

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

In the Matter of:

B. C. S.

Case No. 07CA60

DECISION AND JUDGMENT ENTRY

Released 10/29/08

APPEARANCES:

Timothy Young, Ohio Public Defender, and Brooke M. Burns and Jill E. Beeler, Assistant Ohio Public Defenders, Columbus, Ohio, for Appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Kevin A. Rings, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

Harsha, J.

{¶1} Bryan Christopher Sturm appeals from a judgment denying his postconviction relief petition without an evidentiary hearing. He contends he presented sufficient operative facts to warrant an evidentiary hearing on his claims that trial counsel was ineffective because he failed to obtain experts on false/coerced confessions, ballistics, crime-scene reconstruction, and DNA.

{¶2} Because Sturm did not and could not have raised his current claims in his direct appeal, we reject the State's initial contentions that res judicata bars his petition. In his direct appeal, Sturm unsuccessfully argued that trial counsel was deficient for failing to present an expert on false/coerced confessions during proceedings to determine the confession's admissibility. But here, Sturm contends that counsel was ineffective for failing to present such testimony at trial

to assist the jury in weighing the credibility and reliability of the confession given the lack of physical evidence linking him to the killings. Moreover, Sturm must rely on evidence outside the record to support this claim, i.e., his trial counsel's affidavit reveals why he did not secure these experts, and the experts' reports indicate the kind of testimony they would have provided.

{¶3} However, because Sturm failed to present substantive grounds for relief, i.e., he failed to produce sufficient credible evidence that demonstrates trial counsel's deficient performance and resulting prejudice, he was not entitled to an evidentiary hearing. In his affidavit, trial counsel stated that he initially hired Dr. Brams for both mitigation and false confessions but later realized she was "not sufficient to do the false confession testimony at trial" and then at that point he believed there was insufficient time and/or lack of funding to get such an expert. However, according to Dr. Brams' psychological evaluation report, which trial counsel introduced during Sturm's dispositional hearing, Sturm essentially confessed to Dr. Brams two weeks prior to his trial. Given these circumstances, we cannot conclude that trial counsel was deficient for failing to secure yet another false/coerced confessions expert. Moreover, because Sturm failed to present any credible evidence to show that his confession was in fact false and/or coerced, i.e., evidence he has recanted or specific expert conclusions, he cannot show resulting prejudice. Sturm also failed to show resulting prejudice from trial counsel's failure to secure other experts. Many of the issues raised by these experts, i.e., the lack of physical evidence linking Sturm to the crimes, the investigators' failure to analyze certain physical evidence, and the

inconsistencies between Sturm's confession and the evidence found at the scene, were addressed at trial and vigorously argued by trial counsel during closing arguments. Finally, because Sturm actually confessed to the murders, we simply cannot conclude that he was prejudiced by trial counsel's failure to obtain these other experts.

I. Procedural History and Facts

{¶4} Following a trial in Washington County Juvenile Court, a jury found Sturm delinquent of two counts of murder with firearm specifications for the murder of his grandmother, Nancy Tidd, and his aunt, Emma Tidd, in 2004. We affirmed his convictions in *In the Matter of Bryan Christopher Sturm*, Washington App. No. 05CA35, 2006-Ohio-7101, which contains a detailed recital of the facts and evidence produced at trial. See the attached appendix for the facts that are relevant to this appeal.

{¶5} Sturm filed a timely petition with the trial court for postconviction relief under R.C. 2953.21. Sturm raised six claims for relief: (1) ineffective assistance of counsel due to trial counsel's failure to obtain funds to secure an expert in false/coerced confessions; (2) ineffective assistance of counsel due to trial counsel's failure to obtain funds to secure a ballistic expert; (3) ineffective assistance of counsel due to trial counsel's failure to obtain funds to secure a crime scene reconstruction expert; (4) ineffective assistance of counsel due to trial counsel's failure to obtain funds to secure a DNA expert; (5) the state violated his due process rights because it presented false and/or materially misleading evidence concerning the physical evidence found at the crime scene

by contending that the evidence was consistent with its theory of guilt; and (6) the trial court violated his rights to trial by jury and equal protection when it made the findings for the serious youthful offender disposition, as required by R.C.

2152.13.

{¶6} In support of his petition, Sturm submitted reports from John R. Nixon and Gary A. Rini; the affidavit of Deborah Davis, Ph.D.; a letter from Julie A. Heinig, Ph.D.; the affidavit of Raymond Smith, Sturm's trial counsel; the affidavits of two jurors; and the affidavit of Kelly Heiby, an investigator with the Office of the Ohio Public Defender.

{¶7} After the trial court dismissed Sturm's petition without holding an evidentiary hearing, Sturm filed this appeal.

II. Assignment of Error

{¶8} The trial court erred when it denied Bryan Christopher Sturm's ("Chris") petition for post-conviction relief, and did so without a hearing, because Chris had established that he was deprived of his right to the effective assistance of counsel, equal protection, and a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 2, 10, and 16, Article I and Section 39, Article II of the Ohio Constitution. (A-73-107; Decision and Order Filed November 15, 2007).

III. Post Conviction Relief

A. Standard of Review

{¶9} As we noted in *State v. Harrington*, 172 Ohio App.3d 595, 2007-Ohio-3796, 876 N.E.2d 626, at ¶9, there is some uncertainty concerning the appropriate standard of review used by an appellate court when reviewing a trial court's decision to dismiss a petition for postconviction relief without an

evidentiary hearing. See also *State v. Hoffner*, Lucas App. No. L-01-1281, 2002-Ohio-5201, at ¶6. Appellate courts, including this one, have applied varying standards, including de novo, see *State v. Gibson*, Washington App. No. 05CA20, 2005-Ohio-5353, abuse of discretion, see *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, and a mixed question of fact and law, see *Harrington*, supra. While the Supreme Court of Ohio held in *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, that courts of appeals are to apply an abuse of discretion standard in the context of reviewing a trial court's decision on a petition after it conducts an evidentiary hearing, it did not address the appropriate standard on this type of proceeding, i.e., where the trial court summarily dismisses a petition without a hearing. Because decisions denying such petitions involve both factual and legal questions, we apply a mixed question of law and fact standard of review to determine whether the petition states substantive grounds for relief. See *Harrington*, supra. Thus, we review the trial court's decision on factual issues using a manifest weight standard of review, and we review the trial court's decision on legal issues on a de novo basis. See *Hoffner*, supra.

B. R.C. 2953.21

{¶10} Ohio's postconviction relief statute, R.C. 2953.21, provides convicted individuals with a collateral means to attack their convictions. It is a civil proceeding 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). Thus, a petitioner must demonstrate errors of a constitutional magnitude and resulting prejudice before being entitled to relief under the statute. *Id.*

{¶11} A petitioner seeking post-conviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282, 714 N.E.2d 905, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169. The trial court first must determine whether substantive grounds for relief exist. R.C. 2953.21(C); *Calhoun* at 282-283. 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. *Calhoun*, *supra*. Moreover, before a hearing is warranted, the petitioner must demonstrate that the claimed "errors resulted in prejudice." *Calhoun* at 283.

1. Credibility

{¶12} In determining whether substantive grounds for relief exist, the trial court must examine the petition, any supporting affidavits, any documentary evidence, and all the files and records from the case. R.C. 2953.21(C). When reviewing supporting affidavits, the trial court need not accept the affidavits as true. *Calhoun* at 284. Rather, a trial court may assess the credibility of the affiant. As the Court explained in *Calhoun*:

[I]n reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true

statements of fact. To hold otherwise would require a hearing for every postconviction relief petition. Because the statute clearly calls for discretion in determining whether to grant a hearing, accepting all supporting affidavits as true is certainly not what the statute intended.

{¶13} The *Calhoun* Court provided specific guidance concerning evaluating the credibility of an affidavit:

* * [I]n assessing the credibility of affidavit testimony in so-called paper hearings, [a trial court] should consider all relevant factors. *Id.* at 754, 651 N.E.2d at 1323. Among those factors are (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. Moreover, a trial court may find sworn testimony in an affidavit 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.* at 754-756, 651 N.E.2d at 1323-1323-1324.

Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court. A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.

Calhoun at 284-285.

2. Res Judicata

{¶14} Postconviction relief is not warranted for claims that the petitioner raised or could have raised on direct appeal. *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161, 679 N.E.2d 1131. Res judicata bars any claim that the petitioner raised or could have raised on direct appeal. See, e.g., *State v. Lentz* (1994), 70 Ohio St.3d 527, 639 N.E.2d 784; *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, syllabus. For a defendant to avoid dismissal of the petition by operation of res judicata, the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court record, and it must not be evidence that existed or was available for use at the time of the trial. *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362, discretionary appeal not allowed, 74 Ohio St.3d 1404; see, also, *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fn. 1, 477 N.E.2d 1128.

{¶15} Furthermore, when a defendant, “represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant’s petition for postconviction relief.” *Cole* at syllabus. But, 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. *State v. Walker*, Lucas

App. No. L-99-1383, 2000 WL 1878954, citing *State v. Smith*, 17 Ohio St.3d at 101, fn.1.¹

IV. Ineffective Assistance of Counsel

{¶16} The Sixth Amendment to the United States Constitution and Section 10, Article I, 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 generally interpreted this provision to mean a criminal defendant is entitled to the “reasonably effective assistance” of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To prevail on a claim of ineffective assistance of counsel, Sturm must show (1) his counsel’s performance was deficient in that it fell below an objective standard of reasonable representation, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *State v. Smith* (2000), 89 Ohio St.3d 323, 327, 731 N.E.2d 645, citing *Strickland* at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To establish prejudice, Sturm must show that there is a reasonable

¹ In footnote 1, the Court noted:

* * * In finding that the appellee may proceed under the postconviction relief statute, we note that our decision in *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, is clearly distinguishable from the case at bar. * * * In the present case, defendant, represented by new counsel on appeal, raised the issue of the competency of trial counsel. Unlike in *Cole*, however, it is possible that the issue of competency herein could not fairly have been determined without resort to evidence dehors the record. This evidence includes trial counsel’s previous legal experience and his motivations for failing to follow the notice-of-alibi rule. Under these circumstances, res judicata may not be a bar to postconviction relief.

probability that, were it not for counsel's errors, the result of the proceeding would have been different. *State v. White* (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; *Bradley* at paragraph three of the syllabus. Failure to establish either element is fatal to the claim. *Strickland; Bradley*.

{¶17} When considering whether trial counsel's representation is deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

{¶18} 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-Ohio-4, 739 N.E.2d 749; see, also, *State v. William* (1991), 74 Ohio App.3d 686, 694, 600 N.E.2d 298. Furthermore, the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225; see, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407; *State v. Hartman*, 93 Ohio St.3d 274, 299, 2001-Ohio-1580, 754 N.E.2d 1150. "In many criminal cases, trial counsel's decision not to seek expert testimony 'is unquestionably tactical because such an expert might uncover evidence that further inculcates the defendant.'" *State v. Krzykowski*, Cuyahoga App. Nos. 83599, 83842, and 84056, 2004-Ohio-5966, ¶22, quoting *State v. Glover*, Clermont App. No. CA2001-12-102, 2002-Ohio-

6392, ¶95; see, also, *State v. Samatar*, Franklin App. No. 03AP-1057, 2004-Ohio-2641, ¶12. “Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel’s perspective at the time.” *In re: J.B.*, Butler App. No. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, ¶18, citing *State v. Gapen*, Montgomery App. No. 20454, 2005-Ohio-441, ¶30.

V. Sturm’s Petition and Supporting Evidence

{¶19} In his first through fourth grounds for relief, Sturm claimed that he was denied effective assistance of counsel because trial counsel failed to obtain funds to secure experts in (1) false/coerced confessions; (2) ballistics; (3) crime scene reconstruction; and (4) DNA.² Essentially, Sturm argued that there were such obvious factual inconsistencies between his confession (the centerpiece of the State’s case) and the crime scene evidence (none of which directly linked him to the killings) that his confession was not believable. He argued that given his age and the other circumstances surrounding his confession, as well as the investigators’ substandard investigation (including their failure to sufficiently test or analyze the physical evidence), trial counsel should have presented the testimony of experts to rebut the State’s case.

{¶20} As we previously stated, Sturm submitted several affidavits and other documentary evidence to support his petition,³ including an affidavit from his trial counsel, who swore to the following facts:

² Because Sturm fails to raise his fifth and sixth claims for relief on appeal, we do not address them.

³ Sturm submitted affidavits of two jurors and an affidavit of an investigator with the Ohio public defender’s office who interviewed several jurors. However, the trial court properly concluded that under Ohio’s aliunde rule the jurors were not competent to testify concerning their mental processes during the trial and to the effect that the experts’ testimony would have had on their decision. See Evid.R. 606(B); see, also, *State v. McKnight*, Vinton App. No. 07CA665, 2008-

1. Affiant states I was the lead counsel who represented Bryan Christopher Sturm.
2. Affiant further states that I contracted the services of Dr. Jolie Brams for both mitigation and false confessions regarding juveniles.
3. Affiant further states that the contract was through the Ohio Public Defender's Commission and that her rate was in the neighborhood of \$6,000.00.
4. Affiant further states by the time the case was ready for trial, I realized that Dr. Brams was not sufficient to do the false confession testimony at trial and was only going to be utilized in mitigation to avoid the SYO finding.
5. Affiant further states that our annual budget for experts at the Washington County Branch is \$10,000.00.
6. Affiant further states there was insufficient money to hire nor was there sufficient time to hire a false confession expert.
7. Affiant further states that the trial in this case was held as fast as possible since the Defendant was in lock-down detention.
8. Affiant further states that I assumed that the presumed murder weapon was the weapon involved in this case.
9. Affiant further states that I did not believe there was a reason to hire a ballistics expert nor the funds to do so.
10. Affiant further states that the lack of hiring a ballistics expert in this case had nothing to do with trial strategy.

Ohio-2435, at ¶¶48-52, citing *State v. Hessler* (2000), 90 Ohio St.3d 108, 124. Evid.R. 606(B) would also prohibit hearsay testimony concerning the jurors' statements. See *McKnight*, supra, at ¶52. However, because Sturm does not raise this issue, we need not address it further.

11. Affiant further states the [sic] I did not contract the hire of a crime scene reconstructionist in this case.

12. Affiant further states that the sole reason for the lack of hiring a crime scene reconstructionist [sic] was due to funding.

13. Affiant further states that the lack of hiring a crime scene reconstructionist had nothing to do with trial strategy.

{¶21} Sturm also submitted an affidavit from Davis, a psychologist and expert in coerced and false confessions. In her affidavit, Davis opined that jurors do not appear to understand, in the absence of expert testimony, that false confessions do occur, why they occur and what factors might promote a false confession, how an innocent suspect could provide details about the crime, what kind of suspects might be particularly susceptible to making a false confession, or how to tell the difference between true and false confession. She then discussed several general principles concerning why suspects confess falsely that were “particularly relevant to this case,” including police interrogation techniques and that a suspect may be especially vulnerable due to youth. She also stated that research has shown that false confessions to more serious crimes such as murder were more common than those to less serious crimes. Davis’ affidavit does not indicate whether she personally interviewed Sturm or whether she otherwise familiarized herself with the evidence presented in this case.

{¶22} Nixon, a ballistics expert, indicated in his report that he had reviewed several documents relating to this case, including transcripts of the

police interview and the testimony of the State's medical examiner and firearms examiner; forensic reports relating to DNA, fingerprints, autopsy, and firearms evidence; autopsy and crime scene photographs; and a police sketch of the scene. He concluded that "too many things just don't add up in this case." He opined that Sturm's confession did not "mesh" with the subsequent evidence analysis. For example, in his confession Sturm makes no mention of the blunt trauma attack to his grandmother's head, and he claims that both fatal shots were fired from several feet away, yet the victims suffered "contact" wounds. He also stated that there were several technical issues involving the shotgun that were not addressed at trial, including a valid trigger analysis, whether it was an ejector model – an important consideration for Gunshot Residue Analysis (GSR) and speed of reloading – and a mass analysis of the slug fragments recovered from the victims. He noted that because the caliber of the slugs could not be determined and because there is no evidence to link this gun to the fired projectiles, the possibility exists that another gun was used to commit the homicides. He also noted that testimony of the medical examiner and firearms examiner was not objective. He concluded that the fact that there was no blood or tissue on the muzzle of the .410 shotgun gun indicates that this was not the murder weapon and that there should have been blood found on Sturm's shirt if he had committed the crime. Finally, he made several suggestions concerning additional testing that he believed should have been done.

{¶23} The report from Rini, an expert in crime scene reconstruction, indicated that he had reviewed evidence from this case. He concluded that the

crime scene investigation conducted in this case failed to meet the minimal standards of a professional crime scene investigation and that as a result, potential exculpatory evidence may have been lost, destroyed, missed, or otherwise compromised. For example, he criticized investigators for failing to collect evidence of shoeprints impressions as well as latent print and tool mark evidence from the gun cabinet, failing to establish an approximate time of death, allowing Frank Russell into the crime scene, and failing to sufficiently document/photograph the scene and reconstruct the shooting. He stated that the evidence demonstrates that the victims did not struggle or move at the time of the shooting and thus “suggests the possibility of a simultaneous, or near-simultaneous shooting of the decedents.” He also concluded that the lack of DNA evidence on the barrel or in and around the muzzle of the .410 shotgun was “remarkably inconsistent” with the nature of the victims’ head wounds. He also analyzed the manner in which Sturm’s interrogation was conducted and described the methods as “deplorable” and by professional standards of care “suspect, at best.” Specifically, he noted:

The fact that a police vehicle was used for the interrogation room; that the juvenile was not represented by counsel or an adult advocate; that the interrogation was interrupted by an individual exiting and re-entering the vehicle draws into question the motivation, professionalism, legitimacy, reliability and results of the interrogation.

The questioning and interrogation of a juvenile offender requires special talents and training. There is no evidence that the individual conducting this specialized interrogation received any specialized training in the interrogation of juvenile suspects or that the interrogation was conducted according to

professional standards employed in the interrogation of juvenile suspects.

{¶24} Finally, Sturm submitted a letter from Heinig, an assistant laboratory director at the DNA Diagnostic Center (“DDC”), to Ms. Beeler. Heinig indicated that according to a BCI&I report she had reviewed, a partial DNA profile was obtained from evidentiary item #4S3 (swabbing from the stock end of the shotgun) at three genetic loci and that the contributor of the DNA was male. She also stated that it appeared that a reference strand from Sturm was never submitted to or tested by BCI&I. She then addressed the possibility of having Sturm’s reference standard collected and tested and compared. She indicated that if the alleles at any one of the genetic loci do not match then Sturm would be excluded as a contributor to the DNA. She also explained that it’s the policy at DDC to compare four loci or more for an inclusion to be reported and that in this case, the DNA from the item would be insufficient for a match comparison. She also indicated that at DDC they have been able to detect blood after a garment was washed five times and that they have been able to obtain DNA after one wash. Finally, she stated that so long as there is enough DNA to work with and the surface had not been wiped clean, the likelihood of obtaining DNA from a gun is good.

VI. Trial Court’s Decision

{¶25} In its decision denying Sturm’s petition without a hearing, the trial court found:

In this case, Bryan C. Sturm’s trial counsel did not seek the appointment of experts on confessions, ballistics, DNA or crime scene reconstruction and

instead relied upon cross-examination of the State's witnesses to rebut the State's charge that appellant was guilty of murdering his grandmother and aunt. A review of the record demonstrates that appellant's trial counsel conducted a thorough cross-examination of the state's various experts. His trial counsel explored numerous pertinent issues, as shown by the following exchanges from the transcript.

{¶26} After reviewing several portions of the transcript of trial counsel's cross-examination of various State witnesses, the court went on to conclude:

Petitioner, Bryan C. Sturm, has failed to demonstrate that the actions of his trial counsel were outside the wide range of professionally competent assistance. Petitioner's assertions that the use of experts would have altered the outcome of his trial are pure speculation. Petitioner's counsel's performance was neither deficient nor prejudicial. Attorney Smith is a veteran criminal trial attorney and head of the local office of the Public Defender. His failure to call expert witnesses at trial and instead rely on cross-examination does not constitute ineffective assistance of counsel. The affidavit of Attorney Smith submitted in support of the petition is disingenuous and certainly another indication that Attorney Smith is a zealous and competent trial counsel. Attorney Smith claims in his affidavit that his failure to hire experts was not based on trial strategy but rather due to funding. He is still attempting to do all he can to help his former client, even by claiming to be deficient. This Court refuses to believe the self-serving nature of this affidavit. For one full week of a jury trial, Attorney Smith vigorously defended his client. Given the fact that this was a double homicide committed by a 12 year old; that the serious youthful offender disposition was being sought by the State, and that at the time it appeared to be the first jury trial in the State under the serious youthful offender statute, Attorney Smith could have had at his disposal unlimited resources. He hired one expert for the sentencing phase, but now wants the Court to believe that he couldn't hire others due to funding. He insisted on pushing the State to a quick trial and, as such, this Court believes and finds that he purposely decided to forego the use

of experts for that reason and as part of his trial strategy, despite what he now states in his affidavit.

{¶27} On appeal, Sturm contends that the trial court erred in denying his petition, or at the very least, in refusing to conduct a hearing because he stated substantive grounds for relief and supported his petition with evidentiary materials alleging sufficient operative facts to demonstrate that he received ineffective assistance of counsel. The State contends that his petition lacks substantive merit and that res judicata bars his claims.

VII. Applicability of Res Judicata

{¶28} We first address the State's contention that Sturm's ineffective assistance of counsel claims are barred by res judicata because he raised or could have raised them on his direct appeal. The State argues that Sturm specifically raised, briefed, and argued on direct appeal the precise issue now at the heart of his postconviction petition, i.e., trial counsel's failure to secure the assistance of expert witnesses. The State argues that because we rejected Sturm's ineffective assistance of counsel claims in general, and specifically rejected his claim based on trial counsel's failure to obtain an expert witness in the field of coerced and false confessions, his current claims are barred by res judicata. We disagree.

{¶29} In his direct appeal, Sturm raised the issue of ineffective assistance based on his counsel's failure to secure the assistance of expert witnesses, including an expert in the field of *Miranda* waivers and coerced and/or false confessions. Sturm argued that because trial counsel prior to trial alluded to the fact that his confession may have been coerced and false, trial counsel should

have consulted with and sought the testimony of an expert in the field of coerced and false confession “in order to properly present that issue to the court.” In a separate assignment of error, Sturm argued that the trial court erred in overruling his motion to suppress his confession because it was obtained in violation of his *Miranda* rights; he further argued that even if his *Miranda* rights were not violated, his confession must still be suppressed because it was unreliable due to his age, the circumstances surrounding the interview, and the fact that it was inconsistent with the physical evidence found at the scene.

{¶30} We rejected these claims. First, we concluded that because Sturm was not in custody at the time of the interview, the detectives were not required to advise him of the *Miranda* rights; we then rejected his “unreliability” arguments “based upon the lack of authority and the non-coercive nature of the interview as indicated by the record.” In so doing, we noted:

Normally, unreliability is related to voluntariness and becomes an issue where coercion is involved. There is no evidence of any coercion in this record, including the interrogation techniques. Simply because Sturm’s confession does not exactly mirror the evidence, does not render it unreliable. In his admission, Sturm attempted to minimize his culpability in the crimes by claiming they were accidental. The minor factual inconsistencies between Sturm’s confession and the evidence found at the crime scene do not render his confession inadmissible.

{¶31} Next, in rejecting his ineffective assistance of counsel claim for failing to retain an expert in the field of *Miranda* waivers and coerced and false confession, we concluded that because Sturm was not in custody and, thus, the

detectives were not required to give him *Miranda* warnings, Sturm's counsel was not deficient in failing to obtain an expert.

{¶32} In his postconviction petition, however, Sturm presents a different argument. He does not contend that trial counsel was ineffective for failing to present the testimony of an expert on coerced and false confessions to the court, i.e., during the suppression hearing as a basis to exclude his confession. Rather, he claims that the jurors should have been educated about the occurrence and nature of false confessions and argues that such evidence "could have had a significant and material impact on the way the trier of fact understood, interpreted, and weighed the evidence that was presented."

{¶33} In *Crane v. Kentucky* (1986), 476 U.S. 683, 106 S.Ct. 2142, 90 L.E.2d 636, the United States Supreme Court recognized that while a trial court has the duty to determine whether a confession is voluntary, a jury has the duty to assess its reliability. *Crane* at 688; see, also, *State v. Bailey* (1992), 90 Ohio App.3d 58, 69, 627 N.E.2d 1078. In *Crane*, a sixteen-year-old defendant sought to introduce testimony regarding the psychological impact of the length of his interrogation and the manner in which it was conducted. The Court held that the exclusion of the testimony about the circumstances of the defendant's confession deprived him of his fundamental constitutional right to a fair opportunity to present a defense. The Court recognized that while the issue of whether a confession is voluntary is a question of law for the court, the jury was entitled to hear the excluded testimony in order to make a factual determination of whether

the manner in which the confession was obtained cast doubts on its credibility.

Id. at 689.

{¶34} The Court reasoned:

The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise ... unworthy of belief.' Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Crane at 688-689 (citations omitted).

{¶35} After distinguishing the voluntariness of a confession from the reliability of that confession, *Crane* recognized a criminal defendant's general constitutional right to present competent, credible evidence that bears on the reliability of his confession:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a

complete defense.’ We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and ‘survive the crucible of meaningful adversarial testing.’

Id. at 690-691.

{¶36} Applying this rationale to our case, we believe that Sturm’s current ineffective assistance of counsel claims present a different issue than that raised on his direct appeal. We previously addressed and rejected his claims within the context of the purely legal question of whether his confession was admissible; Sturm did not argue and we did not address his current claim that trial counsel was ineffective for failing to present this “impeachment” evidence to the jury.

{¶37} Next, the State contends that Sturm could have raised these issues on his direct appeal because they are “strikingly” similar to the claims he actually raised. While similar, we conclude that his current claims could not have fairly been determined without resort to evidence outside the record. In *State v. Bethal*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, the Supreme Court of Ohio rejected a defendant’s claim raised on his direct appeal that his trial counsel were ineffective because they failed to obtain defense experts on false confession, ballistics, forensics, and crime-scene reconstruction. The Court found that Bethel was not prejudiced by trial counsel’s actions and noted that in *State v. Madrigal* (2000), 87 Ohio St.3d 378, 721 N.E.2d 52, it had rejected a

similar claim that counsel should have obtained an expert on eyewitness identification: “[R]esolving this issue in Madrigal’s favor would be purely speculative. Nothing in the record indicates what kind of testimony an eyewitness identification expert could have provided. Establishing that would require proof outside the record * * *. Such a claim is not appropriately considered on a direct appeal.” *Bethal* at ¶168, citing *Madrigal* at 390-391.

{¶38} We previously rejected Sturm’s “unreliability” claims “based upon the lack of authority and the non-coercive nature of the interview *as indicated by the record*” and noted that there was “no evidence of any coercion *in the record*, including the interrogation techniques.” [Emphasis added]. In support of his postconviction claims, however, Sturm presents his trial counsel’s affidavit and supporting documents, including expert reports. We believe that this constitutes competent, relevant and material evidence outside the record sufficient to avoid operation of the res judicata doctrine. While the record shows that defense counsel did not call these experts, it does not indicate his motivation in failing to call these experts or what testimony the experts would have provided to the jury. Without record evidence explaining why defense counsel failed to call an expert, Sturm could not demonstrate deficient performance. Without record evidence setting forth what such an expert would have told the jury, he could not demonstrate prejudice flowing from the absence of the testimony. As a result, Sturm must present evidence dehors the record to establish his claim. See *State v. Jenkins*, Miami App. No. 2003-CA-1, 2003-Ohio-4428, at ¶40 (appellant’s ineffective assistance of counsel claims required presentation of evidence

outside the record because while the record revealed that no expert was called, it did not reveal why defense counsel failed to call an expert or what such expert testimony would have provided at trial). In other words, given that this evidence was needed in order to resolve Sturm's claims, he could not have raised them on direct appeal, and they are not barred by res judicata. See *State v. Bragenzer*, Pickaway App. No. 03CA1, 2003-Ohio-5597, at ¶12 (appellant's petition was not barred by res judicata because, contrary to the State's assertion, he could not have based his direct appeal upon matters not in the record, such as his trial counsel's affidavit); *State v. Tate*, Perry App. No. 99 CA 28, 2000 WL 1468587 (trial counsel's affidavit admitting his deficiency in not investigating the issue of bad time and in not filing appropriate pretrial motions constituted evidence dehors); see, also, *State v. Walker*, supra.

VIII. Substantive Grounds for Relief

A. Trial Counsel's Affidavit

{¶39} Sturm contends that the trial court failed to give due deference to trial counsel's affidavit and then summarily concluded that Sturm's "assertions that the use of experts would have altered the outcome of this trial are pure speculation." The court found that counsel's failure to call expert witnesses at trial and to rely instead on cross-examination was merely strategic. Sturm contends this finding is unsupported in the record and is directly contradicted by counsel's affidavit. He argues that the trial court improperly assumed that because trial counsel is an experienced attorney capable of effective cross-examination, he purposely chose not to use defense experts. Sturm argues that

the conflict between trial counsel's affidavit and the court's assumptions should have resulted in an evidentiary hearing. Sturm also contends that the trial court erred in finding that trial counsel's affidavit was "self-serving" and so unworthy of belief on its face that a hearing was unnecessary to determine whether the affidavit was factually true. The State, on the other hand, contends that the trial court acted within its discretion in assessing the sufficiency of Sturm's supporting affidavits because, as the judge who presided over Sturm's trial, the court was in the best position to judge their credibility by comparing them to the testimony presented at trial.

B. Due Deference

{¶40} While a trial court may, in its sound discretion, judge the credibility of affidavits sworn under oath and filed in support of the petition, it must give them "due deference." See *Calhoun* at 284. Moreover, "[a]n affidavit, being by definition a statement that the affiant has sworn to be truthful, and made under penalty of perjury, should not lightly be deemed false." *Id.* Furthermore, the affidavit of a defense attorney, who is an officer of the court and has no personal interest in the success of a defendant's petition, is entitled to greater weight than a defendant's "self-serving" affidavit. See *State v. Kinley* (1999), 136 Ohio App.3d 1, 16, 735 N.E.2d 921, discretionary appeal not allowed in (2000), 88 Ohio St.3d 1444, 725 N.E.2d 284, citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (letter or affidavit from the court, prosecutors, or defense counsel alleging a defect in the plea process might be sufficient to warrant a hearing, although defendant's own affidavit alleging same defect would not,

because the former are not self-serving declarations). Finally, “[a] trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.” *Calhoun* at 285.

{¶41} Essentially, the trial court found that trial counsel was an experienced and competent criminal trial attorney, who held a position of responsibility in the Office of the Ohio Public Defender; yet it found his affidavit to be “disingenuous” and “self-serving.” We find the trial court’s explanation of its basis for discounting the credibility of the sworn affidavit to be internally inconsistent. Also, while trial counsel may have thoroughly cross-examined the State’s witnesses, his ability to do so does not rebut his sworn statement that his decision to forego the use of experts was due to his perception about a lack of funding and/or insufficient time. And, while the judge who considered Sturm’s petition was the same judge who presided over his trial and thus may have had personal knowledge concerning discussions not found on the record, there is nothing in the record that contradicts trial counsel’s affidavit or that supports the trial court’s finding that his decision to forego the use of experts was to push the State to a quick trial or that he “could have had at his disposal unlimited resources.” Finally, because there is nothing in the record that suggests trial counsel has a personal stake in the outcome in this case, we reject the trial court’s finding that trial counsel’s affidavit was “self-serving.” We are aware there may be instances of “professional martyrdom” as an appellate strategy or technique, see *State v. Young*, Hancock App. Nos. 5-95-4, 5-95-6, 1995 WL

380049 (trial counsel discrediting his own conduct by attesting to his professional misconduct in knowing his client's wishes but nevertheless misinforming or misleading that client and the court). However, we see nothing in his affidavit or the record to suggest that the trial court could have reasonably rejected trial counsel's sworn affidavit on its face. Thus, it appears the trial court failed to give trial counsel's affidavit due weight. Nonetheless, to the extent that the trial court failed to give the affidavit due deference, we believe it constitutes harmless error because even if we accept trial counsel's sworn averments as true statements of fact, Sturm failed to allege sufficient operative facts to warrant a hearing.

IX. Lack of Sufficient Credible Evidence to Warrant a Hearing

{¶42} Based on our review of the petition, the supporting documentation, and the record in this case, we conclude the trial court's decision that Sturm was not entitled to a hearing on his petition was correct. We do so on the basis that we review the court's judgment, not the rationale behind it. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9. Here, Sturm's petition failed to present operative facts which, even if proven at a hearing to be true, demonstrate that trial counsel was deficient for failing to present expert testimony to rebut the State's case. Moreover, his petition failed to show that any deficient performance on the part of trial counsel actually resulted in prejudice.

{¶43} We begin our analysis by addressing trial counsel's failure to secure an expert in the field of false/coerced confessions. In his affidavit, trial counsel stated that he initially hired Dr. Brams for both mitigation and false confessions regarding juveniles but later realized she was "not sufficient to do the

false confession testimony at trial,” and then at that point, he believed there was not enough time or money to get such an expert. However, he failed to explain *why* she was “not sufficient.” He did not state whether he realized that she was not qualified to testify as a false confessions expert or whether he simply discovered that her opinion would not be favorable to Sturm. He also failed to explain why, if he believed such an expert was warranted, he did not, at a minimum, raise the issue of the lack of funding with the trial court or request a continuance of the trial to further investigate his options. Nor does he affirmatively state that his decision to forego the use of a false/coerced confession expert was not in fact based on “trial strategy.” In his affidavit, trial counsel specifically states that the lack of hiring a crime scene reconstructionist and ballistics expert “had nothing to do with trial strategy.” However, concerning his decision about a false/coerced confessions expert, he simply makes the factual assertion that there was insufficient time and money to hire such an expert. In other words, he does not specifically state that his decision to forego the use of such an expert was a direct result of his belief that there was insufficient time and/or money, or whether it was based, at least in part, on a trial strategy.

{¶44} Our review of the record, however, shows that his decision not to secure a false/coerced confessions expert was objectively reasonable under the circumstances and did not result in deficient performance. Dr. Brams testified on Sturm’s behalf during the dispositional hearing, during which her 35-page psychological evaluation report on Sturm was admitted into evidence. According

to Dr. Brams' report, she interviewed Sturm two weeks prior to trial and during the interview, Sturm essentially confessed again to committing the crimes stating, "I feel bad ... a little ... I knew it was wrong", "I did something wrong and I deserve punishment", and "wish I can take back what I did." Sturm's admissions and statements of "remorse" are inconsistent with and do not support a defense theory that his confession was false and/coerced. While it is unclear the exact role Dr. Brams' evaluation played in trial counsel's determination that Dr. Brams was "not sufficient to do the false confession testimony," given this information, we cannot say that counsel was deficient for failing to search for and obtain yet another false/coerced confessions expert, who likewise may not have been able to support that defense.

{¶45} Even if we assume that trial counsel's affidavit raises sufficient questions regarding his decision and or motivation for failing to secure a false/coerced confessions expert, Sturm failed to present sufficient credible evidence to establish resulting prejudice. Simply, he failed to present sufficient operative facts to show that his confession was in fact false and/or coerced. He did not present any evidence to show that he has ever recanted his confession. For example, he did not offer his own affidavit indicating that his confession was actually false and/or coerced. Moreover, in her affidavit, Davis merely discussed statistical findings and several "general principles" concerning why suspects confess falsely that were "particularly relevant to this case." However, her affidavit does not indicate what evidence, documents, materials, etc. she reviewed in preparing her affidavit as it relates to this particular case and does

not indicate that she personally evaluated or interviewed Sturm. Most importantly, she did not offer a specific expert conclusion regarding Sturm's confession. Similarly, in his report, Rini described the interrogation methods as "deplorable" and "suspect, at best" and made certain observations about Sturm's interrogation, including the location of the interview, Sturm's lack of representation, the interruptions during the interview, and the detective's lack of specialized training in the interrogation of juvenile suspects. Yet, he failed to offer a specific opinion concerning Sturm's confession. Thus, we conclude that Sturm failed to present sufficient operative facts to warrant a hearing on the issue of whether trial counsel was ineffective for failing to secure a false/coerced confessions expert.

{¶46} Sturm also contends that trial counsel was ineffective for failing to secure experts in the field of ballistics, crime scene reconstruction, and DNA. We again conclude that Sturm failed to present sufficient operative facts to show deficient performance.

{¶47} In his affidavit, trial counsel states that his failure to retain a ballistics expert was due to the lack of funding. However, he also states that he "did not believe there was a reason to hire a ballistics expert" because he "assumed that the presumed murder weapon was the weapon involved in the case." We believe that this information suggests that counsel was satisfied with the notion that the alleged murder weapon, i.e., the .410 shotgun, was the actual murder weapon and instead tried to focus on other issues in the case. Thus, we

cannot find error in the trial court's conclusion that trial counsel's decision not to retain a ballistics expert was a strategic decision.

{¶48} Even if the failure to retain a ballistics expert amounted to substandard representation, we find no resulting prejudice. Many of the issues addressed in Nixon's report were introduced through testimony at trial, such as the lack of blood and gunshot residue on Sturm's shirt; the fact that Sturm's confession made no mention of striking his grandmother with blunt force to the head; the fact that Sturm's confession implied shooting the victims at a distance rather than inflicting a contact wound as shown by the physical evidence; the lack of the victims' blood and/or tissue on the gun; and the lack of Sturm's fingerprints on the gun. Furthermore, Sturm's counsel argued many of these points during his closing argument.

{¶49} Similarly, Sturm failed to show resulting prejudice concerning trial counsel's failure to hire a crime scene reconstructionist and a DNA expert. Rini's report essentially sets forth the facts presented during the trial, i.e., that there was no physical evidence linking Sturm to the murders; that investigators overlooked potential evidence at the scene such as footprints and bloody shoes owned by the grandmother's fiancé; the lack of investigation to narrow the time of death; the lack of gunshot residue; and the lack of blood on Sturm's clothing and/or the alleged murder weapon. Again, most of these facts were presented via testimony during trial and vigorously argued by Sturm's counsel during closing argument.

{¶50} Furthermore, as Sturm correctly points out, his confession was the centerpiece of the State's case. In his direct appeal, we concluded that the State presented substantial evidence upon which a rational trier of fact could reasonably conclude that Sturm was delinquent beyond a reasonable doubt. In so doing, we commented on Sturm's confession:

Sturm's confession placed him inside the victims' home at the time of the murders. He confessed to shooting both his aunt and grandmother, and he knew facts and details that only the shooter could know. For example, Sturm knew the location of the victims' fatal wounds and what they were doing when they died. Furthermore, Sturm knew that three .410 slugs had been fired from a .410 shotgun, and he knew the location of the spent shell casings. Sturm also admitted that he unscrewed the hinges of the gun cabinet in order to take possession of the murder weapon, which is consistent with the investigation at the scene.

Additionally, Sturm admitted taking actions to destroy forensic evidence that might have been used against him by washing his pants and showering to eliminate any gunshot residue. This evidence negates Sturm's assertion that the evidence is deficient because none of the forensic scientists at the Ohio Bureau of Criminal Investigation were able to find any gunshot residue or DNA linking Sturm to the crime.

Sturm's behavior immediately following the shooting is also consistent with guilt. He fled the crime scene and ran along a trail without a shirt for approximately two and one-half miles. He eventually came to a road and asked Rodney West, a passing motorist, to give him a ride to a location other than his home. West testified that Sturm appeared "scared to death."

{¶51} As we have already determined, Sturm failed to present substantial credible evidence to demonstrate that trial counsel was ineffective for failing to secure a false/coerced confessions expert, i.e., he failed to show deficient

performance or resulting prejudice. Given his confession, as well as the other evidence presented at trial, we simply cannot conclude that trial counsel's failure to call experts in the field of ballistics, crime scene reconstruction, and DNA resulted in prejudice. As we noted in his direct appeal, Sturm attempted to minimize his culpability in the crimes in his confession by claiming they were accidental, a notion first advanced by the detective who interviewed Sturm. And though there were "minor factual inconsistencies" between his confession and the evidence found at the scene, they were not so inconsistent as to render his confession "unreliable" as a matter of law. To the contrary, the confession was powerful and damaging evidence against Sturm, despite the fact that it did not "exactly mirror" the evidence. Thus, in light of his confession, we simply cannot conclude that the issues raised by these other experts demonstrate a sufficient showing of resulting prejudice.

{¶52} Therefore, we conclude that Sturm was not entitled to a hearing on his petition. Accordingly, we overrule his sole assignment of error.

JUDGMENT AFFIRMED.

APPENDIX

{¶53} The double homicide occurred on November 22, 2004, at Nancy Tidd's home, where she lived with her boyfriend, Frank Russell, and her daughter, Emma Tidd. Nancy and Emma were both found sitting in the living room with gunshot wounds to the head. In addition to the gunshot wound, Nancy had a large laceration on the top left side of her head. Police believe this injury was caused by the butt end of the .410 single shot shotgun found at the scene. They both appeared to be in a very relaxed state, with no signs of a struggle. Nancy was found in a recliner with a sandwich and newspaper in her right hand, her glasses on her lap, and the phone lying to her side by the armrest of the chair. Emma was found on the couch holding a fork in her right hand with spaghetti, and the plate of spaghetti had fallen from her lap.

{¶54} The detectives at the scene initially focused their investigation on Russell, but he had a viable alibi, which placed him at work at the time of the killings. However, Russell told detectives that while at work he had received a call at 4:30 p.m. from Nancy, who informed him that Sturm was at the home and that he had been "huffing" gasoline. He became worried and left work after he called home throughout the evening and no one answered the phone. Detectives also learned that a motorist named Rodney West called to report that he had picked up a boy walking along State Rout 530. The boy, who was wearing jeans and shoes, but no shirt, hat or gloves in late November, told West his name was Chris Sturm and he asked for a ride. West drove the boy to an old abandoned store with apartments above it, where the boy said he lived.

{¶55} Later that evening, detectives went to Sturm's house to interview him. After obtaining permission from Sturm's father, Detective Warden interviewed Sturm in an unmarked cruiser in front of Sturm's residence with Sturm's father and another detective initially present. Prior to questioning him, Detective Warden told Sturm that he was not under arrest, did not have to speak with them, and that he could leave at any time; Sturm responded that he understood. Initially, Sturm told Detective Warden that he got up around 1:00 p.m., decided to skip school, and instead "huffed" gasoline for half an hour to an hour. Then he got a ride to his grandmother's house, where he took a nap until 3:30 p.m. He then got permission from his grandmother to take the .410 shotgun in the backyard to target practice. After firing two shots at a beer can, he went back inside and got into an argument with his grandmother. He put the gun back in the corner and called his uncle for a ride home. When he got home he took a shower, washed his jeans, and watched television.

{¶56} Detective Warden was convinced Sturm was not telling the truth and asked Sturm's father to exit the vehicle so he could speak to him. Once outside, Detective Warden told Sturm's father about the information they had received from Rodney West. Sturm's father asked if he should get an attorney, but Detective Warden did not answer his question and instead responded that he

needed to know the truth. Sturm's father then stated "Mark, you go ahead and talk to him, but be good to him" and walked towards the house. After Detective Warden got back into the vehicle, he resumed questioning and then told Sturm that he knew West had given him a ride home. Using an interrogation technique called minimization, he then asked Sturm whether it was a possibility that the weapon could have accidentally gone off, striking his aunt and grandmother. But Sturm denied this suggestion.

{¶57} Detective Warden continued to question him, and eventually Sturm stated that he shot his aunt accidentally and shot his grandmother because she had been "putting him down." He stated that he pulled the weapon up to shoot his grandmother and his aunt Emma reached out and grabbed the weapon. Sturm stated that when he went to fire, he accidentally struck his aunt Emma in the side of the head. Sturm then stated that he accidentally discharged the weapon into the wall behind his grandmother, but then reloaded the gun and shot his grandmother in the side of the neck. He then kicked the shells into the kitchen, put the gun in the laundry room, and exited out the back of the residence into the woods. When he started to "sober up," he puked. His shirt had burrs in it so he took his shirt off and threw it down. West picked him up and gave him a ride home, where he then washed his jeans and took a shower to get rid of any gunshot residue. At that point, Detective Warden read Sturm his *Miranda* rights and after obtaining a written waiver, he tape recorded Sturm's statement. Sturm essentially repeated the earlier version of events.

{¶58} The case against Sturm was based largely on his confession because there was no physical evidence directly linking him the murders. Sturm's fingerprints were not found on the spent shell casings or the .410 shotgun; while there was one sufficient latent print found on the frame of the gun just above the trigger, it was never unidentified. There was no blood or gunshot residue found on Sturm's jeans or his long-sleeve shirt, which authorities found in the woods. There was a partial DNA profile found on the stock end of the gun that belonged to an "unidentified male," although Sturm was never excluded as the source of the DNA. There was no blood or tissue in or around the muzzle of the .410 shotgun Sturm said he used in the killings, despite the fact that the victims sustained "contact" wounds. Neither Nancy's blood nor her DNA were found on the butt end of the shotgun, which investigators believed was used to inflict her severe head wound. Finally, the lead fragments recovered from the victims could not be linked to the .410 shotgun because the slugs had disintegrated.

{¶59} After the jury found Sturm delinquent of two counts of murder, along with each firearm specification, the court imposed a "blended sentence:" the traditional juvenile disposition, committing Sturm to the Department of Youth Services until age twenty-one and two consecutive terms of fifteen years to life in an adult prison for each count of murder. The court stayed the adult portion of

the sentence pending successful completion of the juvenile disposition. Sturm appealed to this Court, raising ten assignments of error:

I. THE JUVENILE COURT ERRED WHEN IT DENIED BRYAN CHRISTOPHER STURM'S MOTION TO SUPPRESS THE STATEMENTS HE MADE DURING A CUSTODIAL INTERROGATION BECAUSE THOSE STATEMENTS WERE ELICITED IN VIOLATION OF HIS CONSTITUTION (SIC) RIGHT AGAINST SELF-INCRIMINATION.

II. THE TRIAL COURT VIOLATED BRYAN CHRISTOPHER STURM'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT ADJUDICATED HIM DELINQUENT OF TWO COUNTS OF MURDER WITH GUN SPECIFICATIONS WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE JUVENILE COURT VIOLATED BRYAN CHRISTOPHER STURM'S RIGHT TO DUE PROCESS BY ADMITTING CHARACTER EVIDENCE IN VIOLATION OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

IV. THE JUVENILE COURT VIOLATED BRYAN CHRISTOPHER STURM'S RIGHT TO DUE PROCESS BY ADMITTING HEARSAY EVIDENCE IN VIOLATION OF OHIO RULES OF EVIDENCE 801 AND 802, THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

V. THE JUVENILE COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT THERE WAS A NECESSITY FOR A SERIOUS YOUTHFUL OFFENDER DISPOSITIONAL SENTENCE UPON BRYAN CHRISTOPHER STURM.

VI. THE TRIAL COURT ERRED IN SENTENCING BRYAN CHRISTOPHER STURM TO CONSECUTIVE TERMS IN AN ADULT PRISON THEREBY DENYING HIM DUE PROCESS AS PROVIDED FOR BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

VII. BRYAN CHRISTOPHER STURM WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF

COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

VIII. THE TRIAL COURT ERRED WHEN IT IMPOSED A TERM OF INCARCERATION THAT EXCEEDED THE MINIMUM TERM OF INCARCERATION. THE SERIOUS YOUTHFUL OFFENDER SENTENCE WAS IMPROPERLY BASED ON FACTS THAT WERE NOT FOUND BY THE JURY, IN CONTRAVENTION OF *BLAKELY V. WASHINGTON* (2004), 542 U.S. 296.

IX. WASHINGTON COUNTY'S JUVENILE COURT AND DETENTION FACILITY AND OHIO'S SERIOUS YOUTHFUL OFFENDER DISPOSITIONAL SENTENCING SCHEME, R.C. 2152.021, R.C. 2152.11, R.C. 2152.12, AND R.C. 2152.14, VIOLATES A JUVENILE'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AND VIOLATED BRYAN CHRISTOPHER STURM'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AS APPLIED AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION.

X. OHIO'S SERIOUS YOUTHFUL OFFENDER DISPOSITIONAL SENTENCING SCHEME, R.C. 2152.021, R.C. 2152.11, R.C. 2152.12, AND R.C. 2152.14, VIOLATES A JUVENILE'S RIGHT TO DUE PROCESS AS GUARENTED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

After we rejected his appeal, Sturm appealed to the Supreme Court of Ohio.⁴

⁴ The Court accepted Sturm's discretionary appeal as to his First Proposition of Law only, which concerns the Serious Youthful Offender Statute, and is holding Sturm's appeal and staying the briefing schedule for a decision in Supreme Court case numbers 2007-Ohio-0291 and 2007-Ohio-0472, and In re: D.H., 10th App. No. 06AP-250, 2006-Ohio-6953.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that the 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 Washington County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Kline, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
William H. Harsha, 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.