to testify: a firearm expert and Colin Teets. Appellant supported his petition with the affidavits of Steve Yuszka, a gun shop owner and National Rifle Association certified pistol instructor; Colin; Nichole Teets, appellant's mother; and Melony Van Gundy, appellant's grandmother. The state filed a memorandum contra the petition.

{¶ 11} On December 4, 2017, the trial court issued a decision and entry denying appellant's petition for post-conviction relief. The court concluded that the issues surrounding the firearm expert were res judicata, as appellant had argued ineffective assistance of counsel based on his trial counsel's failure to call a firearm expert in his direct appeal. The court found the credibility of Colin's affidavit questionable, noting that "family members often have a vested interest in a trial outcome." (Dec. 4, 2017 Decision & Entry at 2.) The court concluded trial counsel's exclusion of Colin's testimony was a tactical decision.

{¶ 12} Appellant appeals, assigning the following two assignments of error for our review:

[I.] THE TRIAL COURT ABUSED ITS DISCRETION IN
APPLYING RES JUDICATA TO APPELLANT'S FIRST
GROUND FOR RELIEF IN HIS POST-CONVICTION
PETITION AS APPELLANT PRESENTED EVIDENCE
DEHORS THE RECORD CONTAINING SUFFICIENT
OPERATIVE FACTS TO DEMONSTRATE THAT TRIAL

COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION, AND R.C. 2953.21.

[II.] THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING A MERITS DETERMINATION WITHOUT HOLDING A HEARING BECAUSE APPELLANT'S SECOND GROUND FOR RELIEF IN HIS POST-CONVICTION PETITION PROVIDED SUFFICIENT OPERATIVE FACTS TO DEMONSTRATE THAT TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION; AND R.C. 2953.21.

{¶ 13} For ease of discussion, we address appellant's second assignment of error first. Appellant's second assignment of error asserts the trial court erred in making a merits determination regarding the credibility of Colin's affidavit without holding a hearing on appellant's petition.

{¶ 14} The post-conviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). The post-conviction relief proceeding is designed to determine whether "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)(1)(a). Post-conviction review is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Id.* It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *State v. Knauff*, 4th Dist. No. 13CA976, 2014-Ohio-308, ¶ 18.

{¶ 15} "[A] trial court's decision granting or denying a postconviction relief petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58. A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, ¶ 8.

{¶ 16} A criminal defendant seeking to challenge a conviction through a petition for post-conviction relief is not automatically entitled to an evidentiary hearing. *Calhoun* at 282, citing *State v. Cole*, 2 Ohio St.3d 112 (1982). Before granting an evidentiary hearing, the trial court must determine whether substantive grounds for relief exist. R.C. 2953.21(D). In making such a determination, the court shall consider, the petition, supporting affidavits, documentary evidence, and all the files and records from the case. *Id.* See also *id.* at 284 (noting that R.C. 2953.21 "clearly calls for discretion in determining whether to grant a hearing" on a petition for post-conviction relief).

{¶ 17} "Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a violation of the petitioner's constitutional rights." *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, ¶ 11. Moreover, before a hearing is warranted, the petitioner must demonstrate that the claimed "errors resulted in prejudice." *Calhoun* at 283. A court may dismiss a petition for post-conviction relief without a hearing when the petitioner fails to submit evidentiary material "demonstrat[ing] that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Id.* at paragraph two of the syllabus. See also *State v. Lewis*, 4th Dist. No. 10CA3181, 2011-Ohio-5224, ¶ 11; *State v. Slagle*, 4th Dist. No. 11CA22, 2012-Ohio-1936, ¶ 14.

{¶ 18} The Sixth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The Supreme Court of the United States has interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish a claim of constitutionally ineffective assistance of counsel, appellant must satisfy a two-prong test. *Id.* Appellant must show that: (1) defense counsel's performance was so deficient that she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) that defense counsel's errors prejudiced appellant so as to deprive him of a fair trial. *Id.* To show prejudice, a defendant must establish a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 694. A reasonable probability

is a probability sufficient to undermine confidence in the outcome. *Id.* The failure to make either showing defeats a claim of ineffectiveness of trial counsel. *Id.* at 697.

{¶ 19} When considering whether trial counsel's representation was deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). See also *State v. Bradley*, 42 Ohio St.3d 136, 144 (1989) (holding that counsel's "tactical decisions" do not "rise to the level of ineffective assistance"); *State v. Keck*, 4th Dist. No. 09CA50, 2011-Ohio-1643, ¶ 67 (noting that "appellate courts will not review, for purposes of ineffective assistance claims, trial 'strategy,' even if that trial strategy proves to be ultimately unsuccessful").

{¶ 20} Generally, the decision whether to call a witness "falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001). See also *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 127 (noting that decision about "which witnesses to call * * * are committed to counsel's professional judgment"); *State v. Betts*, 4th Dist. No. 03CA25, 2005-Ohio-2913, ¶ 18.

{¶ 21} Colin was 17 years old when he made the affidavit at issue. In his affidavit, Colin stated that he spoke with appellant's attorney prior to trial, and provided her with the following information regarding the events from February 1, 2015:

After Alicia arrived at the apartment, I observed Trevor
attempt to obtain the apartment keys from Alicia. When Alicia

refused to give up the keys, Trevor grabbed them from her. Alicia became upset and physically attempted to get the keys back. I attempted to restrain Alicia and she pushed me onto the living room sofa. While Alicia was attempting to regain control of the keys, I heard her tell Trevor that she was going to kill him.

After being pushed to the sofa by Alicia, I left the apartment for a brief time in order to calm down. When I reentered the apartment, I observed Alicia and Trevor struggling over Trevor's shotgun. Alicia appeared to have control of the shotgun because she had one hand near the trigger and the other hand on the area of the barrel. Trevor meanwhile had one hand on the stock of the shotgun and the other hand on the barrel.

The shotgun at issue was kept by Trevor for self-protection in the corner of his bedroom. I do not know who went upstairs to the bedroom to obtain the shotgun. However, by the way Alicia was holding the shotgun, I believe Alicia must have been the one who went to the bedroom to obtain the shotgun.

I then observed Trevor take the shotgun away from Alicia and exit through the front door. Trevor went to the parking lot and used the shotgun to beat on Alicia's vehicle. When Alicia saw what Trevor was doing to her vehicle, I observed her exit the apartment. I then observed her place herself between Trevor and her vehicle. At this point, Trevor stopped striking the vehicle, and Trevor and Alicia were face to face. I was about four to five feet away from them. Trevor was holding the shotgun across his chest so the barrel was pointed upward and the butt was down at an approximate 45 degree angle. The shotgun was not pointed at Alicia.

I observed Trevor turn to go back to the apartment and as he turned, Alicia grabbed the barrel of the shotgun. A brief struggle ensued. As Alicia pushed the shotgun, it accidentally discharged and struck Alicia in the facial area. Trevor immediately went to the apartment and called 9-1-1. Trevor then sat on the steps to await medics and police.

(Colin Aff. at ¶ 6-10.)

{¶ 22} Appellant asserts there was no strategic reason for his trial counsel not to call Colin to testify, as Colin's testimony "would have confirmed and explained that Salyers reached for the gun, causing an accidental discharge." (Appellant's Brief at 22.)

Appellant thus contends Colin's testimony would have allowed the jury to believe appellant did not purposefully pull the trigger. The trial court concluded that Colin's affidavit lacked credibility and counsel's decision not to call Colin to testify was a tactical decision.

{¶ 23} While a trial court should "give due deference to affidavits sworn to under oath and filed in support of the petition," the court in its discretion may judge the affiant's "credibility in determining whether to accept the affidavits as true statements of fact." *Calhoun* at 284. Thus, "[t]he trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." *Id.* In assessing the credibility of affidavit testimony the court should consider the following factors:

- (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

Id. at 285.

{¶ 24} A trial court may also find affidavit testimony "to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby

weakening the credibility of that testimony." *Id.* A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so. *Id.*

{¶ 25} Appellant argues the trial court erred in concluding Colin's affidavit lacked credibility solely because Colin is appellant's brother. However, "one or more" of the factors listed in *Calhoun* "may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility." *Id.* at 285. *See also State v. Wright*, 6th Dist. No. E-03-054, 2004-Ohio-5228, ¶ 57 (noting that "[a] trial court, when deciding to hold a hearing on a petition for post-conviction relief, may discount self-serving affidavits from the petitioner or his family members").

{¶ 26} Moreover, the record presents additional reasons to support the court's conclusion that Colin's affidavit lacked credibility. *Compare Myers v. Garson*, 66 Ohio St.3d 610, 615-16 (1993) (noting that "an appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court"). Initially, the judge reviewing appellant's petition for post-conviction relief was also the judge who presided at appellant's trial. *See Calhoun* at 286 (noting that the presiding trial judge is "in the best position to observe the defendant and his attorney and therefore assess the credibility of the affidavits" submitted in support of the petition).

{¶ 27} Furthermore, Colin's affidavit contains statements which are not based on personal knowledge. "For obvious reasons," both "affidavits supporting motions for summary judgment" as well as "lay witness testimony in a court of law" must be "made on personal knowledge." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 26, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*,

69 Ohio St.3d 217, 223 (1994); Evid.R. 602 (holding that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). See also *State v. Monroe*, 10th Dist. No. 04AP-658, 2005-Ohio-5242, ¶ 37 (holding that "[a] defendant's own self-serving affidavit, at least insofar as it sets forth matters outside his personal knowledge, alleging a constitutional deprivation will not compel a hearing in a post-conviction hearing"); *State v. Lee*, 8th Dist. No. 39699 (Mar. 13, 1980) (holding that "where an affidavit is filed in response to a motion for summary judgment in a post-conviction relief proceeding, that affidavit must step beyond bare allegations and assert specific facts of the petitioner's personal knowledge").

{¶ 28} " 'Personal knowledge' is 'knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *Bonacorsi* at ¶ 26, quoting *Black's Law Dictionary* 875 (7th Ed.1999). Thus, " '[t]he subject of a witness's testimony must have been perceived through one or more of the senses of the witness,' " and a witness is incompetent to testify to any fact " 'unless he or she possesses firsthand knowledge of that fact.' " *Id.*, quoting Weissenberger's *Ohio Evidence Treatise*, Section 602.1, 213 (2002).

{¶ 29} Colin admits in his affidavit that he did not know who went upstairs to obtain the shotgun. As such, Colin's further statement that he believed Salyers retrieved the shotgun was not a statement based on personal knowledge.

{¶ 30} There is no indication in Colin's statement that the shotgun discharged accidentally was based on personal knowledge. Although Colin averred he perceived Salyers grabbed and pushed the barrel of the shotgun, Colin fails to explain how he observed the shotgun discharge accidentally. Colin did not state appellant's hands were

nowhere near the trigger of the shotgun such that the firearm could only have discharged accidentally. Rather, Colin averred appellant was holding the shotgun when appellant and Salyers were facing each other. Accordingly, Colin's statement that the shotgun discharged accidentally was not based on personal knowledge.

{¶ 31} We additionally note Colin's averment that appellant "immediately went to the apartment and called 9-1-1" after the shooting. (Colin Aff. at ¶ 10.) This statement contradicts the state's evidence from a disinterested county employee who testified that appellant called the regular, non-emergency line to report the shooting; not 911.

{¶ 32} Reviewing Colin's affidavit, we find no abuse of discretion in the trial court's conclusion that Colin's affidavit lacked credibility. Appellant's trial attorney met with Colin prior to trial to assess Colin's trial testimony. *See State v. Jeffers*, 10th Dist. No. 10AP-1112, 2011-Ohio-3555, ¶ 12 (observing the defendant's trial counsel "performed due diligence by investigating [witness's] potential testimony prior to trial"). Accordingly, appellant failed to present sufficient credible evidence demonstrating his trial attorney's decision not to call Colin to testify was anything other than a tactical trial decision.

{¶ 33} Appellant's second assignment of error is overruled.

{¶ 34} Appellant's first assignment of error asserts the trial court erred in concluding appellant's ground for relief based on his trial counsel's failure to call a firearm expert to testify was barred by *res judicata*.

{¶ 35} Prior to trial, on November 10, 2015, the defense filed a witness list identifying firearm expert Steve Yuszka as a potential defense witness. On November 12, 2015, the state filed a motion in limine asking the court to preclude any testimony from Yuszka, as appellant failed to comply with Crim.R. 16(K). Crim.R. 16(K) provides the

failure to disclose an expert's written report later than 21 days prior to trial "shall preclude the expert's testimony at trial." The trial court never ruled on the motion in limine, and defense never attempted to call Yuszka to testify.

{¶ 36} In his direct appeal, appellant argued his trial counsel rendered ineffective assistance by failing to comply with Crim.R. 16(K) and failing to call a gun expert to testify. *Teets* at ¶ 75. This court concluded appellant failed to demonstrate ineffective assistance of counsel, as appellant speculated "that the Crim.R. 16(K) issue, rather than trial counsel's tactical decision, precluded a gun expert as a witness and speculate[d] that the gun expert's testimony at trial would have supported appellant's theory of the case." *Teets* at ¶ 77.

{¶ 37} Yuszka averred in his affidavit appellant's trial counsel interviewed him prior to trial. Counsel asked Yuszka if a Mossberg 12-gauge semi-automatic shotgun, the type of shotgun at issue in the case, could have accidentally discharged during a confrontation between two people. Yuszka "selected the same model Mossberg semi-automatic shotgun" from his stock and "demonstrated to [appellant's trial counsel] that the weapon could have the safety disengaged and be fired accidentally during a struggle involving two people." (Yuszka Aff. at ¶ 3.) Yuszka reviewed photos of Salyers from the crime scene, and averred he "felt the injury was consistent with close range shot and could have been caused during a struggle over the shotgun." (Yuszka Aff. at ¶ 3.) Yuszka additionally stated he provided appellant's attorney with a list of his qualifications sometime in October 2015, but never received a subpoena to testify at trial.

{¶ 38} Appellant also submitted identical affidavits from his mother and grandmother in support of his petition, stating his family paid his trial attorney \$1,500 for a

firearm expert. Appellant's mother and grandmother averred that, after trial, they asked appellant's attorney why no firearm expert had testified and counsel "responded that the Judge would not allow the firearms expert to testify." (Nichole Teets Aff. at ¶ 2; Van Gundy Aff. at ¶ 2.)

{¶ 39} '[R]es judicata applies to proceedings involving post-conviction relief,' " and bars any issue that was or could have been raised at trial or on direct appeal. *State v. Heid*, 4th Dist. No. 15CA3710, 2016-Ohio-2756, ¶ 18, citing *State v. Burton*, 4th Dist. No. 13CA12, 2014-Ohio-2549, ¶ 17. For a petitioner to avoid dismissal of their petition for post-conviction relief due to res judicata, "the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court record." *B.C.S.* at ¶ 14, citing *State v. Lawson*, 103 Ohio App.3d 307, 315 (12th Dist.1995).

{¶ 40} A petition for post-conviction relief, rather than a direct appeal, is the proper vehicle to raise an ineffective assistance of counsel claim premised on evidence outside the record. *State v. Williams*, 4th Dist. No. 15CA3, 2016-Ohio-733, ¶ 37. See also *State v. Madrigal*, 87 Ohio St.3d 378, 390-91 (2000) (observing that where "[n]othing in the record indicates what kind of testimony an * * * expert could have provided" such a "claim is not appropriately considered on a direct appeal"). Thus, "even if the issue of ineffective assistance of counsel is raised on direct appeal, that issue will not be barred by res judicata in a postconviction relief proceeding if the issue could not have been determined without resort to evidence dehors the record." *B.C.S.* at ¶ 15, citing *State v. Walker*, 6th Dist. No. L-99-1383 (Dec. 29, 2000). See also *State v. Smith*, 17 Ohio St.3d 98, 101 (1985) fn. 1.

{¶ 41} As Yuszka's affidavit testimony presents evidence from outside the trial court record, we agree *res judicata* did not bar appellant's first ground for relief. However, we find the trial court's rejection of appellant's first ground for relief to be correct on other grounds. See *State v. Shaffer*, 4th Dist. No. 14CA15, 2014-Ohio-4976, ¶ 14 (noting that a reviewing court "will not reverse a correct judgment merely because it is based on an erroneous rationale").

{¶ 42} The decision of whether or not to call an expert is generally considered a matter of trial strategy. *State v. Akers*, 4th Dist. No. 98 CA 33 (Sept. 9, 1999), citing *State v. Coleman*, 45 Ohio St.3d 298, 308 (1989). Indeed, "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas*, 66 Ohio St.3d 431, 436 (1993), citing *State v. Thompson*, 33 Ohio St.3d 1, 10-11 (1987). See also *State v. Delawder*, 4th Dist. No. 14CA12, 2015-Ohio-1857, ¶ 34, quoting *State v. Goza*, 8th Dist. No. 89032, 2007-Ohio-6837, ¶ 58 (noting that "[b]ecause calling witnesses is within the realm of trial tactics, defense counsel did not have a duty to call an expert witness' "); *State v. Hartman*, 93 Ohio St.3d 274, 299 (2001).

{¶ 43} Appellant continues to speculate that it was "[d]ue to the failure by counsel to comply with Crim.R. 16(K)" that "the jury heard no expert testimony" from the defense. (Appellant's Brief at 13.) However, Yuszka's affidavit states simply that he provided counsel with his qualifications, and he did not receive a subpoena to testify. Yuszka's affidavit fails to demonstrate that counsel's failure to comply with Crim.R. 16(K) was the reason Yuszka did not testify at trial. Indeed, Yuszka's affidavit equally supports a finding that counsel chose not to call Yuszka to testify after meeting with Yuszka and assessing his trial testimony. Appellant's mother's and grandmother's statements regarding what

counsel told them following the trial are hearsay.¹ See Evid.R. 801(C). Accordingly, appellant failed to present competent evidence from outside the record demonstrating the Crim.R. 16(K) issue, rather than counsel's strategic decision, motivated counsel's decision not to call Yuszka to testify.

{¶ 44} Appellant asserts that Yuszka's testimony would have supported the defense's theory that Salyers "reached for the gun thereby causing it to fire." (Appellant's Brief at 11.) In the absence of Colin's affidavit stating that Salyers reached for the gun, however, Yuszka's affidavit establishes only that the firearm could have discharged accidentally during a struggle between two people. As such, Yuszka's affidavit testimony leaves intact the possibility that appellant purposefully fired the shotgun.

{¶ 45} As the decision of whether to call an expert witness is considered a matter of trial strategy, and Yuszka's potential testimony could have supported the state's case as much as the defense's case, the record fails to demonstrate that appellant's trial counsel acted deficiently in failing to call Yuszka to testify. See *Calhoun* at 284 (noting that "where a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential"). Moreover, we note counsel's pre-trial meeting with Yuszka might have been beneficial in and of itself, as it could have helped to prepare counsel for cross-examination.

{¶ 46} Appellant also fails to demonstrate prejudice resulting from his attorney's failure to call Yuszka to testify. Immediately following the shooting, appellant told the

¹ Appellant appears to acknowledge the questionable validity of these statements, noting that counsel's alleged statement "was either not true or if true, was the result of [appellant's trial attorney's] ineffective assistance." (Appellant's Brief at 12.)

operator of the non-emergency assistance line that he had "snapped" and "shot her in the head." (Tr. Vol. I at 213, 215.) Appellant told the first responding officer " 'I killed her.' " (Tr. Vol. I at 152.) There is no indication in the record that appellant ever stated the firearm discharged accidentally during a struggle. Yuszka's affidavit states only that, theoretically, the gun could have discharged accidentally during a struggle, not that the firearm did discharge accidentally in this case. *Compare B.C.S. at ¶ 45* (noting that the appellant failed to establish prejudice resulting from his trial attorney's failure "to secure a false/coerced confessions expert" as appellant "failed to present sufficient operative facts to show that his confession was in fact false and/or coerced"). Accordingly, considering the evidence presented at trial, Yuszka's affidavit fails to present sufficient operative facts demonstrating a reasonable probability that the outcome of the trial would have differed had he testified.

{¶ 47} Appellant additionally argues that testimony from both Colin and Yuszka would have allowed the jury to believe "that Salyers was the aggressor and grabbed the weapon, causing it to fire, which may have supported an instruction and possible conviction on voluntary manslaughter." (Appellant's Brief at 13.) As noted above, however, the trial court did not err in finding Colin's affidavit lacked credibility. As Yuszka's affidavit does not contain any personal observations of Salyers' conduct, there is no indication Yuszka's testimony would have supported a voluntary manslaughter instruction.

{¶ 48} Appellant failed to present sufficient credible evidence demonstrating he suffered a violation of his constitutional rights based on his trial counsel's failure to call a firearms expert to testify.

{¶ 49} Based on the foregoing, appellant's first assignment of error is overruled.

{¶ 50} As appellant's petition failed to present sufficient operative facts demonstrating his trial counsel rendered constitutionally ineffective assistance, we find no abuse of discretion in the trial court's decision denying appellant's petition for post-conviction relief without a hearing.

{¶ 51} Having overruled appellant's two assignments of error, we affirm the judgment of the Pickaway County Court of Common Pleas.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Tyack, J.*, and Luper Schuster, J.*; Concur in Judgment and Opinion.

For the Court

BY: _____
Susan D. Brown, Presiding Judge*

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

*Susan D. Brown, G. Gary Tyack, and Betsy Luper Schuster, Judges of the Tenth Appellate District, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.

Summary/keywords: Judgment affirmed. Trial court did not abuse its discretion in denying appellant's petition for post-conviction relief. Appellant's brother's affidavit lacked credibility and was not based on personal knowledge. Appellant failed to demonstrate ineffective assistance of counsel based on his trial counsel's decision not to call a firearm expert to testify.