

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO

Appellee

V.

RICHARD BLANKENSHIP

Appellant

C.A. No. 2025-CA-99

Trial Court Case Nos. 22-CR-0812(B);
23-CR-0033(B)

(Criminal Appeal from Common Pleas Court)

FINAL JUDGMENT ENTRY & OPINION

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Pursuant to the opinion of this court rendered on September 18, 2026, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately send a copy of the court's ruling to each party and note that action on the docket. Additionally, pursuant to App.R. 27, the clerk of the court of appeals shall send a certified copy of this judgment, which constitutes a mandate, to the clerk of the trial court and note the service on the appellate docket.

For the court,

TZ Geforseman

ROBERT G. HANSEMAN, JUDGE

LEWIS, P.J., and TUCKER, J., concur.

OPINION
CLARK C.A. No. 2025-CA-99

RICHARD BLANKENSHIP, Appellant, Pro Se
JOHN M. LINTZ, Attorney for Appellee

HANSEMAN, J.

{¶ 1} Richard Blankenship appeals from the Clark County Common Pleas Court’s judgment that denied his motion for leave to file a delayed petition for postconviction relief. For the following reasons, the judgment of the trial court is affirmed.

I. Facts and Procedural History

{¶ 2} On November 1, 2022, Blankenship and two codefendants were indicted by a Clark County grand jury in Clark C.P. No. 22-CR-0812 for numerous offenses involving trafficking in illegal drugs, engaging in a pattern of corrupt activity, and illegal manufacturing, cultivation, assembly, or possession of chemicals for the manufacture of illegal drugs. All the charges alleged that the offenses involved a continuous course of conduct that occurred from on or about October 20, 2020, to on or about November 8, 2021.

{¶ 3} Blankenship was promptly arraigned and appointed counsel. From a document titled “Immunity Agreement” attached to Blankenship’s motion for leave to file a delayed petition for postconviction relief, as well his merit brief on appeal, on December 7, 2022, Blankenship, with his counsel, personally met with a detective from the Springfield Police Department and an assistant prosecuting attorney. The document appears to have been signed by Blankenship on December 7, 2022. The document also contains the relevant agreement of the State:

- IMMUNITY. The State of Ohio hereby grants legal immunity to Richard Blankenship for all potential criminal drug trafficking and possession

charges that arise from their statements to law enforcement on the date of this agreement, except if the Defendant testifies at their or someone else's trial, in which case the statements may be used by the State for impeachment purposes only. There is no immunity for statements regarding crimes of felony violence.

{¶ 4} Blankenship provided information to the State on December 7, 2022; however, the details of Blankenship's information are not in the record. On January 17, 2023, Blankenship and his two codefendants were indicted on one additional first-degree felony count of trafficking in a fentanyl related compound in Clark C.P. No. 23-CR-0033. Like the indictment in his prior case, the indictment in the new case alleged conduct that occurred from or about October 20, 2020, to on or about November 8, 2021.

{¶ 5} The two cases were consolidated, and as reflected in the bill of particulars filed by the State, the evidence supporting all the charges against Blankenship stemmed from search warrants that were obtained and executed on November 8, 2021, after an investigation into Blankenship and his codefendants. Two different residences were searched, and the Springfield Police Department seized 765.8 grams of acetaminophen; 2,076.6 (presumably grams—the unit is unspecified) of a yellow powder substance; a .39-gram fentanyl pill; 31.67 grams of methamphetamine; 7 pills containing 2.70 grams of fentanyl and acetaminophen; 28.96 grams of methamphetamine; bags containing 13.02 grams of methamphetamine; a bag containing 41.97 grams of fentanyl and acetaminophen; 1,867.7 grams of a fentanyl and acetaminophen mixture; a bag containing 2.52 grams of a methamphetamine, fentanyl, and acetaminophen mixture; a blender containing 142.53 grams of fentanyl and acetaminophen; an AK Model B10F .762 caliber firearm; \$1,234.00

in United States currency; a large press; scales; and other miscellaneous evidence related to trafficking in illegal narcotics.

{¶ 6} Blankenship was tried separately from his codefendants. He appealed, and we set forth the evidence presented at his trial as follows:

The charges against Blankenship stemmed from an undercover investigation of drug trafficking in Clark County. Evidence presented at trial established that the investigation began around July 2021 when police cultivated a confidential source who provided information about a drug-trafficking operation involving three individuals—Ariel Bush, Todd Frye, and Richard Blankenship. The source reported that Bush was “pressing” or manufacturing pills disguised and labeled as Percocet but containing fentanyl. The source provided an approximate location where Bush was staying. A detective subsequently located Facebook conversations in which an individual sought to obtain real Percocet pills from Bush, requesting not to receive pressed fentanyl disguised as Percocet.

Springfield police initiated surveillance on Bush. They discovered that he resided at 819 Grant Street with his girlfriend, Heather Flaker, and drove a Ford Mustang registered to her. Police also obtained a cell-phone number for Bush and learned that a “top caller” of his was Blankenship. Police placed a GPS tracking device on Bush’s car and found that one of his primary destinations was Blankenship’s residence at 124 North Shaffer Street. Investigators also obtained Blankenship’s phone records and located approximately 400 text and cell phone conversations between Bush and Blankenship each month.

On August 24, 2021, police conducted a traffic stop of a vehicle observed leaving Bush's residence. A search of the vehicle uncovered five pounds of marijuana in the trunk and a firearm in the back seat. Further review of Bush's Facebook account suggested that he was trafficking marijuana, methamphetamine, and "pressed pills" from his residence. Investigators also found the name Todd Frye in Facebook records related to drug transactions. Police began tracking Frye's vehicle and discovered that he frequently visited Blankenship's residence. Police learned that Frye was under investigation in Union County for allegedly selling pressed fentanyl pills which had resulted in an overdose death. Investigators obtained Frye's cell phone number and found that he was communicating with Bush and Blankenship.

Police began using a confidential source to request pressed fentanyl pills from Bush through phone calls and text messages. On these occasions, Bush would respond by saying things like "he's doing them now" or "I'm going to check on them." Police would watch as the tracker on Bush's vehicle moved to 124 North Shaffer Street. Officers conducting surveillance also observed Bush arriving at 124 North Shaffer Street and entering the garage. The confidential source subsequently purchased counterfeit Percocet pills from Bush. The pills were imprinted with the numbers "10/325," indicating that they were Percocet, when in fact they contained fentanyl mixed with acetaminophen.

Police obtained search warrants for 819 Grant Street and 124 North Shaffer Street. They executed the warrants on November 8, 2021. The search of Blankenship's residence and garage revealed large quantities of drugs,

including methamphetamine and four pounds of fentanyl mixed with acetaminophen. Police also found a pill-pressing machine, Firm press (a binding agent to make tablets), counterfeit Percocet pills containing fentanyl and acetaminophen, hundreds of dollars in cash, digital scales in a bedroom, a blender with white powder on it, and an AK-47 rifle. Some of the drugs were packaged in baggies in preparation for distribution. The search of Bush's residence resulted in discovery of marijuana, vacuum-sealed bags, a blender with white acetaminophen powder, scales, and firearms.

In addition to the foregoing evidence, the State's evidence at trial included cell-phone text exchanges between Bush and Blankenship discussing apparent drug transactions. The State also presented evidence of text exchanges between Blankenship and prospective drug purchasers regarding specific drug requests, as well as text exchanges between Frye and Blankenship about the manufacture and trafficking of drugs. During a police interview, Blankenship admitted keeping the pill-pressing machine at his home, storing drugs in his safe, and handing drugs to buyers at his house on multiple occasions within 30 days prior to his arrest. He claimed that his involvement was at Bush's request and that he was "a pawn in their scheme."

Frye testified against Blankenship at trial and recalled pressing the fentanyl pills at Blankenship's house. Frye stated that he, Blankenship, and Bush all assisted in pressing the pills. Frye recalled participating in the operation approximately seven or eight times during the time frame set forth in the indictment against Blankenship. On those occasions, Frye travelled from Logan County to Clark County to meet with Bush and Blankenship to press

pills. Frye acknowledged a joint effort involving the three of them working together to manufacture the pills. According to Frye, Bush provided the ingredients, and Frye and Blankenship pressed pills together. On each occasion, they pressed between 100 and 200 pills.

State v. Blankenship, 2023-Ohio-4442, ¶ 4-10 (2d Dist.).

{¶ 7} After a four-day trial, the jury returned guilty verdicts for engaging in a pattern of corrupt activity, illegal assembly or possession of chemicals for the manufacture of drugs, aggravated trafficking in methamphetamine, aggravated possession of methamphetamine, trafficking in a fentanyl-related compound, and possession of a fentanyl-related compound. The jury found that Blankenship was a major drug offender and that he had a firearm in his possession or under his control related to his count of illegal assembly or possession of chemicals for the manufacture of drugs.

{¶ 8} On February 9, 2023, Blankenship received a total indefinite prison sentence of 35 to 40.5 years. His timely appeal followed, and the transcripts were filed on May 1, 2023. We considered four assignments of error in Blankenship’s direct appeal, which concerned jury selection, sufficiency and manifest weight of the evidence, an evidentiary issue surrounding a recorded phone conversation from the jail, and a sentencing issue under Reagan Tokes. *Id.* Except for an error in the sentencing that did not affect Blankenship’s total aggregate prison sentence, we affirmed Blankenship’s convictions. *Id.*

{¶ 9} On October 29, 2025, Blankenship moved for leave to file a delayed postconviction relief petition with the trial court. Blankenship claimed that his trial counsel was ineffective for failing to object to the prosecution of him based on the “immunity agreement” he signed with the State on December 7, 2022. Blankenship argued that he was unavoidably prevented from filing the petition for postconviction relief earlier than October

2025 due to his trial counsel's lack of cooperation in providing him with a copy of the immunity agreement. Blankenship asserted that, but for trial counsel's errors, he would not have been found guilty because he was immune from prosecution. The trial court overruled Blankenship's motion on November 25, 2025, finding that the postconviction relief petition was untimely and res judicata prevented Blankenship's ineffective assistance of counsel claim. This appeal followed.

{¶ 10} Blankenship's assignment of error claims that the trial court abused its discretion when it denied his motion for leave to file a delayed postconviction relief petition. He challenges the trial court's decision that res judicata barred the petition. Regarding timeliness, he claims that because he was unavoidably delayed in obtaining a copy of the immunity agreement, the trial court should have considered his untimely petition. As for the merits of Blankenship's petition, he argues that trial counsel rendered ineffective assistance by failing to raise the December 7, 2022 immunity agreement as a bar to trial. We consider each argument in turn.

II. The Trial Court Did Not Abuse its Discretion When it Denied Blankenship's Motion for Leave to File a Delayed Petition for Post Conviction Relief.

{¶ 11} An appellate court reviews a trial court's denial of a postconviction relief petition under an abuse of discretion standard. *State v. Gondor*, 2006-Ohio-6679, ¶ 52. An abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Marcum*, 2023-Ohio-4058, ¶ 28 (2d Dist.), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

Postconviction Proceedings Generally

{¶ 12} "A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." *State v. Steffen*, 70 Ohio St.3d 399, 410

(1994). For that reason, a petition for postconviction relief is not a constitutional right and the only rights afforded to a defendant in postconviction proceedings are those granted by the legislature enumerated in R.C. 2953.21 through 2953.23. See *id.* See also *State v. Moore*, 99 Ohio App.3d 748, 751 (1st Dist. 1994); R.C. 2953.21(K) (“[T]he remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case . . .”).

{¶ 13} Among the categories of people who are authorized to file a petition for postconviction relief is “[a]ny person who has been convicted of a criminal offense . . . and who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.” R.C. 2953.21(A)(1)(a). A petitioner “may file a supporting affidavit and other documentary evidence in support of the claim for relief.” R.C. 2953.21(A)(1)(b). “A petitioner shall state in the . . . petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.” R.C. 2953.21(A)(4).

{¶ 14} The court must determine whether there are substantive grounds for relief stated in a petition. R.C. 2953.21(D). “In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript.” *Id.* “If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.” *Id.* “If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition.” R.C. 2953.21(H).

Res Judicata

{¶ 15} Blankenship challenges the trial court's determination that his ineffective assistance of counsel claim is barred by the doctrine of res judicata. We agree.

{¶ 16} While it is true that “[p]ostconviction review is a narrow remedy, since *res judicata* bars any claim that was or could have been raised at trial or on direct appeal,” *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994), “[t]here’s a twist when it comes to claims of ineffective assistance of counsel.” *State v. Blanton*, 2022-Ohio-3985, ¶ 2. “[R]es judicata does not bar a postconviction ineffective assistance of counsel claim when either (1) the petitioner had the same attorney at trial and on appeal or (2) he must rely on evidence outside the trial record to establish his claim for relief.” *Blanton* at ¶ 2, citing *State v. Cole*, 2 Ohio St.3d 112, 113-114 (1982).

{¶ 17} Blankenship relies on the December 7, 2022 immunity agreement for his claim of ineffective assistance of trial counsel. Since this document is unrelated to the evidence at trial underlying Blankenship's convictions, the immunity agreement was not in the record of his direct appeal. Therefore, in Blankenship's case, the ineffective assistance of trial counsel claim could not have been brought in his direct appeal, and therefore, res judicata does not bar his ineffective assistance of counsel claim.

{¶ 18} However, while res judicata does not bar the claim, Blankenship's motion for leave to file his petition and assert the claim was not timely.

Timeliness of Petition for Postconviction Relief

{¶ 19} The trial court determined that Blankenship's motion for leave to file his petition was untimely because it was filed more than 365 days after the transcripts were filed in his direct appeal. We agree.

{¶ 20} R.C. 2953.21 provides a time limit for filing a petition for postconviction relief. The statute requires that any person claiming a denial of constitutional rights must file the petition “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction.” R.C. 2953.21(A)(2)(a). A trial court generally has no jurisdiction to consider an untimely or successive petition. *State v. Apanovitch*, 2018-Ohio-4744, ¶ 35-36, 38; R.C. 2953.23(A) (trial courts are prohibited from entertaining any untimely petition for postconviction relief).

{¶ 21} Blankenship’s transcripts were filed in his direct appeal on May 1, 2023, which made Blankenship’s filing deadline April 30, 2024 (as 2024 was a leap year). Given that Blankenship did not file his motion for leave to file his petition until October 29, 2025, which was 547 days beyond the filing deadline, the trial court did not abuse its discretion when it denied Blankenship’s motion for leave to file the petition on timeliness grounds.

{¶ 22} While untimely, Blankenship claims that his petition fell into the “unavoidably prevented from discovery” exception to the 365-day filing limit.

Unavoidably Prevented from Discovery Exception

{¶ 23} A trial court has jurisdiction, and may consider an untimely petition, if a petitioner “shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.” R.C. 2953.23(A)(1)(a). “A petitioner may make the required showing . . . by demonstrating that he was previously unaware of the evidence on which the petition relies and could not have discovered it by exercising reasonable diligence.” *State v. Johnson*, 2024-Ohio-134, ¶ 18. In *Johnson*, the Ohio Supreme Court explained that “unavoidably prevented” means “not ‘merely prevented,’” and “a petitioner filing an untimely postconviction petition must show that any

delay in discovering the facts undergirding the petition was ‘incapable of being avoided or evaded.’” *Id.* at ¶ 24, quoting *Merriam-Webster’s Collegiate Dictionary* (11th Ed. 2003).

{¶ 24} In addition, for a trial court to consider an untimely petition, a petitioner must also show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted.” R.C. 2943.23(A)(1)(b). “Clear and convincing evidence is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 25} Blankenship alleged in his motion for leave to file a delayed petition that he was unavoidably prevented from filing his petition earlier due to trial counsel’s lack of responsiveness to his requests for a copy of the immunity agreement. Although the trial court did not address Blankenship’s claim, from our review, we are not convinced. Blankenship’s effort to obtain a copy of the immunity agreement did not involve new information he was prevented from discovering. Instead, Blankenship had full knowledge of the agreement on December 7, 2022, when he signed it. He was aware of the immunity agreement before, during, and after his trial. We agree with the State’s characterization that Blankenship knew about the document but just did not have a copy of it in his possession. Blankenship was not prevented from discovering its existence.

{¶ 26} Therefore, we conclude that Blankenship did not meet his burden of proof to show that he was unavoidably prevented from discovering the immunity agreement on which he relies to claim ineffective assistance of trial counsel. Blankenship has also failed to show

by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of his offenses. Blankenship's argument is without merit. The trial court did not abuse its discretion when it denied Blankenship's motion for leave to file an untimely petition.

Ineffective Assistance of Counsel

{¶ 27} While the merits of Blankenship's claim of ineffective assistance of counsel do not need to be addressed because he failed to establish the "unavoidably prevented" requirement for the trial court to consider his untimely petition, we nevertheless do so.

{¶ 28} A properly licensed attorney in Ohio is presumed to be competent. *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980). Therefore, the burden to establish incompetence is on the defendant. *Id.* To prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

{¶ 29} *Strickland* requires a defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defendant, depriving him of a fair trial. *State v. Grate*, 2020-Ohio-5584, ¶ 49, citing *Strickland* at 687. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus; *Strickland*, 466 U.S. at 694. The failure to make an adequate showing on either prong is fatal to an ineffective assistance of counsel claim. *Strickland* at 697.

{¶ 30} Blankenship claims that he received ineffective assistance of trial counsel based on counsel's failure to raise the immunity agreement as grounds not to proceed to trial. The immunity agreement states in full:

- IMMUNITY. The State of Ohio hereby grants legal immunity to Richard Blankenship for all potential criminal drug trafficking and possession charges that arise from their statements to law enforcement on the date of this agreement, except if the Defendant testifies at their or someone else's trial, in which case the statements may be used by the State for impeachment purposes only. There is no immunity for statements regarding crimes of felony violence.
- CONFIDENTIALITY: The State shall not call [Blankenship] as a witness to testify regarding statements he made to law enforcement on the date of this agreement. . . . Any information may be used by investigators to further other cases regardless of future cooperation by Defendant. If the Defendant testifies at their or someone else's trial, their statements made on **December 7, 2022** may be used . . . for impeachment purposes only.
- PLEA OFFERS: The State of Ohio is making no promises at this time regarding a plea agreement or plea offer to Defendant.

Complete Agreement

No additional promises, agreements or conditions have been entered into other than those contained in this document.

{¶ 31} Non-prosecution agreements are governed by contract law. *State v. Parris*, 2014-Ohio-4863, ¶ 12 (6th Dist.). Courts give effect to the intent of the parties and presume that the intent is reflected in the plain language of the contract. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 11. If the language of a contract is plain and unambiguous, courts will enforce the terms as written and will not turn to evidence outside the four corners of the

contract to alter its meaning. *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 2019-Ohio-4716, ¶ 13.

{¶ 32} Applying the immunity agreement's plain language here, Blankenship's arguments fail. Blankenship claims that he did not testify at his, or anyone else's, trial and therefore he held up his end of the bargain; however, that is not what the agreement states. The agreement merely states that the State will not call Blankenship as a witness to testify regarding any statements he made on December 7, 2022. There is nothing contained in the agreement rewarding Blankenship with a dismissal of charges in exchange for him not testifying.

{¶ 33} Blankenship appears to have also misread the immunity he received and confuses it with blanket immunity. The immunity from prosecution Blankenship received was for additional trafficking- or possession-related offenses that were disclosed on December 7, 2022. The agreement does not cover the offenses that the State had already indicted, or had evidence of, regarding the continuous course of conduct that occurred between October 20, 2020, and November 8, 2021. Such offenses not covered by the agreement include the trafficking in a fentanyl-related compound offense in Clark C.P. No. 23-CR-0033. While the charge in Case No. 23-CR-0033 may have been indicted later in time, the State had obtained evidence for the charge from the investigation and execution of the November 8, 2021 search warrant, approximately a year before Blankenship's December 7, 2022 statements.

{¶ 34} Additionally, post-indictment non-prosecution agreements without trial court approval are not binding agreements. *State v. Mucci*, 2002-Ohio-6896, ¶ 26 (7th Dist.). Assuming for the sake of argument that the immunity agreement was a post-indictment immunity agreement, there is no indication in the record that the trial court approved it. More

likely, the agreement offered pre-indictment immunity based on the information Blankenship provided, and such an agreement did not require court approval. *Mucci* at ¶ 25. The agreement's language is consistent with a pre-indictment agreement, as it states that "[a]ny information may be used by investigators to further other cases" and that Blankenship would not be charged with criminal drug trafficking and possession charges that arose from his December 7, 2022 statements.

{¶ 35} Because there is no merit to Blankenship's claim that the immunity agreement shielded him from prosecution for the offenses underlying his convictions, trial counsel did not provide deficient performance by failing to argue that the immunity agreement barred the State from proceeding to trial. Moreover, considering the evidence presented at Blankenship's trial, we cannot conclude that the immunity agreement would have resulted in acquittal of all the charges on which he was convicted.

{¶ 36} Finally, we address Blankenship's claim that his conviction of trafficking in a fentanyl-related compound in Case No. 23-CR-0033 stemmed exclusively from the statements he made on December 7, 2022. This claim is contradicted by the record. The record of Blankenship's trial reveals that evidence of the trafficking offense was retrieved from his residence from the execution of the November 2021 search warrant, well before Blankenship's December 2022 statements. That evidence included four pounds of fentanyl mixed with acetaminophen, a pill press, money, individually wrapped bags of drugs ready for distribution, money, and an AK-style weapon. The evidence also included approximately 400 text and cell phone conversations between Blankenship and his codefendant Bush that occurred before the search warrant's execution. In addition, Frye, one of Blankenship's codefendants, testified that he helped Blankenship press between 100 to 200 pills on seven or eight different occasions. Accordingly, Blankenship has failed to establish that the

evidence was obtained exclusively from his December 7, 2022 statements. Blankenship's arguments are without merit, and his assignment of error is overruled.

III. Conclusion

{¶ 37} The judgment of the trial court is affirmed.

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LEWIS, P.J., and TUCKER, J., concur.